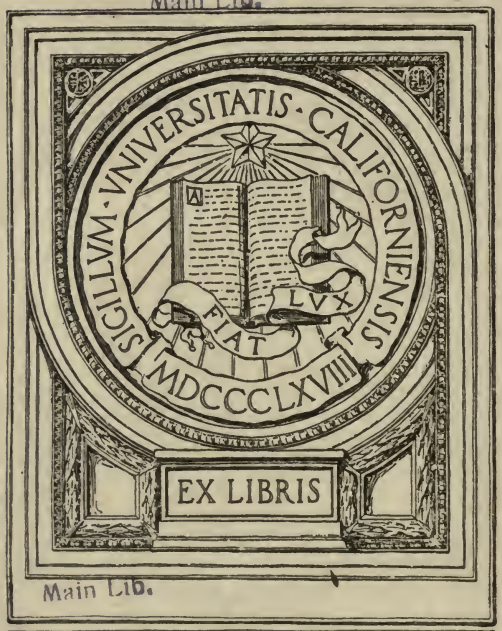

THE COMMERCIAL CODE OF JAPAN

BY

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The object of the University is to promote the scientific study of legal problems—historical and practical, and to assist in the improvement of the law.

PREFACE.

The author, Mr. Yang Yin Hang, is a native of China and a graduate in law of the Waseda University, Tokyo, Japan. After acquiring a thorough familiarity with English he spent two years as a graduate student in law at the University of Pennsylvania, receiving last June the degree of Master of Law. While in residence at the University he made himself familiar with our commercial law, and wrote and annotated this translation. The object which he seeks to accomplish is not merely to render accessible to English-speaking students the commercial law of Japan, but also to increase our knowledge of and interest in the commercial codes of the civil law.

The Commercial Code of Japan is based mainly on the Commercial Code of Germany. At the same time it contains elements from the commercial codes of practically all Continental countries, and some administrative provisions due to Japanese conditions. The mere translation of the text of a code drawn by civilians, however useful to one who has already read widely in the civil law, is of little use to a person trained only in the American and English law, unless the notes are so arranged as to answer, in part at least, the numerous questions which necessarily occur to him. One class of the

notes, therefore, accompanying this translation, is designed to answer the more important of these questions.

Further, carrying out the thought that one object of the present work is to increase our knowledge of the commercial codes of the civil law generally, Mr. Yang has written an historical introduction designed to give in outline, not only the history of the creation of the Japanese Commercial Code, but a concise statement of the history and sources of the present commercial law of Continental Europe. With the same object in view, he has also placed in the notes information in regard to analogous provisions in European codes. Finally, as the Japanese Code itself is avowedly based mainly on the German Commercial Code, where differences exist which may interest the student of comparative law the exact provisions of the German Code are given in full in the notes. In quoting from the German Code, use has been made of the translation by Bernard A. Pratt, Esq., of the Middle Temple, published by Chapman and Hall of London; all references to the text of the German Code in quotation marks being verbatim copies of Mr. Pratt's translation.

The reader will find throughout the work many expressions which, though accurate English, would hardly have occurred to an American or Englishman. This slight peculiarity of language may at first be thought to be a blemish, but I think the reader will find that in practically every instance Mr. Yang's phraseology serves to convey his exact shade of meaning in the most concise form possible.

The codes of the civil law are the result of two centuries of effort to express the law in statutory form. One of the chief values to us in their study is the fact that they teach conciseness combined with clearness in the expression of legal ideas. The Japanese Commercial Code is an excellent example. Mr. Yang, as a thoroughly trained civilian, has caught the spirit of the original, and his slight peculiarities of expression are in most cases the happy result of an effort to present a legal idea in the fewest possible words compatible with accuracy.

In the absence of Mr. Yang and on his behalf, I desire to express, as I know he would wish me to do, his appreciation of the assistance of Samuel D. Matlack, Esq., in reading the proof of the entire work and in preparing the index. Acknowledgment should also be made of the services of George F. Deiser, Esq., in verifying, by reference to the original sources, all statements made by Mr. Yang in the notes in regard to the provisions of the different European and Latin American codes and statutes. The value of the historical introduction has been greatly increased by the suggestions made by W. W. Smithers, Esq., Secretary of the Bureau of Comparative Law of the American Bar Association.

WM. DRAPER LEWIS.

HISTORICAL INTRODUCTION.

Commercial law as a separate branch of the greater body of civil law began to assume doctrinal distinctness in mediæval times, though the origin of maritime law may be traced to Phœnicia, Carthage, Greece, and other ancient countries along the eastern coast of the Mediterranean Sea, whence provisions for commercial paper, general average, and the liability of the master of a ship found their way to the Roman law. There were three causes from which the commercial law was recognized as special law: First, owing to the impetus given commerce by the League of the Lombard Cities, the League of the Rhine, and the Hanseatic League, together with the resulting notable prosperity of many cities in northern Europe and in Italy after the Crusades, business transactions became more complicated, the old Roman law became inadequate when applied to new cases, and consequently commercial customs, *ex necessitate*, attained the force of law in all the great marts. Second, under the feudal system, traders at fairs and markets being treated as a special class of people, usually called *collegia mercatorum*, had their own special legislature, special jurisdiction, and therefore special jurisprudence, named *jus mercatorum*. Thirdly, since the rules of the canon law, especially those relating to the prohibition of usury,

were too rigid and inflexible, it was necessary to have a law more equitable. All these factors contributed to the growth of what in time came to be recognized and called Commercial Law.

The commercial law mentioned above was no more than the customary law prevailing in different countries, but not codified. France was the first country to have a commercial code. Early in 1673 the famous *ordonnance* of Louis XIV, entitled *Le Code des Marchands*, was issued. It consisted of one hundred and twenty-two articles, divided into Commerce in General, Bills and Notes, Bankruptcy, and Commercial Jurisdictions. This ordinance was also called Code Savary, because it was written by Jacques Savary, an expert merchant. In 1681 another code, called the *Ordonnance de la Marine*, was promulgated. It was considered the most excellent code at the time of Louis XIV, and was welcomed by all the countries of Europe. By the beginning of the nineteenth century, the *Code des Marchands* and the *Ordonnance de la Marine* had become overshadowed by doctrinal development, and changed methods of business called for a restatement of the principles of commercial law.

In 1808 the present French Commercial Code went into effect. It consists of four books,—Commerce in General, Marine Commerce, Bankruptcy, and Commercial Jurisdictions. Since the French Commercial Code was the only commercial code at the beginning of the nineteenth century, the accomplishment of that code was a great revolution in the legal world. Every country in Continental

Europe was more or less, directly or indirectly, affected by this code. So far as the military force of Napoleon extended, the French Commercial Code had its influence.

Germany, however, had an independent system of commercial law. Before the confederation of the German states, Prussia had already had a code called *Das allgemeine Landrecht.* It was a voluminous code, containing civil law, general law, and even public law, but many of the provisions dealt with *causa mercantilis*, especially the Law of Bills and Notes and Marine Commerce. This code was promulgated and enforced in 1794, and some Germans insist that it was the oldest commercial code in the world. It was the local law of Prussia and not the federal law of Germany. Indeed, there was then no "Germany." The "Germanic Confederation" of 1814 was not pan-Germanic, and achieved little more than a name until it evaporated in 1867, when the "Confederation of the North" eliminated Austrian influence and laid the ground for the real German Empire in 1871. In 1847 the Law of Bills and Notes was passed by the representatives of the states, but was not adopted by any considerable number of the states until 1862. In 1861 the old German Commercial Code was passed, but was not adopted by the states composing the Confederation of the North until 1869. The old German Commercial Code consisted of four books: (1) Traders, (2) Commercial Associations, (3) Commercial Transactions, and (4) Marine Commerce. The present German Commercial Code of 1897 is based on this

code, but has made a considerable change; the new code does not recognize absolute commercial transactions as does the French Commercial Code, but recognizes a trader as the centre of *causa mercantilis*. In 1877 the Law of Bankruptcy was passed as a special statute. It is applicable to all traders and non-traders; whereas in France, such law of bankruptcy is only applicable to traders.

After the passage of the old German Commercial Code, European countries began to adopt the German system instead of the French system. Some still adhered to the old French theory, and some tried to combine the two theories. Thus, in the present world (except in England and the United States, where the development of law is independent of Continental Europe, and where there is no judicial or legislative difference between the civil law and commercial law), there are three systems of commercial law,—French system, German system and Franco-German system.

FRENCH SYSTEM.

This system includes the old commercial codes of Italy, Belgium, Spain, and Portugal, and the present commercial codes of Holland, Luxemburg, and those countries in Central and South America which have adopted the old Spanish Commercial Code.

Italy has contributed many commercial customary laws to the world. Before the adoption of the old *Codice di Commercio*, there were different laws in different states. The old code was promulgated

in 1866 and was chiefly derived from the French Commercial Code.

Belgium became subject to the French Commercial Code of 1808 at the same time as France, of which it was territorially then a part, and after the fall of Napoleon in 1814 retained it; but after the separation from Holland in 1830 several statutes were passed by which the French Code was more or less revised, the several acts while of different dates being designated as books of the revised Commercial Code.

Spain, as early as 1737, in the reign of King Philip V, had a commercial code which was based on the *Code des Marchands* and the *Ordonnance de la Marine* of France, as well as the customary law of Spain. In 1829 the old *Codigo de Commercio* was passed and became effective January 1, 1830. It consisted of five books: (1) Traders and Agents; (2) Commercial Transactions; (3) Marine Commerce; (4) Bankruptcy; (5) Commercial Jurisdictions. But in 1868 Commercial Jurisdictions were abolished. Though this code was chiefly derived from the French Commercial Code, it took many provisions from the King Philip's Code of 1737. The Spanish Code of 1829 is the basis of the mercantile law now prevalent in many countries of Central and South America, such as Brazil, Chili, Peru, Honduras, Nicaragua, etc.

Portugal first had a commercial code in 1833, called *Codigo Commercia Portugues*. It was divided into two books,—the Land Commerce and the Marine Commerce. It was based on the commercial codes of France, Spain and Holland, and also the Prussian Code of 1794.

Holland became subject to the French Commercial Code in 1811 after the country had been annexed to the French Empire, but after the restoration of 1813 modifications ensued, and in 1817 commercial jurisdictions were abolished. In 1838 the *Wetboek van Koophandel* was promulgated and enforced. It is divided into three books, which are identical with the first three books of the French Commercial Code. But in the Dutch Code there are provisions for insurance other than marine insurance and for commercial vessels sailing on rivers, lakes and harbor waters. In 1893 the law of bankruptcy was revised. It is applicable to all traders and non-traders, as in Germany.

Luxemburg still uses the French Commercial Code as its own code without alteration.

GERMAN SYSTEM.

This system includes the commercial codes of Austria, Hungary, Switzerland, and the commercial law of Scandinavia, etc.

In 1850 Austria adopted the Law of Bills and Notes, which was passed by the representatives of the federal states of Germany. The old German Commercial Code was also adopted to take effect in 1863, excepting the book on Marine Commerce; for Austria already had its own customary law concerning marine commerce. This law chiefly deals with marine police and it has never been codified. The Law of Bankruptcy was passed in 1868 as a statute. It is based on the law of bankruptcy of Prussia and is applicable to all traders and non-traders.

Hungary, having had a complete body of commercial law of its own until 1850, and after that year having submitted to various legislation dictated by Austria, which was found unsuitable, had a commission prepare a code in harmony with the usages of the people, and the law thus prepared was promulgated in 1861 and from time to time afterwards was revised. A new code was published in 1875. The first book deals with traders and business associations, the second book deals with commercial transactions; but, as in Austria, there are no provisions for marine commerce. However, there are provisions for warehousing, associations and contracts of insurance other than marine insurance. The Law of Bills and Notes was enforced in 1877, and the Law of Bankruptcy in 1881, both being of German origin.

Switzerland, like England and the United States, does not recognize the difference between civil and commercial law; but it has a code called *Code fédéral des obligations*, passed in 1881. This code provides for ordinary contracts, obligations, transfer of property rights, and the general principles applicable to both civil and commercial transactions.

The present code commission, however, has already drafted a new book on the subject, to be added to the four books adopted in 1909, to take effect as parts of the new code on January 1, 1912.

The commercial law of Scandinavia is not codified. Denmark is governed by the modified general code of Christian V, published in 1683 (*Danske Lov*); Norway by a general code promulgated in 1867

(*Norske Lov*), which is largely a copy of the Danish Code, and Sweden by the general code of 1734, composed of a collection of Swedish acts and the Danish Code as then amended. In all those countries, however, the deficiencies of their general codes have been supplied by later special laws upon associations, bills of exchange, bankruptcy and other features of commercial law.

FRANCO-GERMAN SYSTEM.

This system includes the present commercial codes of Italy, Spain and Portugal, as well as the new commercial codes of Roumania and Argentine. The commercial law of Russia partakes largely of this system.

The present Commercial Code of Italy was promulgated in 1882 and enforced in 1883. Though this code contains the law of bankruptcy and of commercial jurisdictions according to the French style, its substance is mainly derived from the old German Commercial Code. Indeed, it abstracts the excellence of both the French and the German codes. Besides this, there is a separate code called *Codice par la marina mercantile*, which consists of public law concerning maritime affairs.

The present Commercial Code of Spain was promulgated in 1885 and extended to the island possessions in 1886. It is divided into four books: (1) Traders and Commerce in General; (2) Commercial Contracts; (3) Marine Commerce; (4) Bankruptcy and Commercial Prescriptions.

The present Commercial Code of Portugal was promulgated in 1888 and enforced in 1889. It is

divided into four books as the present Spanish Commercial Code, and is chiefly derived from the present Italian Commercial Code and the Belgian Commercial Code.

The new Commercial Code of Roumania of 1887 is modelled on the present Commercial Code of Italy.

The new Commercial Code of Argentine of 1889 is modelled on the present Commercial Code of Portugal.

Russia has a code called *Svod Zakonov*, enforced in 1835, although provision for a separate commercial jurisdiction was authorized in 1833. Its eleventh book deals with commercial law. This book consists of five volumes: (1) Commercial Rights; (2) Commercial Obligations, including Bills and Notes; (3) Commercial Vessels; (4) Commercial Jurisdictions, including the Bankruptcy of Traders; (5) Commercial Institutions, including Exchange, Brokerage, and Commercial Books. These provisions were developed from the time of Peter the Great. In 1857 a revision of the Code of 1835 was published and a part designated as *Ustav Torgovi*, the Russian words for "commercial law." This law is not applicable to Poland and Finland, the former using the French Commercial Code, the latter having its own customary law, its civil code of 1734 and subsequent special statutes.

The three systems of commercial law mentioned above are all directly affected by the Roman system of law, though the Roman law only recognized the difference between *jus civile* and *jus gentium*, and

in those days commercial law had not much developed. The influence of the Roman system of law is now not only felt in the Western world, but has extended to the Eastern world.

Japan is the first Oriental nation to adopt the Occidental law. In Japan, as in other Oriental countries, private law was in a very undeveloped state, and the people transacted their business with each other according to customs and usages, which were not identical in all parts of the country and were not necessarily enforced by the courts. In 1880 the Japanese government employed a German, named Reusler, to compile a Japanese commercial code. This was completed and promulgated in 1890, and is known as the First Japanese Commercial Code. The law of commercial associations, of bills and notes, and of bankruptcy, which constituted a part of the code, was enforced in 1893, and the rest of the code was enforced in 1898. When this code was compiled different foreign commercial codes were consulted, especially the German Commercial Code of 1861, the French Commercial Code of 1808, the Italian Commercial Code of 1865, and the Spanish Commercial Code of 1830. As the compiler of this code was a German, he naturally took many of its provisions from the old German Commercial Code, yet the fact that the code included the law of bankruptcy and the law of bills and notes showed the influence of the French system. Indeed, the First Japanese Commercial Code belonged to the Franco-German system.

But there were many defects in this code: First, the old Japanese customs and usages not being very

much consulted, in some points it was not adaptable to the Japanese business conditions. Second, as it contained public regulations concerning insurance business and commercial vessels, it confounded the public and private law; and again, as it included procedural provisions, it also confounded the adjective and substantive law. Third, since the First Japanese Civil Code was compiled by a Frenchman, and was modelled on the French Civil Code, many provisions of the Commercial Code were contradictory to those of the Civil Code, and besides there were many redundant provisions in the two codes. For these reasons, the First Commercial Code was afterwards revised, and in 1899 the present Commercial Code was promulgated and in the same year enforced. The present code is based entirely on the German system, especially the German Commercial Code of 1897, though a few points, such as the insertion of the Law of Bills and Notes in the code, the recognition of the difference between absolute and relative commercial transactions, the adoption of two warehouse receipts, etc., are different from the German Code; and as to business associations the French theories have been retained. With the enforcement of the present code, the First Commercial Code was abolished, except the law of bankruptcy, which is still in force. The law of bankruptcy in Japan, as in France and Italy, is applicable only to traders.

YANG YIN HANG.

University of Pennsylvania,
June 14, 1910.

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THE COMMERCIAL CODE OF JAPAN.

BOOK I.

OF COMMERCE IN GENERAL.

SECTION 1.—THE APPLICATION OF LAW.

Article 1. In the absence of any provision in this Code concerning *causa mercantilis*, the commercial customary law is applicable; and if there is no such customary law the Civil Code is applicable.

Derived from Art. 1 of the old German Commercial Code. The same provisions are also found in Art. 1 of the Hungarian Commercial Code, Art. 1 of the Italian Commercial Code, Art. 2 of the Spanish Commercial Code, and Art. 3 of the Portuguese Commercial Code.

There are no such provisions in the present German Commercial Code; but according to the Rules for the Operation of the Commercial Code of Germany, only the provisions of the Civil Code are applicable in the absence of any provision in the Commercial Code and in the said Rules.

Article 2. The provisions of this Code are applicable to commercial transactions carried on by public juristic persons, unless the law or ordinances provide to the contrary.

A juristic person is a person or organization capable of being the subject of rights. A public juristic person is a juristic person constituting a part of the political institution of the state; for example, cities, towns, or public institutions such as the Board of Trade, the Institution for the Prevention of Flood, etc.

According to Art. 7 of the Italian Commercial Code and Art. 17 of the Portuguese Commercial Code, the State, Provinces and Communes are prohibited from acting as traders. However, the German Commercial Code recognizes that a public juristic person may be a trader within the meaning of the Code, but at the same time it provides that certain provisions applicable to an ordinary trader are not applicable to a public juristic person. Arts. 36 and 42 of that Code read as follows:—

"Art. 36. Any business undertaken by the Imperial Government, by a Federal State, or by a parochial body, need not be registered. If any registration has been made, it must be confined to a statement of the firm-name, the place of business, and the object of the undertaking."

"Art. 42. The rights of the directorate of an undertaking of the Imperial Government, of a Federal State, or parochial body, to keep accounts in a way different to those enacted by Arts. 39 to 41, are in no way affected."

Article 3. The provisions of this Code are applicable to both parties, if the transaction, on the part of one of them, is a commercial transaction.

Thus: if a student buys a book from a bookseller, the transaction on the part of the bookseller being a commercial transaction, the whole transaction is subject to the Commercial Code.

Both the old and the present German Commercial Code (Art. 345) have the same provisions. The French Commercial Code and those codes based on the French system have no such provisions.

SECTION 2.—TRADERS.

Article 4. Any person carrying on a commercial transaction[1] in his own name[2] as a business[3] is a trader within the meaning of this Code.[4]

[1] A commercial transaction is either absolute or relative. An absolute commercial transaction is a transaction which by its nature is commercial, irrespective of the person who carries it on. For instance, a man buys goods with the intention of selling them again for profit: this is an absolute commercial transaction. On the other hand, a transaction is a relative commercial transaction, not because of its nature, but because the person carrying it on is a trader. For instance, carriage of goods or passengers is a relative commercial transaction. If even a student buys books with the intention of selling them, the transaction is commercial, for such a transaction is an absolute commercial transaction; on the other hand, if a student, not a common carrier, carries goods even for the purpose of receiving a pecuniary reward, the transaction is not commercial, for the business of carriage is only a relative commercial transaction and the student in the illustration given is not in the business. See Arts. 263 and 264, *infra*.

[2] "In his own name" means that the trader is to enjoy the rights and perform the obligations arising from his business. Thus: if he appoints a manager to manage his business, he is no less a trader; but the manager is not a trader but an employee. In case a guardian carries on business for his ward, only the ward is the trader within the meaning of the Code.

[3] The expression "as a business" means that the commercial transaction is one of a series of transactions successively carried on for the purpose of earning profit. Thus, a mutual insurance association is not a trader. Again, if a person, occasionally or even very often, goes to the market, buying goods which he again sells for a profit, he is not a trader, for he is not carrying on such transactions regularly.

[4] Derived from Art. 1 of the French Commercial Code and Art. 4 of the old German Commercial Code. On the other hand, Art. 1 of the present German Commercial Code provides that a trader within the meaning of the Code is a person who carries on a trade, and then enumerates nine kinds of trade, such as the buying and reselling of movable goods or valuables, etc. Thus, according to the German principle, the center of *causa mercantilis* is the trader himself, and not the commercial transaction; and consequently, the German Code does not recognize the existence of the absolute commercial transaction.

Article 5. An infant or married woman carrying on a commercial transaction shall be registered.

They must register their names and residences in the court. Special registers, such as the Register for Infants and the Register for Married Women, are kept in the court. See Arts. 140 and 149 of the Procedure in Non-actionable Matters.

Article 6. If an infant or married woman is permitted to become a member of unlimited liability in a business association, he or she is considered as a competent person in relation to the business of the company.

The permission spoken of is granted to the infant by his parents or guardians: See Arts. 883 and 921 of the Civil Code: to the married woman, by her husband: See Art. 14 of the Civil Code.

Article 7. A guardian carrying on a commercial transaction for his ward shall be registered.[1] Any restriction on the authority of the guardian cannot be set up as a defense against third parties acting in good faith.[2]

[1] A special register called the Register for Guardians is kept in the court. See Art. 140 of the Procedure in Non-actionable Matters.

[2] When a guardian carries on a commercial transaction for his ward, it is necessary for the guardian to get permission from the *concilium domesticum*, which is an organization recognized by the Civil Code, the members of which are chosen from the relatives of the family either by the court or by will. This organization has power to restrict the authority of the guardian.

"Acting in good faith," means without notice.

Article 8. The provisions for the trade register, trade names, and trade books have no application to peddlers, street venders and other petty traders.

If the capital of a trader is not above 500 *yen* (a *yen* equals about one half of an American dollar) he shall be treated as a petty trader. See Art. 7 of the Rules for the Operation of the Commercial Code and the Imperial Decree of the 32d year of *Meiji*, No. 271.

Art. 4 of the German Commercial Code provides that the enactments concerning trade names, trade books and procuration have no application to artisans or to persons whose business does not exceed the limits of a mere handicraft. In Japan, the scope of the petty trader is determined by the Imperial Decree; in Germany, each state is empowered to issue decrees determining in the most precise manner what a mere handicraft is, taking as a basis the manner in which it is taxed, or in the absence of any assessment, some other basis.

SECTION 3.—THE TRADE REGISTER.

Article 9. Whatever is to be registered under the provisions of this Code[1] must be registered on

the application of the party in the trade register of the court within whose jurisdiction the seat of business of such party is situated.[2]

[1]There are ten kinds of registers, which are kept in the Court: (1) the Register for Trade Names, Arts. 19, 21, 24; (2) the Register for Infants, Art. 5; (3) the Register for Married Women, Art. 5; (4) the Register for Guardians, Art. 7; (5) the Register for Managers, Art. 31; (6) the Register for *Société en nom collectif*, Arts. 51–53, etc.; (7) the Register for *Société en commandite*, Arts. 105, 107; (8) the Register for *Société anonyme*, Arts. 141, 204, 217, etc.; (9) the Register for *Société en commandite par actions*, Arts. 242, 254; (10) the Register for Foreign Companies, Art. 255.

[2]The competent court in which such registration must be made is the Sub-district Court, or its branch office, at the place where the applicant's seat of business is located. See Arts. 39, 149, etc., of the Procedure in Non-actionable Matters, and the Regulations of the Trade Register.

Art. 8 of the German Commercial Code provides that the trade register is to be kept by the court. Art. 12 provides that declarations relating to entries in the trade register, as well as the affixing of the prescribed signatures, the custody of which is imposed on the court, ought to be made there either in person or in a public and formal manner.

Article 10. Whatever is to be registered at the place of the principal office must be also registered at the place of any branch establishment unless the Code provides to the contrary.

Art. 13, pars. 1 and 2, of the German Commercial Code reads as follows:—

"So far as is not otherwise laid down in this Code, entries in the trade-register and the declarations required for this purpose, as well as the affixing of signatures and the other

depositions required to be made at the trade register, must be made at each court which keeps such a trade register, and within whose jurisdiction the proprietor of any firm has a branch establishment, and in the same manner as made at the court of the principal place of business.

"No entry can be made in the court of the branch establishment before it is shown that a proper entry has been made in that of the principal one."

Article 11. Whatever has been registered shall be published by the court without delay.

It is published in the official paper and also in a newspaper. The Sub-district Court, during the month of December every year, designates the newspaper in which all things registered will appear. See Arts. 144–146 of the Procedure in Non-actionable Matters.

The provisions of Arts. 10 and 11 of the German Commercial Code are substantially the same as those of the Procedure in Non-actionable Matters.

Article 12. Whatever is to be registered cannot be set up as a defense against third parties acting in good faith before it is registered and published. Even after such registration and publication it cannot be set up against those who for a reasonable cause have no knowledge of the fact.

If a third party using ordinary care can discover the fact, he will not be protected if his ignorance is due to his own negligence. On the other hand, if he is ignorant without his own fault, he can defend himself on the ground of a reasonable cause. But in such case the burden of proof is upon the defendant.

Art. 15, pars. 1 and 2, of the German Commercial Code reads as follows:—

"So long as a fact which ought to be inscribed in the trade register has not been so inscribed and published, it cannot be used to the prejudice of a third party by him whose duty it is to inscribe it, unless such third party has had knowledge of such fact.

"If a fact has been duly registered and published, a third person is obliged to admit its validity against himself, unless he either did not know or it could not be held that he ought to have known it."

Article 13. If the party fails to register what must be registered at the place of a branch establishment, the provisions of Art. 12 are applicable only to transactions carried on at the branch establishment.

Art. 15, par. 3, of the German Commercial Code provides that, for commercial relations with a branch establishment inscribed in the trade register, the inscription and publication by the court in whose jurisdiction such branch establishment is situated is conclusive within the meaning of these enactments.

Article 14. Even if a registration is contradictory to the publication, the former can be set up as a defense against third parties.

I.e., The party registering is not responsible for the negligence of the officer of the court or the editor of a newspaper.

Any mistakes or omissions of fact in the register can be corrected on the application of the party. If they have been made through the willful act or gross negligence of the officer of the court, the applicant or any party interested can claim damages. See Arts. 48 and 57 of the Procedure in Non-actionable Matters.

Article 15. If things already registered are changed or extinguished afterwards, such change or extinction shall be registered without delay.

For instance, an infant may be prohibited from continuing in business by his parents or guardians, or a manager of a business may resign.

SECTION 4.—TRADE NAMES.

Article 16. A trader may use his surname, or full name, or any other kind of name[1] as his trade name.[2]

[1] A trader cannot, however, use the name of another as his trade name.

[2] A trader is under no obligation to have a trade name. But Art. 18, par. 1, of the German Commercial Code, provides that a trader who carries on his business without a partner or with only a sleeping partner, must make use of his surname with at least one of his unabbreviated forenames as his trade name. Again, in Germany, a trader can sue or be sued in his trade name, but the Supreme Court of Japan has held that a trader must be sued in his own proper name, which in Japan means the name he bears in the official census.

Article 17. A business association shall, according to its nature, use the words *société en nom collectif*, *société en commandite*, *société anonyme*, or *société en commandite par actions* in its trade name.

This is an exception to Art. 16, because a business association being a juristic person has no census name and must have a trade name to identify itself.

However, this does not mean that these French words must be used. The Japanese words for these four companies are as follows:—

1. *Gomei Kaisha.* (*Société en nom collectif.*)
2. *Goshi Kaisha.* (*Société en commandite.*)
3. *Kabushiki Kaisha.* (*Société anonyme.*)
4. *Kabushiki Goshi Kaisha.* (*Société en commandite par actions.*)

Arts. 19 and 20 of the German Commercial Code read as follows:—

"Art. 19. The firm name of an ordinary partnership (*société en nom collectif*) must include the name of at least one of the partners with an addition explanatory of the existence of partners or the names of all the partners.

"The firm name of a commandite company (*société en commandite*) must include the name of at least one of the partners personally responsible, with some addition explaining the existence of a company.

"No prefixing of forenames is necessary.

"The firm name of an ordinary partnership or a commandite company may not contain other names than those of the partners who are personally responsible."

"Art. 20. As a general rule, the firm name of a limited liability company (*société anonyme*) as well as that of a commandite company divided into shares (*société en commandite par actions*) ought to be derived from the object of the undertaking. The former firm name ought in addition to include the words 'limited liability company' and the latter 'commandite company divided into shares.' "

Article 18. If no business association exists, a word indicating the existence of a business association shall not be used in the trade name. This provision is applicable where the trader has succeeded to the business of a business association.

Any person acting in violation of these provisions is punishable by a fine of from 5 to 50 *yen*.

Art. 18, par. 2, of the German Commercial Code provides that no addition may be made to the firm name which shows the existence of an association or causes deception as to the nature and extent of the business. But in Japan, only the word showing the existence of an association, if such is not the fact, is prohibited. Other words having no connection with the business may be added, except that in the case of an insurance association no words other than "life insurance," "fire insurance," etc., are allowed to be added which might cause a deception as to the nature and extent of the business.

Article 19. A trade name already registered by another person cannot be registered within the same *Shichoson* for the same business.

Art. 14 of the Rules for the Operation of the Commercial Code provides that a *Shichoson* denotes each *Ku* in Tokyo, Saikyo and Osaka, and that, in the places where the city system or *Choson* system has not been enforced, it denotes the pre-existing *Choson*, territorial administrative division or some section of the same kind. Thus, Tokyo City is divided into several "ku." If a trader has already registered his trade name in one "ku," other persons cannot register the same trade name for the purpose of carrying on the same business in the same "ku."

As to the administrative divisions of Japan, see Art. 22, note, *infra*.

Art. 158 of the Procedure in Non-actionable Matters provides that no registration shall be allowed unless the trade name can be clearly distinguished from the trade names already registered by others. Any registration in violation of this rule is void and therefore the party cannot acquire the right of using such trade name.

A Japanese trader acquires the right of using his trade name as soon as the trade name is registered. He has a right to register it, but is under no obligation to do so. On the other hand, according to Art. 29 of the German Commer-

cial Code, every trader is bound to register his trade name and the address of his place of business in the court within whose jurisdiction it lies.

The registration of a trade name has a different object from the ordinary commercial registration, such as the registration of a manager, etc.; the latter is to warrant an existing right, the former to create a new right.

Art. 30 of the German Commercial Code provides that every trade name must be clearly distinguishable from those existing in the same locality or district and already registered in the trade register; and that if a merchant has the same forenames and surnames as another already registered in the trade register, and wishes to use such names as his trade name, he must add a note to distinguish his trade name from those already registered.

Article 20. He whose trade name has been registered can ask for an injunction to restrain other persons from using the same or a similar trade name for the purpose of unfair competition. In such case, damages can be claimed.

He who uses the trade name already registered by another person within the same *Shichoson* for the same business is presumed to use it for the purpose of unfair competition.

As the purpose of unfair competition is sometimes hard to prove, the law raises such a presumption in favor of the plaintiff. But if the same or a similar name is used for a different business, though in the same "shichoson," or in a different "shichoson," though for the same business, the burden of proof would not be on the defendant, but on the plaintiff.

Art. 37 of the German Commercial Code provides that any one who uses a trade name which is not his property may be prevented by the court from using it, and be liable

to a fine. It also provides that any one finding himself injured by a third person unlawfully using a trade name may demand that he cease so to use it.

Article 21. The transfer of a trade name cannot be set up as a defense against third parties unless such transfer has been registered.

Such registration must be made by the transferee. See Art. 161 of the Procedure in Non-actionable Matters.

After registration, though not published, the transfer is valid against third parties even acting in good faith and committing no fault. Thus, the rule is different from that relating to the trade register (see Art 12, *supra*), but the same as that provided in the case of the registration of real property and in the case of the registration of the formation of a business association.

Article 22. In case both the trade name and the business are transferred,[1] unless the parties expressly provide otherwise, the transferor cannot carry on the same business within the same *Shichoson* for a period of twenty years.

If the transferor has promised not to carry on the same business, such promise has its validity only in the same *Fu* or *Ken*[2] for a period not more than thirty years.[3]

The transferor, irrespective of the provisions of the preceding paragraphs, cannot carry on the same business for the purpose of unfair competition.[4]

[1] Art. 23 of the German Commercial Code provides that the trade name cannot be alienated separately from the business which it designates. But in Japan, the trade name may be transferred without transferring the business. However, a

different rule exists in the case of a trade mark. Art. 6 of the Japanese Trade Mark Act provides that no trade mark may be transferred without the transfer of the business which it designates.

According to the decision of the Japanese Supreme Court, it is presumed that the transfer of a business includes the place of business, credits, good will, trade books, etc. The transferee also assumes the debts unless the agreement provides to the contrary.

[2] For administrative purposes Japan is divided into three *Fu* and forty-two *Ken*. Though the *Fu* is larger than the *Ken*, there is no difference in the organization; the distinction in name and extent of territory is purely historical. The administration of each *Fu* or *Ken* is under the direct supervision of the Minister of the Home Affairs. Each *Fu* or *Ken* is divisible in several *Guns* or *Shis*. A *Shi* is a local administration of a city. A *Gun* is subdivided into *Chosons*. The *Choson* is the rural local administration. The administration of the *Choson* is subject to the administration of the *Gun* and the administration of the *Gun* or the administration of the *Shi* is subject to the administration of the *Fu* or *Ken* in which it is situated. Only the *Shi* and the *Choson* have complete autonomy, but each administrative organization above described has its major assembly, councils, etc. The administrative organization is detailed in three statutes: namely, the Statute of *Fu Ken* System, the Statute of *Gun* System, and the Statute of *Shichoson* System.

[3] Thus, if the transferor promises not to carry on the business through the whole country for thirty years, or not to carry it on for a longer period than thirty years in the same *Fu* or *Ken*, such a contract is void as in restraint of trade.

[4] For instance, as far as this provision of the Code is concerned, the transferor may carry on the same business in a place near to the place in which his old business is carried on. In such case, however, the transferee still has a right to complain on the ground of unfair competition.

Article 23. The provisions of Art. 22 are applicable where the business is transferred exclusive of the trade name.

Article 24. If a person has abandoned or altered his trade name already registered, and such abandonment or alteration is not registered, the parties interested can apply to the court for the cancelation of the registration of such trade name.

On the application mentioned above, the court must summon the person whose trade name has been registered to make objections within a certain period of time fixed by the court, and if no objection is made during such period, the registration shall be instantly canceled.

Art. 31 of the German Commercial Code provides that any alteration in the trade name or in the personnel of its proprietors, as well as any transfer of the place of business to another locality, is to be registered in the trade register; but it does not provide that a party interested in the business has a right to apply for the cancelation of the trade name.

SECTION 5.—TRADE BOOKS.

Article 25. A trader shall keep books, in which the daily dealings and all such facts as may affect his property shall be systematically and clearly recorded;[1] but as to his household expenses, it is sufficient to record the total amount each month.[2]

As for the dealings of retail business, only the total amount of every day's sale, either in cash or on credit, must be recorded.

[1] For instance, damages caused by fire, earthquake, etc., or any obligation arising from contract or tort, are to be recorded in the journal.

Identical with Art. 38, par. 1, of the German Commercial Code.

[2] There is no provision in the German Code for an account of the total monthly household expenses. According to the Law of Bankruptcy of Japan, a trader may become responsible for his negligence when he is adjudged bankrupt. If he has squandered his property or incurred an extraordinary debt through his prodigal expenses for his person or family, gambling, speculation, or improper mercenary spirit, he is guilty of negligent bankruptcy, and is punishable by imprisonment with hard labor from two months to four years.

Thus, in the Court of Bankruptcy, the account of the household expense will serve as an evidence as to whether the bankrupt is guilty of negligence or not.

Article 26. On the commencement of business or on the registration of the formation of a company, and at a certain time once a year, a balance sheet and a general inventory of movables, immovables, credits, debts and of any other property shall be made and entered in the books prepared for that purpose.

A valuation of the movables, immovables, credits and other property, based on the market value at the time of making the inventory, shall be inserted in the account.

The keeping of the inventory and balance sheet as well as the journal is said to be in the duty of a trader; but it does not follow that the trader who fails to keep them is necessarily liable to a punitive sanction, except in case of bankruptcy. The party wilfully keeping a false record or negligently fail-

ing to keep his trade books is punishable for fraudulent or negligent bankruptcy. A different rule is applied to a business association. If the directors of a business association fail to keep the inventory or balance sheet in its principal or branch offices, do not record what they ought to record, or make a false record, they are punished by a fine of from five to five hundred *yen*.

In regard to the attitude of the law toward trade books, the French advocate the principle of interference, and the English are in favor of the *laissez faire* doctrine. The Germans take a middle course: that is, the trader is obliged to keep trade books, but they are not subject to governmental inspection. The Japanese Code entirely adopts the German system. See Art. 39 of the German Commercial Code.

Article 27. In a company which distributes profits more than once a year, its inventory and balance sheet shall be made at the time of each distribution according to the provisions of Art. 26.

Article 28. A trader shall preserve his trade books and any correspondence in connection with his business for ten years.[1]

As to the preservation of trade books, such period of time begins to run as soon as the books are closed.[2]

[1] The heir of the trader has the same duty, but a transferee of the business is not under the obligation to preserve the trade books of his transferor.

[2] This article is identical with Art. 44 of the German Commercial Code.

SECTION 6.—TRADE EMPLOYEES.

Article 29. A trader may appoint a manager to carry on business for him either in his principal office or in a branch establishment.

Here the word, "manager" is the equivalent of the "*prokurist*" in the German Commercial Code. See Sect. 5 of the German Commercial Code.

Article 30. A manager has authority to do all acts in court or outside of court representing the employer, in regard to his business.[1]

A manager may appoint or dismiss the head clerk, clerks, or other employees.

Any restriction on the authority of a manager cannot be set up as a defense against third parties acting in good faith.[2]

[1] *I. e.*, A manager has the right to represent his employer in all acts connected with the prosecution of the business, whether ordinary business transactions or the collection and defense of claims in court.

Identical with Art. 49, par. 1, of the German Commercial Code.

[2] Identical with Art. 50, par. 1, of the German Commercial Code.

Article 31. The employer shall register the appointment of a manager or the termination of his authority with the court at the place of the principal office or at the place of any branch establishment for which such manager is appointed.

Identical with Art. 53, pars. 1 and 4, of the German Commercial Code.

Article 32. A manager without the consent of his employer cannot carry on commercial transactions or become a member of unlimited liability of a

business association, either on his own account or on account of third persons.

If a manager, in violation of these provisions, has carried on commercial transactions for himself, the employer may consider such transactions as done on his account.[1]

If the employer fails to exercise this right within two weeks after he has been informed of such transactions, or if one year has elapsed from the time of such transactions, he can no longer enforce such right against the manager.[2]

[1] The employer has a right of election by which he may either consider the transactions as done on his account in case the transactions are profitable, or sue for damages if they are not profitable.

[2] There are no such provisions in the German Commercial Code as in this article, except that Art. 60 provides that a clerk cannot, without the consent of his principal, either do any business on his own account or carry on a business similar to that of his principal for himself or a stranger, and in case a clerk infringes this regulation, the principal (Art. 61) has a right to consider the transaction as done on his account. On the other hand, a Japanese clerk is not subject to this rule.

Article 33. A trader may appoint the head clerk or clerks and authorize them to do certain classes of acts or particularly specified matters.

The head clerk or clerks have authority to do all acts in regard to the matters intrusted to them.

The legal status of clerks differs from that of the manager in the following manner:—

1. The clerks are special agents.
2. They may be appointed either by the employer or by the manager.

3. The appointment of clerks need not be registered.

4. Restrictions upon the authority of clerks can be set up as a defense against third parties even though they have no notice of the restrictions.

5. Clerks may do any commercial act for themselves or others without the consent of their employer.

Article 34. Employees other than a manager, head clerk or clerks,[1] are presumed to have no authority to do juristic acts[2] for the benefit of the employer.

[1] *I. e.*, Apprentices.

[2] A juristic act is defined to be a manifestation of will, the purpose of which is to produce a legal effect of a private nature where the purpose is carried out by law according to the expectation of the party who manifests the will. Thus, if a man tells his servant to shut the door, this is a manifestation of will, but still not a juristic act; for the effect to be produced is the effect of fact, not the effect of law. Nor is the act of bringing an action in the court a juristic act; for procedure is a branch of public law and therefore the act of bringing a suit at law does not produce a legal effect of a private nature. Again, if a man sets fire to his own house with the expectation of acquiring an indemnity from an insurance company, the law will not enforce such an effect as he expects, and consequently his act is not a juristic act. But a juristic act is not necessarily, though generally, a contract. The act of one party alone without an *aggregatio mentium* is no less a juristic act. For examples, a donation, the making of a will, the ratification or rescission of a contract by an infant, etc., are juristic acts.

Article 35. So far as the relation between employer and employee is concerned, the provisions of Arts. 29–34 do not affect the application of the provisions of the Civil Code.

SECTION 7.—COMMERCIAL AGENTS.

Article 36. A commercial agent is not an employee,[1] but a person who acts permanently for a definite trader[2] as a representative or a middleman[3] in commercial transactions within the scope of the business of such trader.

[1] The commercial agent being an independent trader, all provisions concerning the trade register, trade name and trade books are applicable to him.

[2] Those who act as agents for any trader who may apply to them are not commercial agents within the meaning of the present article. By acting for a definite trader, the commercial agent is different from a broker.

[3] A representative within the meaning of this article is one authorized to do a juristic act as defined by Art. 643 of the Civil Code. By a middleman is meant one who is authorized to do a non-juristic act within the meaning of Art. 656 of the Civil Code.

Article 37. If a commercial agent has acted as a representative or a middleman in commercial transactions, he shall give notice to his principal without delay.

According to the principle of the Civil Code, an agent is only obliged to make a report on the principal's demand, but in commercial transactions such demand is unnecessary. See Arts. 645 and 646 of the Civil Code.

Similar to Art. 84, par. 2, of the German Commercial Code.

Article 38. A commercial agent, without the consent of his principal, cannot carry on commercial transactions within the scope of the principal's

business, or become a member of unlimited liability of a business association, doing the same business, either on his own account or on account of third persons.

If a commercial agent acts in violation of these provisions, Art. 32, pars. 2 and 3, is applicable.

Here the duty of a commercial agent is different from that of a manager. The latter is absolutely prohibited from doing any commercial transaction or becoming a member of any company in which he would be unlimitedly liable for the debts. The commercial agent, however, is only prohibited from carrying on a commercial transaction within the scope of the principal's business or becoming a member of unlimited liability in a company doing the same business. See Art. 32, *supra*.

Article 39. A commercial agent intrusted with the sale of goods has authority to receive notice in regard to the defect or deficiency of the goods and to the performance of the contract of sale.

According to the rule of the Civil Law, whether an agent entrusted with the sale of goods has authority to receive such a notice entirely depends on the original contract between the principal and the agent, and consequently the vendee is obliged to examine the nature and extent of the contract. In order to prevent this inconvenience, the Commercial Law provides an exception to this rule, and gives the commercial agent authority to receive the notice. Thus, if the vendee discovers that the goods are defective, he may directly claim damages, or the termination of the contract, or the deduction of the price from the agent. Notice to the agent has the same effect as notice to the principal.

Derived from Art. 86, par. 2, of the German Commercial Code.

Article 40. If the parties have not fixed the duration of the contract of agency, each party may terminate the contract on notice given two months before the termination.

In case of an unavoidable necessity,[1] each party may terminate the contract at any time irrespective of whether the duration of the contract has been fixed or not.[2]

[1] What is an unavoidable necessity is a question of act which is to be decided by the court. For instance, if a commercial agent is called to serve in the army, in case of war, this would be an unavoidable necessity and terminate the contract of agency.

[2] This article is an exception to the rule of the Civil Code, under which each party to a contract of agency has a right to terminate it at any time. See Art. 651 of the Civil Code.

This article is identical with Art. 92 of the German Commercial Code except that in the latter the notice must be given six weeks before the termination of the contract.

Article 41. A commercial agent has a lien on all the property of his principal in his possession for any claim arising out of the contract of agency, except where the contract provides that the agent shall not have such a lien.

This is an exception to the rule stated in Art. 295 of the Civil Code. According to that article, a person has a right to retain the property of another until any claim arising from the same property is satisfied, but he has no lien on property which has no connection with such claim.

BOOK II.

BUSINESS ASSOCIATIONS.

SECTION 1.—GENERAL PROVISIONS.

Article 42. A business association within the meaning of this Code is an association formed for the purpose of carrying on commercial transactions as a business.

The reader will find a short account of the business associations of Japan and under the Continental Codes, in two articles by the present editor, University of Pennsylvania Law Review, Vol. 58, pp. 1 and 61.

There are two kinds of juristic persons under the Civil Code: (1) association, the organization of persons; (2) trust property, the organization of property.

Thus, a business association is a trader within the meaning of Art. 4.

Article 43. Business associations are divided into four kinds: *société en nom collectif*, *société en commandite*, *société anonyme*, and *société en commandite par actions*.

Article 44. A business association is a juristic person.

The residence of a business association is at the place of its principal office.

There is no such provision in the German Commercial Code. It is maintained by the majority of the jurists of

that country that the *société en nom collectif*, *société en commandite*, and *société en commandite par actions* are not juristic persons. On the other hand, a business association is construed as a juristic person in France, though there is no express provision in the French Commercial Code to that effect. The Commercial Codes of Belgium and Spain are the only commercial codes besides the Japanese, which expressly provide that a business association is a juristic person.

The legal effects of being a juristic person are as follows:—

1. The property of the association will be independent of the property of its members or shareholders. A debtor of the association cannot set off against the claim of the association a debt due him by a member of the association.
2. The association will have an independent residence.
3. The association can be put in bankruptcy independently of its members or shareholders.
4. The association will be capable of suing or being sued.
5. The association will be obliged to make a registration in the court.

Article 45. The existence of a business association cannot be set up as a defence against third parties unless the formation of such business association is registered.

Derived from Arts. 123, par. 1, and 200, par. 1, sentence 1, of the German Commercial Code.

Article 46. A business association cannot make preparation to begin business before it is registered at the place of its principal office.

Art. 123, par. 2, of the German Commercial Code provides that if a *société en nom collectif* begins its business before it is registered, its legal relations begin at the same time. This provision is also applicable to a *société en commandite*.

Art. 200, par. 1, of the German Commercial Code provides that any act done by a *société anonyme* in the name of the association before it is registered personally binds the person who has done it, and if several persons participate in doing it, they are jointly and severally liable. These provisions are applicable to a *société en commandite par actions*.

Article 47. If a business association does not open business within six months after it has been registered, the court may dissolve it on the application of the attorney-general or by exercising its executive power. But if there is reasonable cause, such period of time may be extended on the application of the association.

In Japan, as in all civil law countries, the courts have certain administrative power which they may exercise on their own initiative. This is the fundamental difference between the civil and the common law conceptions of a court.

Article 48. If a business association acts contrary to the public order or good morals, the court may dissolve it on the application of the attorney-general or by exercising its executive power.

SECTION 2.—SOCIÉTÉ EN NOM COLLECTIF.

Sub-Section 1.—Formation.

Article 49. Articles of association shall be made on the formation of a *société en nom collectif*.

The association begins to have its existence as soon as the written contract is made. The doctrine that such a written contract is essential to the existence of an association is derived from the French system of jurisprudence. It is quite

unnecessary in Germany to observe such formality; for in Germany a *société en nom collectif* may be formed by an implied intention.

Article 50. The following particulars shall be set forth in the articles of association, with the signatures of all the members:—

1. The object of the association.
2. Its trade name.
3. The names and residences of the members.
4. The place of the principal office and the place of each branch establishment.
5. The nature and value or basis of valuation of the contributions of the members.

Article 51. Within two weeks after the making of the articles of association, the association shall register the following particulars at the place of the principal office and the place of any branch establishment:—

1. The particulars enumerated in Art. 50, Nos. 1–3.
2. The principal office and each branch establishment of the association.
3. The date of its formation.
4. The term for its existence or causes for its dissolution, if such term or causes have been fixed.
5. The nature of the contributions of the members and the value of the property contributed.
6. The names of the members who are to represent the association, if such members have been designated.

If a branch office is established after the formation of the association, the registration mentioned

above shall be made at the place of such branch establishment within two weeks, and the fact that such branch office is established shall be registered at the place of the principal office and the place of any other branch office within the same period of time.

If a new branch office is established within the same province as the court which has jurisdiction over the place of the principal office or the place of any other branch establishment, it is sufficient to register the fact that such branch office is established.

Art. 106 of the German Commercial Code reads as follows:—

"The partnership (*société en nom collectif*) must make a declaration before the court within whose jurisdiction its place of business is, which must include,—

1. The names, forenames, profession and place of abode of each member.
2. The firm name of the company and the place where it carries on business.
3. The date when the partnership was formed.

Article 52. When the principal office or any branch establishment is removed to another place, the registration of such removal shall be made at the former place within two weeks; and the registration mentioned in Art. 51, par. 1, shall be made at the new place within the same period of time.

If the principal office or a branch establishment is removed to a place within the jurisdiction of the same court, only such removal shall be registered.

Article 53. If any alteration takes place in the particulars enumerated in Art. 51, par. 1, such

alteration shall be registered at the place of the principal office and the place of any branch establishment within two weeks.

Art. 107 of the German Commercial Code reads as follows:—

"If the firm name of the partnership (*société en nom collectif*) is changed, or the business carried on in another place, or if a new member enters into the partnership, this has also to be entered in the trade register."

Sub-Section 2.—The Internal Relations of the Association.

Article 54. In regard to the internal relations of the association, the provisions of the Civil Code concerning partnership are applicable, unless the articles of association or this Code provide to the contrary.

A partnership under the Civil Code is a contract under which each party promises to contribute money, property or service for the purpose of carrying on a common enterprise. The special characteristic of this partnership is that unless a joint liability is created by a special contract, a mere contract of partnership does not make the partners jointly liable for partnership debts, though each of them is unlimitedly liable for his own share of the partnership debts. Such a partnership is not necessarily a commercial organization. Even an educational institution or a scientific association may be a partnership provided it has not been incorporated. See University of Pennsylvania Law Review, Vol. 58, p. 1.

Article 55. If debts are assigned to the company by a member as his contribution, such member is responsible for the payment on default of the debtor.

In such case, the member is not only liable for the interest but also for damages.

When such contribution is made, the debts must be completely assigned to the association. If the debts are non-negotiable, the debtor must be duly informed by the original creditor, or the consent of the debtor must be obtained. If they are negotiable, the instruments must be properly indorsed and delivered. In case of a government bond, a mere delivery is sufficient. See Arts. 467, 469 and 473 of the Civil Code.

Article 56. In the absence of a special provision in the articles of association, each member has a right as well as a duty to manage the business of the company.

Identical with Art. 114 of the German Commercial Code.

Article 57. The appointment or dismissal of a manager is performed by the majority of the members, even if certain members have been appointed for the management of the business.

Art. 116, pars. 3 and 4, of the German Commercial Code reads as follows:—

"The appointment of an agent necessitates the approval of all the managing partners unless there is danger in delaying to appoint.

"Revocation of the agent's authority can be made by any one of the partners having authority to make the appointment or to concur in making the appointment."

Article 58. The alteration of the articles of association or any act beyond the scope of the object of the association[1] cannot be effected without the agreement of all the members.[2]

[1] According to the report made by the committee for compiling the Commercial Code, when an association makes a donation to some charitable institution, it is an act beyond the scope of the purpose of the association.

[2] Identical with Art. 116, par. 2, of the German Commercial Code.

Article 59. If a member transfers the whole or part of his interest in the association to a third person without the consent of the other members, such a transfer cannot be set up as a defence against the association.

I.e. Though such a transfer is valid between the transferor and the transferee, the transferor is still liable to the association as a member, if the association holds him.

This is a provision derived from the old German Commercial Code.

Article 60. A member without the consent of the other members cannot carry on commercial transactions within the scope of the business of the association or become a member of unlimited liability of any other business association doing the same business, either on his own account or on account of third persons.

If a member in violation of these provisions carries on commercial transactions for himself, the other members on a conclusion of the majority may consider them as done on account of the association.

If the other members fail to exercise such right within two weeks after one of them has been informed of such transactions or if one year has elapsed from

the time of such transactions, they can no longer enforce such right against the member.

This article is derived from Arts. 112 and 113 of the German Commercial Code.

Sub-Section 3.—The External Relations of the Association.

Article 61. If particular members of the association have not been appointed representative members by the articles of association or by agreement of all the members, each member represents the association.

The representation of the association is distinguished from the management of the business of the association, the former arising from the external relation and the latter from the internal relation. All the Codes based on the German system generally recognize such a distinction. On the other hand, under the French system, these two rights are confounded. See Art. 125 of the German Commercial Code.

Article 62. A representative member of the association has authority to do all acts in court or outside of court in regard to the business of the company.[1]

The provisions of Arts. 44, par. 1, and 54 of the Civil Code are applicable to a *société en nom collectif*.[2]

[1] Identical with Art. 126, par. 1, of the German Commercial Code.

[2] Art. 44, par. 1, of the Civil Code provides that a juristic person is responsible for damage done to third persons by its directors or other representatives. Art. 54 of the same Code provides that any restriction on the authority of the direc-

tors cannot be set up as a defense against third parties acting in good faith.

Art. 126, par. 2, of the German Commercial Code reads as follows:—

"A limitation of authority to represent is of no effect against a third person, especially in the case of a limitation that shall extend the representation only to certain transactions or class of transactions, or that shall hold good only under certain circumstances or for a certain time or place."

Article 63. If the debts of the association cannot be satisfied out of its assets, each member is jointly liable for the payment.

A creditor of the association cannot sue the individual members unless he avers that he cannot be satisfied out of the firm assets. He has practically to show either that the association is in bankruptcy or that he has sued the association and failed of satisfaction. In other words, the individual members are not principal debtors, but "accessory debtors." On the other hand, under the German Code, as well as the Hungarian Code, the members of the association are treated as principal debtors. A creditor of the association has a right of election to sue either the association or the individual members, or the association and its members jointly. Thus, the Japanese treat the *société en nom collectif* as an entity; the Germans treat it as a partnership. The present article is probably derived from the Commercial Codes of Italy and Belgium: in the former it is provided that no claim can be made against the members unless the right of action has been exercised against the company; the latter provides that there can be no judgment against the members unless there has been a judgment rendered against the association. The *Code fédéral des obligations* of Switzerland has a similar provision.

I have used the term "accessory debtor" to describe the relation between the members of the association and the

creditors, as the relation has no exact counterpart in the English and American common law. Under the Civil Code, a surety is an accessory debtor. If he can show that the principal debtor is able to perform the debt and that such a performance can be easily enforced, the creditor is obliged to exhaust the property of the principal debtor. Strictly speaking, the members of the *société en nom collectif* are neither principal debtors nor sureties; for according to the Japanese Civil Code, in case there are several sureties, they are not jointly liable to the creditor.

Article 64. A member who has been admitted to the association after its formation is responsible for the debts incurred before his admission to membership.

This provision is identical with Art. 130, par. 1, of the German Commercial Code. Under that Code, any agreement contrary to such provision is of no effect against third parties. It is also held in France that a new member must be liable for the old debt, but this liability can be dispensed with by a contract between the members. Again, the new member's liability for the old debt is recognized by Art. 89 of the Hungarian Commercial Code, Art. 78 of the Italian Commercial Code and Art. 565 of the *Code fédéral des obligations* of Switzerland. The theory that a member is not liable for debts contracted by the *société en nom collectif* prior to his admission as a member prevails only in England and the jurisdictions under its system.

Article 65. If a person, though not a real member, does an act which may induce other persons to believe that he is a member, he shall be responsible as a member to the third parties acting in good faith.

No such provisions can be found in the German Commercial Code or other continental codes. Probably this article is of an English origin, expressing, as it does, a rule corresponding to the "partnership by estoppel" of the common law.

Art. 113 of the First Japanese Commercial Code provides that a person shall be liable as a member to third persons in the following cases:

1. If he allows his name to be used in the trade name.
2. If he participates in the management of the business.
3. If he enjoys the rights and assumes the duties of a member.

Article 66. A decrease of the contribution of a member cannot be set up as a defense against the creditors of the company unless such decrease is not objected to by the creditors within two years after it has been registered at the place of the principal office.

Article 67. An association cannot distribute profits before any impairment of its capital has been made good. If profits are distributed in violation of this provision, the creditors of the company may demand that they be refunded.

There are no such provisions in the German Commercial Code. The provisions concerning the reduction of capital are derived from the Italian Commercial Code.

Sub-Section 4.—The Retirement of Members.

Article 68. If articles of association have failed to stipulate for the duration of the association or have stipulated that the association shall last as long as

the life of a certain member,[1] any member may retire at the end of a business year. But in such case a notice must be given six months before such retirement.

In case of unavoidable necessity, a member may retire at any time, irrespective of whether the articles of association have or have not stipulated for the period of the duration of the company.[2]

[1] The result of this provision is, that a provision that the association shall continue as long as one of its members shall live is illegal or at least is not effective.

[2] According to the German Commercial Code, a cause of the retirement of a member is a cause of the dissolution of the association. In Europe, the Codes, either of the German or of the French system, except the Italian Commercial Code, do not recognize that the members of a *société en nom collectif* or *société en commandite* may independently retire without effecting the dissolution of the company. As the Japanese *société en nom collectif* is considered as a juristic person, so the provision of the Italian Code is adopted in order to accord with the entity theory. Consequently, though provisions similar to the present article are found in the German Commercial Code, Arts. 132, 133, 134, the latter provide that the retirement of a member and the dissolution of the association are simultaneous events.

Article 69. In addition to the cases mentioned in Art. 68, a person will cease to be a member of the association,—

1. On the happening of any cause mentioned in the articles of association;
2. With the consent of all the members;
3. On his death;
4. On his bankruptcy;

5. On his incompetency being declared by the court;

6. On his expulsion.

Nos. 1–4 are causes for a dissolution of the association under the German Commercial Code, except that in case of death or bankruptcy the association may continue if it has been so agreed between the members. See Arts. 131, 138, 139, of the same code. Nos. 5 and 6 are not found in Art. 131 of the German Code, though expulsion is recognized by Art. 140.

Article 70. A member can be expelled only in the following cases and then only with the unanimous consent of the other members. The expulsion cannot be set up as a defense against the expelled member unless notice has been given to him,—

1. When a member is unable to contribute or does not contribute within a reasonable time after a call has been made;

2. When a member acts in violation of the provisions of Art. 60, par. 1;

3. When a member has committed an improper act towards the association, during his management of its business or his representation of it;

4. When a member has interfered with the management of the business in case he has no right to do so;

5. When a member in any other respect fails to perform important duties.

For instance, certain duties of the member may be stipulated in the articles of association, the violation of which will justify an expulsion.

In Germany the expulsion of a member can be effected only by the Court. See Arts. 133 and 140 of the German Commercial Code.

Article 71. A retired member is entitled to repayment of his interest in the company, even if the contribution of such member is no more than service or good will. But this provision is not applicable where the articles of association have provided to the contrary.

For instance, a man who has a good credit in the business world allows his name or trade name to be inserted in the trade name of the association; this is a contribution of good will within the meaning of this article.

Article 72. If the surname or full name of a retired member is still used in the trade name of the association, he may demand the discontinuance of such use.

Article 73. A retired member is responsible for a debt of the association incurred before the registration of his retirement at the place of the principal office. Such responsibility terminates when two years have elapsed after the registration.

The preceding provisions are applicable to new members to whom the interest in the association has been transferred with the consent of all the other members.

See notes to Art. 103, *infra*.

Sub-Section 5.—Dissolution.

Article 74. The association is dissolved,—

1. At the expiration of the time for which the association is formed, or on the happening of any cause specified in the articles of association;
2. When the enterprise of the association is accomplished, or its accomplishment becomes impossible;
3. With the consent of all the members;
4. By a consolidation with or absorption by other associations;
5. When there remains only one member in the association;
6. By the bankruptcy of the association;
7. By a decree of the court.

Art. 131 of the German Commercial Code makes no provision for the dissolution of the association on the happening of the events designated in Nos. 2, 4 and 5 of the article. On the other hand, the bankruptcy or death of a member is in the German Code a cause of dissolution, and also a notice of retirement given by a member is a cause of dissolution.

Article 75. In cases falling under Art. 74, No. 1, the association may be continued with the consent of the whole or part of the members. The dissenting members are to be treated as if they had retired.

Article 76. When an association is dissolved, except in the case of consolidation or absorption[1] or bankruptcy, such dissolution shall be registered

within two weeks at the place of the principal office and the place of any branch establishment.[2]

[1] In Japanese, there is a word pronounced "*Gohei*," which signifies either the consolidation of two associations or the absorption of one association by the other.

[2] Art. 143 of the German Commercial Code provides that when the dissolution of the association has not taken place owing to bankruptcy, the dissolution must be inscribed by all the members in the trade register. A similar provision exists in case a member retires from the association.

Article 77. The consolidation or absorption of associations may take place by a unanimous agreement of the members.

This provision is derived from the Italian Commercial Code, but under that Code consolidation is not considered as dissolution. The German Commercial Code makes no provision for the consolidation of a *société en nom collectif* and a *société en commandite*.

Article 78. When a resolution of consolidation or absorption is passed, the association shall make an inventory and a balance sheet within two weeks.

The association must publicly announce to its creditors within this period that they may present their objections within a certain time, and if the creditors are known to the association, they must be separately notified. But the time within which they may present their objections shall not be less than two months.

Article 79. If creditors make no objections against the consolidation or absorption within the time men-

tioned in Art. 78, par. 2, they are considered to have consented to it.

If creditors make objections, the consolidation or absorption cannot take place unless the debts are paid or adequate security is furnished.

A consolidation or absorption in violation of the preceding provision cannot be set up as a defense against the creditors who have presented their objections.

Article 80. If a consolidation or absorption has taken place without making the public announcement mentioned in Art. 78, par. 2, it cannot be set up as a defense against the creditors of the company.

If a consolidation or absorption has taken place without making separate notifications to the creditors who are known to the association, it cannot be set up as a defense against such creditors.

Article 81. When a consolidation or absorption has taken place there shall be made at the place of the principal office and the place of any branch establishment within two weeks a registration of alteration, in the case of an absorption, on the part of the association which continues to exist after the absorption, and, in the case of consolidation or absorption, a registration of dissolution on the part of the association or associations which cease to exist through the consolidation or absorption, and in the case of consolidation, a registration of the particulars mentioned in Art. 51, par. 1, on the part of the association which is created by the consolidation.

Article 82. The association which continues to exist after an absorption, or which is created by a consolidation, succeeds to the rights and duties of the association or associations which cease to exist through the consolidation or absorption.

Article 83. In case of unavoidable necessity, any member may apply to the court for a dissolution of the association. But, in such case, the court, on the application of a member, may expel a member or members instead of dissolving the association.

Similar to Art. 133, par. 1, and Art. 140, par. 1, of the German Commercial Code.

Sub-Section 6—Liquidation.

Article 84. For any purpose connected with liquidation, an association is deemed to continue in existence after its dissolution.

Thus, during the time of liquidation, the dissolved association can sue or be sued in the name of the association.

Article 85. The method of disposition of the property of a dissolved association may be concluded by the unanimous agreement of the members. In such case an inventory and balance sheet shall be made within two weeks after the dissolution.

The provisions of Arts. 78 (par. 2), 79 and 80, are applicable to the case mentioned above.

Art. 158 of the German Commercial Code provides that if the members agree upon another kind of partition instead of liquidation, the enactments concerning liquidation are

applicable to the rights of a third person, so long as there are any assets still undivided.

Article 86. If the method of disposition of the property has not been concluded according to the provisions of Art. 85, liquidation shall take place according to the provisions of the following thirteen Articles, except in cases of consolidation and bankruptcy.

Derived from Art. 145, par. 1, of the German Commercial Code.

Article 87. When a liquidation takes place, all the members are to be liquidators or the majority of the members may appoint the liquidators.

Derived from Art. 146, par. 1, of the German Commercial Code.

Article 88. In cases arising under Art. 74, No. 5, the court will appoint liquidators on the application of any person interested.

Art. 146, par. 2, of the German Commercial Code reads as follows:—

"At the request of one of the interested parties, the nomination of the liquidators may be made by the Court in whose jurisdiction the partnership has its place of business, when there is serious ground for so doing; in such a case the Court may nominate persons as liquidators who do not belong to the partnership. (*Société en nom collectif.*)"

Article 89. When an association has been dissolved by a decree of the court, the same court will appoint liquidators on the application of any person interested or of the attorney-general.

Article 90. When liquidators have been appointed they shall register their names and residences at the place of the principal office and the place of any branch establishment within two weeks.

Similar to Art. 148, par. 1, of the German Commercial Code.

Article 91. The duties of liquidators are as follows:—

1. To wind up the pending business.
2. To collect and pay debts.
3. To distribute the remaining property.

Liquidators have authority to do all acts in court or outside of court necessary for the performance of these duties. Any restriction on the authority of the liquidators cannot be set up as a defence against third parties acting in good faith.[1]

The provision of Art. 81 of the Civil Code is applicable to the liquidation of a *société en nom collectif*.[2]

[1] This article is derived from Arts. 149, 151, and 155, par. 1, of the German Commercial Code.

[2] Art. 81 of the Civil Code reads as follows:—

"When the liquidators, during the liquidation of a juridical person, have found that its property is not sufficient to pay its debts, they shall instantly apply to the Court for a declaration of bankruptcy and make a public notice thereof.

"The office of the liquidators terminates as soon as they assign the business to the trustee in bankruptcy.

"In such case any debt paid or delivery made by the liquidators can be taken back by the trustee in bankruptcy."

Article 92. If the existing property of an association is not sufficient to meet the debts, the liquidators may require the members to make contribu-

tions, even though such contributions are not due at the time of liquidation.

Article 93. If there exist several liquidators, all acts in regard to the liquidation are concluded by the majority. But as to third parties, each liquidator may represent the association.

Art. 150 of the German Commercial Code reads as follows:—

"When there are several liquidators, they can only undertake matters concerning the liquidation acting together unless it has been agreed that they can act alone and separately; such an agreement must be inscribed in the trade register."

"The enactments of par. 1 do not take away from the liquidators the right of authorizing certain among them to do certain acts or a certain class of acts."

Article 94. As soon as the liquidators assume their offices, they shall examine the assets of the association, make an inventory and balance sheet, and deliver them to the members.

The liquidators, on the application of the members, must make a monthly report to them in regard to the progress of the liquidation.

According to Art. 154 of the German Commercial Code, the liquidators must make a balance sheet at the beginning and end of the liquidation.

Article 95. The liquidators cannot distribute the assets of the association to its members before all the debts have been paid.

Art. 155 of the German Commercial Code provides that the assets that are over after payment of debts must be

divided by the liquidators between the members, in proportion to their shares in the capital of the association.

Article 96. The liquidators who have been appointed by the members may be dismissed at any time. The majority of the members must concur in such dismissal.

In case of necessity, the court may dismiss the liquidators on the application of any person interested.

This article corresponds to Art. 147 of the German Commercial Code, which, however, requires "the unanimous resolution of interested parties."

Article 97. The dismissal or change of liquidators shall be registered at the place of the principal office and the place of any branch establishment.

Corresponds to Art. 148, par. 1, of the German Commercial Code.

Article 98. As soon as liquidation is finished, the liquidators shall render an account and submit it to the members for their approval.

If the members make no objection to the account within a month, they are considered to have approved it, except where the liquidators have acted dishonestly.

Article 99. As soon as liquidation is finished, the liquidators shall make a registration thereof at the place of the principal office and the place of any branch establishment.

Identical with Art. 157, par. 1, of the German Commercial Code.

Article 100. If the formation of an association has been rescinded after the commencement of its business,[1] liquidation shall take place as in the case of dissolution. In such case, the court will appoint liquidators on the application of any person interested.[2]

[1] For instance, the contract of the formation of an association may be rescinded on the ground of fraud or duress, or a party to the contract may be an infant who has entered into it without the consent of his guardian. In such cases, all acts done in the name of the association after its formation and before its rescission are deemed to be valid under this article.

[2] In the German Commercial Code there is a similar provision for a *société anonyme*, but not for a *société en nom collectif* or a *société en commandite*. According to the Commercial Codes of Portugal and Belgium, the general rule for all business associations is that a liquidation takes place in case the formation of the association is void.

Article 101. The books of the association, its business correspondence, and all documents connected with the liquidation shall be preserved for ten years after the dissolution has been registered at the place of its principal office in the case of Art. 88, or, in any other case, after the completion of the liquidation has been registered. The custodian of these books and documents is appointed by the majority of the members.

Art. 157, par. 2, of the German Commercial Code reads as follows:—

"The books and paper of the dissolved partnership (*société en nom collectif*) are given into the safe keeping of one of the

partners or of a third party. In default of an arrangement being come to, such partner or third party will be chosen by the Court in whose jurisdiction the partnership has its seat of business."

Article 102. On the death of a member leaving several heirs,[1] one representative shall be appointed in order to exercise the rights of the member in regard to the liquidation.[2]

[1] See note to Art. 428, *infra*.

[2] Derived from Art. 146 of the German Commercial Code.

Article 103. The liability of the members mentioned in Art. 63 is terminated when five years have elapsed after the dissolution of the association was registered at the place of its principal office.

Even after the expiration of the said period, the creditors of the association may demand the payment of the debts out of the remaining property which has not been distributed.

The period of time spoken of, as well as that mentioned in Art. 73, *supra*, is not prescription within the meaning of the Civil Code; and therefore the rules of the Civil Code concerning suspension of prescription, etc., *i.e.* suspending the operation of the Statute of Limitations for civil obligations, are not applicable. However, the German Commercial Code deems this period of time as prescription. Art. 159 of that Code provides that claims against a member for contracts entered into by the company are not maintainable after five years from the dissolution of the company or retirement of the member, so long as the claim is not subject to a shorter prescription; and that prescription begins with the end of the day on which the dissolution of the company, or retirement of the member, is entered in the trade register of the district in which the company has its place of business.

SECTION 3.—SOCIÉTÉ EN COMMANDITE.

Article 104. A *société en commandite* is composed of members of unlimited liability and members of limited liability.

Art. 161, par. 1, of the German Commercial Code reads as follows:—

"A company which has for its object the carrying on of a business under a firm name, the responsibility of one or several of the members with regard to the creditors of the company being limited to the amount of their subscribed capital, whilst that of the other members is unlimited, is a *commandite* company (*société en commandite*)."

Article 105. The provisions for a *société en nom collectif* are applicable to a *société en commandite* in case there are no special provisions in this section.

Derived from Art. 161, par. 2, of the German Commercial Code.

Article 106. In addition to the particulars mentioned in Art. 50, the limited or unlimited liability of each member of a *société en commandite* shall be set forth in the articles of association.

Article 107. In addition to the particulars mentioned in Art. 51, No. 1, the association shall register the limited or unlimited liability of each member at the place of its principal office and the place of any branch establishment within two weeks after the articles of association have been made.

Derived from Art. 162, par. 1, of the German Commercial Code.

Article 108. The contributions of the members of limited liability can only be made with money or other property.

Thus, service or good-will cannot be contributed. In Germany, as far as the members *inter se* are concerned, a member of limited liability may give a service as his contribution towards the capital.

Article 109. Each member of unlimited liability has a right and duty to manage the business of the association unless the articles of association provide to the contrary.

If there are several members of unlimited liability, the management of the business is concluded by majority.

See Arts. 56 and 105, *supra*, and their notes.

Article 110. The appointment and dismissal of a manager must be concluded by the majority of the members of unlimited liability, even if there are special members appointed for the management of the business of the association.

See Arts. 57 and 105, *supra*, and their notes.

Article 111. The members of limited liability, at the end of a business year, within business hours, may demand an inspection of the inventory and balance sheet of the association and inquire into its affairs and the state of its property.

In case of necessity, the court may, on the application of the members of limited liability, allow

them to inquire into the affairs of the association and the state of its property.

This article is derived from Art. 166 of the German Commercial Code.

Article 112. A member of limited liability cannot transfer the whole or part of his interest in the association without the consent of all the members of unlimited liability.

The interests of the members of unlimited liability can be transferred only with the unanimous consent of both the members of unlimited liability and those of limited liability. See Arts. 59 and 105, *supra*, and their notes.

Article 113. A member of limited liability may carry on commercial transactions within the scope of the business of the association or become a member of unlimited liability of any other company of the same business, either on his own account or on account of third persons.

Derived from Art. 165 of the German Commercial Code.

Article 114. If there are no members of unlimited liability appointed by the articles of association or by an agreement of all the members to represent the association, each member of unlimited liability represents the association.

See Arts. 61 and 105, *supra*, and their notes.

Article 115. A member of limited liability has no right to manage the business of the association or to represent it.

Derived from Arts. 170 and 164 of the German Commercial Code.

Article 116. If a member of limited liability acts in such a manner as induces others to believe that he is a member of unlimited liability, he is responsible as a member of unlimited liability to third parties acting in good faith.

This is derived from the old German Commercial Code, Art. 169, which provided that a member of limited liability should be unlimitedly liable if his name appeared in the trade name.

Article 117. On the death of a member of limited liability, his heir takes his place as a member.

A declaration of incompetency against a member of limited liability is not a cause for his retirement.

Art. 177 of the German Commercial Code provides that the death of a member of limited liability does not necessitate the dissolution of the association.

Article 118. A *société en commandite* is dissolved when all the members of unlimited liability or all those of limited liability have retired; but in the latter case, on a unanimous resolution of the remaining members of unlimited liability, the company may be continued as a *société en nom collectif*.

In case the company is changed into a *société en nom collectif* as mentioned above, the dissolution of the *société en commandite* shall be registered within two weeks at the place of the principal office and the place of any branch establishment; and as to the *société en nom collectif*, a registration shall be made in accordance with the provision of Art. 51, No. 1.

SECTION 4.—SOCIÉTÉ ANONYME.

Sub-Section 1.—Formation.

Article 119. There must be at least seven promoters for the formation of a *société anonyme*.

In Germany only five promoters are required. This article is of English or French origin.

Article 120. The promoters must draw up and sign the Articles of Association, in which the following particulars must be set forth:[1]—

1. The object of the association.
2. The trade name.
3. The total amount of the capital.
4. The amount of each share.
5. The number of shares which a director must own.[2]
6. The place of the principal office and the place of any branch establishment.
7. The manner in which the association has given its public notice.[3]
8. The names and residences of the promoters.

[1] All these requirements, except Nos. 5 and 8, are found in Art. 182 of the German Commercial Code, but according to the latter, the mode of nominating and composing the directorate and the manner in which a general meeting of shareholders is summoned must be fixed in the articles of association.

[2] A director must be a shareholder in Germany, but in France, even a stranger may become a director. Under the present article, a Japanese director must at least hold one share. See Arts. 164 and 168, *infra*.

[3] For instance, the association may fix a certain newspaper in which any notice of the association is to be given. By doing so, the holders of certificates to bearer as well third persons dealing with the association may refer to such paper for all information concerning the business of the association.

Article 121. The particulars mentioned in Art. 120, Nos. 5–7, if not set forth in the articles of association, may be inserted afterwards by the preliminary meeting of shareholders or by the general meeting of shareholders.

The resolution of such general meeting shall take place in accordance with the provisions of Art. 209.

As these particulars are comparatively unimportant, their omission is not a ground for avoiding the articles of association. They may, therefore, be supplied later at the meetings. The preliminary meeting is called by the promoters after the first payment has been made upon each share. See Art. 131, *infra*.

Article 122. Promises touching the following matters shall have no effect unless they have been set forth in the articles of association:—

1. The term for the existence of the association and the causes for its dissolution.

2. The issue of shares above their face value.

3. The special interests to be received by the promoters and the names of the promoters who are to receive such interests.

4. The names of the persons who contribute property other than money, the nature and value of such property, and the number of shares issued in consideration for such contributions.

5. The expenses of the formation of the association, for which the association will be liable, and the amount of compensation to be received by the promoters.

This article is identical with Art. 186 of the German Commercial Code, except Nos. 1 and 2; as to No. 2, however, Art. 184 of the same Code provides that shares may be issued at a higher price if the articles permit.

Article 123. The association begins to have its existence when the promoters have subscribed the whole amount of its shares.[1] In such case, the first payment, not less than one fourth of the shares, must be made by the promoters without delay;[2] and the directors and auditors must be appointed. Such appointment is concluded by the majority of the promoters.[3]

[1] The German Commercial Code recognizes the difference between the simultaneous formation and the successive formation of a *société anonyme:* in the latter, the promoters ask for subscriptions to the shares; in the former, they themselves are subscribers to all the shares. The present article deals with the method of the simultaneous formation of a *société anonyme.* But the French Commercial Code provides only for the successive formation and there is no special provision for the simultaneous formation. Neither did the First Japanese Commercial Code recognize the latter. See Art. 188 of the German Commercial Code.

[2] Both in Germany and France, the first payment must not be less than one fourth of the whole amount of the capital.

[3] Art. 190, par. 1, of the German Commercial Code reads as follows:—

"When the founders subscribe for all the shares, they ought at the time of the foundation of the company, or even at a special meeting held under the court or before a notary, to appoint a council of supervision (auditors)."

The word "auditors" is explained under Art. 180, *infra*.

Article 124. As soon as the directors are appointed, they must apply to the court for the appointment of inspectors for the purpose of inspecting the particulars mentioned in Art. 122, Nos. 3–5, and whether the first payment has been made or not.

The court, on the report of the inspectors, may take action under the provisions of Art. 135.

This article is derived from Arts. 192 and 193 of the German Commercial Code.

Article 125. If the promoters do not subscribe the whole amount of the shares, they shall invite subscriptions.

Similar to Art. 189, par. 1, of the German Commercial Code.

Article 126. If a person desires to subscribe for shares, he must sign two copies of the certificate of subscription and designate therein the number of shares to be subscribed.[1]

The certificate of subscription must be made by the promoters and must contain the following particulars:—

1. The date on which the articles of association were drawn up.
2. The particulars mentioned in Arts. 120 and 122.

3. The number of shares subscribed by each promoter.

4. The amount of the first payment.

If the subscriber pays more than the face value of the shares, he must state on the certificate of subscription the amount which he pays for the shares.[2]

[1] The reason why two copies must be made is, that one copy is for the association itself and the other is for the court when the formation of the company is registered. See Art. 187, pars. 2 and 3, of the Code of Procedure in Non-actionable Matters.

[2] This article is derived from Art. 189 of the German Commercial Code.

Article 127. A subscriber is obliged to make payment according to the number of shares subscribed.

Article 128. Shares cannot be issued at a price less than their nominal value.[1]

The amount of the first payment cannot be less than one-fourth of the amount of the shares.[2]

[1] Identical with Art. 184, par. 1, of the German Commercial Code.

[2] See Art. 123, *supra*, and notes. There is an exception to this rule. The first payment in a railway company may be less than one fourth, but not less than one tenth.

Article 129. As soon as the shares are subscribed the promoters must call for the first payment.

If shares are issued at a price more than the nominal value, the excess amount shall be paid with the first payment.

Article 130. If the subscriber does not make the payment mentioned in Art. 129, the promoters may notify him that he must pay within a certain period of time and that, upon his default, he will lose his rights. But such period of time shall not be less than two weeks.

If the subscriber who has been notified does not make the payment, he loses his rights. In such case the promoters may again invite subscriptions for the shares subscribed by him.

The above provisions do not affect the right to claim damages from the subscriber.

The promoters may sue the subscriber without such notification and claim a specific performance. But as soon as the subscriber loses his rights, the promoters can no longer compel him to pay for his subscription, though he is still liable for damages. "To lose rights" means that he can no longer enjoy the rights of a subscriber, that is, the right to attend a preliminary meeting of shareholders, or to become a shareholder when the association is completely formed.

Article 131. As soon as the payment mentioned in Art. 129 has been made, a preliminary meeting of shareholders must be called by the promoters.

In a preliminary meeting of shareholders, all resolutions shall be passed by a majority of the votes of the subscribers present, provided such majority represents at least one-half in number as well as in interest of all the subscribers.

The provisions of Arts. 156, pars. 1 and 2, 161, pars. 3 and 4, 162, and 163, pars. 1 and 2, are applicable to the preliminary meeting of shareholders.

Art. 190, par. 2, of the German Commercial Code provides that when the promoters do not subscribe for all the shares, they ought, after the capital has been subscribed, to call a general meeting for the purpose of electing auditors.

Article 132. The promoters shall make a report to the preliminary meeting of shareholders on all matters in regard to the formation of the association.

Article 133. At the preliminary meeting of shareholders, directors and auditors shall be appointed.

See note to Art. 131.

Article 134. Directors and auditors shall examine the following particulars and make a report to the preliminary meeting of shareholders:[1]—

1. Whether the whole number of shares has been subscribed.
2. Whether the payment mentioned in Art. 129 has been made on each share.
3. Whether the matters mentioned in Art. 122, Nos. 3–5, are reasonable.

In case directors or auditors are appointed from the promoters, the preliminary meeting of shareholders may appoint special inspectors instead of the directors and auditors to make the examination and report.[2]

[1] The preliminary meeting is usually continued for several days, the members meeting and then adjourning to meet again to hear the report.

[2] This article as well as Art. 124 is derived from Arts. 192 and 193 of the German Commercial Code.

Article 135. If the preliminary meeting of shareholders is of opinion that the matters mentioned in Art. 122, Nos. 3–5, are unreasonable, they may be altered. But in case a contribution is made in property other than money, and the number of shares to be given in consideration is decreased, the contribution may be made in money.

Article 136. In case some shares have not been subscribed or the payment mentioned in Art. 129 has not been made, the promoters shall be jointly liable for such subscription or payment. This provision is applicable where the subscription has been rescinded.

Art. 202, par. 1, of the German Commercial Code reads as follows:—

"The founders are jointly and severally responsible to the company for the accuracy and detail of the declarations they make relating to the subscription and the money paid up of the capital, as well as those referring to the statements provided for by Art. 186 for the registration of the company in the trade register, in addition to the obligation which is incumbent on them to repair possible damages that might be sustained hereafter; they are especially held responsible for the amount of capital not yet subscribed, to get overdue instalments paid, and to repay any amount which has not been taken into account in the estimates of foundation expenses."

Article 137. The right to claim damages from the promoters is not affected by Arts. 135 and 136.

Art. 202, pars. 2, 4 and 5, of the German Commercial Code reads as follows:—

"The founders are severally and jointly liable to the company for damages which it may sustain on account of

wilful misrepresentation regarding the share capital, on those things taken into account as designated in Art. 186.

"If a company suffers a loss on account of the insolvency of a shareholder, the founders who knew of such insolvency and allowed him to become a shareholder are jointly and severally liable to repair such a loss.

"With the founders the following are responsible to the company jointly and severally for damages:—

"1. He who takes a sum of money not included in the estimates of the expenses of foundation, if, when he takes such money, he knew, or from the circumstances ought to have known that this sum was being paid to him secretly, as well as every person who is knowingly an accomplice in such secret payment.

"2. In case of damage caused by malicious intention in anything connected with the subscription of the capital, every third person knowingly an accomplice in causing such damage."

Article 138. The preliminary meeting of shareholders may alter the articles of association or abandon the formation of the association.

Art. 196 of the German Commercial Code reads in part as follows:—

"In case the promoters have not subscribed for all the shares, the court calls a general meeting of shareholders inscribed on the list to come to a resolution concerning the formation of the company.

"The majority which expresses itself in favor of the formation of the company must include at least one-fourth of the shareholders inscribed on the list; the amount of their share must at least represent one-fourth of the whole capital.

"When even this majority is reached the formation of the company is considered as refused when a portion of the shareholders falls under the conditions provided for by Art. 186, and when the majority of votes given by the other shareholders are against the formation."

Article 139. When the promoters have not subscribed the whole amount of shares, the association begins to have its existence at the end of the preliminary meeting of shareholders.

Article 140. If the payment mentioned in Art. 129 is not fully made within one year after the subscription of the whole amount of shares, or the preliminary meeting of shareholders is not called by the promoters within six months after such payment, subscribers may rescind their subscriptions and demand that the money paid be refunded.

The promoters will be jointly liable for the repayment of the subscription. See Art. 136, *supra.*

Article 141. A *société anonyme* shall register the following particulars at the place of the principal office and the place of any branch establishment within two weeks from the ending of the examinations mentioned in Art. 124 in case the promoters have subscribed the whole amount of shares, or from the ending of the preliminary meeting of shareholders in case the promoters have invited subscriptions:—

1. Those particulars mentioned in Art. 120, Nos. 1–4 and 7.
2. The principal office and any branch establishment.
3. The date of the formation of the association.
4. The term of its duration or causes for its dissolution, if they have been stipulated.
5. The amount paid on each share.

6. The rate of interest, if interest is to be distributed before the commencement of business.

7. The names and residences of the directors and auditors.

The provisions of Arts. 51, pars. 2 and 3, 52 and 53 are applicable to a *société anonyme*.

According to the majority of the continental codes, the whole articles of association must be registered or filed in the court; but the German Code, from which the present article is derived, only requires the important facts to be registered. See Arts. 195, 198 and 199 of the German Commercial Code.

Article 142. No subscriber shall be allowed to rescind his subscription on the ground of fraud or duress after a company has been registered at the place of its principal office according to the provisions of Art. 141, par. 1.

This provision is an exception to the general rule of the civil law in regard to rescission of contract. But persons incompetent to make a contract, as infants who have not the permission of parents or guardians, are allowed to rescind this subscription.

Sub-Section 2.—Shares.

Article 143. The capital of a *société anonyme* shall be divided into shares.

Article 144. The responsibility of a shareholder is limited to the amount of shares subscribed by or transferred to him.[1]

As to payment on shares, a shareholder cannot claim a set-off against the association.[2]

[1] Identical with Art. 211 of the German Commercial Code.

[2] Payment on shares must be made in money. Claims against third persons, such as bills, notes or bonds, and claims against the association cannot be contributed as payment on shares.

Art. 221 of the German Commercial Code provides that shareholders and their predecessors cannot be discharged from making the payments indicated in Arts. 211 and 220; they cannot set off debts due to them by the association against such payments.

Article 145. The amount of all the shares shall be equal.[1]

The amount of each share cannot be less than fifty *yen*, but in case the whole amount of the shares is to be paid in at once, the amount of each share may be reduced to twenty *yen*.[2]

[1] This provision is derived from the French and Italian Codes.

[2] Art. 180 of the German Commercial Code provides as follows:—

"The capital of the company must amount to at least 1,000 marks.

"In the case of an undertaking of public utility, the federal council may, if it be a matter of special local interest, authorize an issue of non-transferable shares to a less amount, but never less than 200 marks. . . ."

Article 146. If one share is owned by several persons, the owners in common shall appoint one person in order to exercise the rights of a shareholder.

The owners in common are jointly liable to the association for the payment of the share.

This article is identical with Art. 225, pars. 1 and 2, of the German Commercial Code. Under the German system a share is indivisible and the existence of a partial shareholder is not recognized.

Article 147. No certificates of shares[1] shall be allowed to issue unless registration has been made at the place of the principal office according to the provisions of Art. 141, par. 1.

Certificates issued in violation of this provision are void, but the right to claim damages from those who issue them is not affected.[2]

[1] A certificate may be issued for one share or for many shares. The former is called a simple certificate; the latter, a compound certificate. In Japan, it is usual to have one certificate for one share.

[2] This article is identical with Art. 200, par. 3, and Art. 209, par. 2, of the German Commercial Code.

Article 148. A certificate shall contain the following particulars, bearing a number and signed by the directors:—

1. The trade name of the company.
2. The date on which the registration mentioned in Art. 141, par. 1, was made at the place of the principal office.
3. The total amount of the capital.
4. The amount of each share.

The amount of each payment on the shares must be inserted in the certificate if the whole amount of shares is not to be paid up all at once.

Article 149. In the absence of any provision in the articles of association to the contrary, shares

can be transferred without the consent of the association; but no transfer or even a promise to transfer can be made before a registration has been made at the place of the principal office according to the provisions of Art. 141, par. 1.

The same provisions are found in Art. 222, par. 2, and Art. 200, par. 2, of the German Commercial Code.

Article 150. Unless the name and residence of a transferee have been entered in the book of shareholders, and his name written on the certificate, no transfer of a personal share can be set up as a defence against the company or third persons.

Shares are divided into two kinds, personal shares and shares to bearer. In the former, the name of its holder is inserted, but in the latter, there is no specific name. A valid transfer of a share to bearer can be executed by delivery.

Art. 222, par. 1, of the German Commercial Code provides that personal shares must be inscribed in the share register of the association with the name, address and profession of the holder accurately written.

Article 151. A *société anonyme* shall not acquire or take as security its own shares.[1]

Shares cannot be canceled except the provisions in regard to the reduction of capital are strictly followed. But this provision is not applicable where, in accordance with the articles of association, such cancelation is made from the profits which otherwise would be distributed to the shareholders.[2]

[1] There are three principles of law in regard to the question whether a *société anonyme* can acquire its own shares. According to the French Commercial Code and the old German

Commercial Code, such acquisition is neither limited nor prohibited. On the other hand, a *société anonyme* is absolutely restrained from acquiring its own shares as in Japan by the German law of 1870 and the Commercial Codes of Hungary, Spain and Sweden. However, the present Commercial Code of Germany as well as those of Austria, Italy, Belgium and Switzerland, only make certain restrictions upon such acquisition. For instance, Art 226 of the German Code provides that in the usual course of business a *société anonyme* must not acquire or take as security its own shares unless in execution of a commission to purchase. In the usual course, it cannot acquire or accept as security its certificates even to execute an order to purchase. It is the same with its own shares if they have not been fully paid up, or, when they have been issued at a price above their nominal value, if this price has not been fully paid up.

[2] Art. 227 of the German Commercial Code reads as follows:—

"The regaining possession of (paying off of) shares is only authorized if provided for by the articles of association. Provision for so doing ought to be made in the original articles or in articles modifying the original ones, drawn up before subscription to the shares, unless such regaining possession is to be effected, not by drawing lots, giving notice, or by similar means, but by purchasing shares outright.

"No repurchasing may be effected except by means of profit available at the annual taking of account, in so far as it is not done in the way prescribed for the reduction of capital."

Article 152. A call on shares must be made to each shareholder two weeks before the call is due.

If a shareholder fails to pay on the day appointed, the association may notify him that he must pay within a certain period of time, and that upon his default, he will lose the rights of a shareholder.

But such period of time shall not be less than two weeks.

In such a case, the association may instantly sue the delinquent shareholder without giving the second notification. The purpose of allowing the association to give the second notification is to avoid the inconvenience of bringing an action. As soon as an action has been brought, the association can no longer avail itself of this convenient method.

"To lose the rights of a shareholder" means that the share will be forfeited by the association. When a share is forfeited, the association will acquire it as long as it has not been re-acquired by the original transferor or resold to a third person.

Art. 219 of the German Commercial Code reads as follows:—

"If a call is not paid punctually, shareholders may be given time to pay such call with the notice that after the expiration of such time, they will be deprived of their right to participate in profits as well as their right to the money they have already paid.

"Notice must be given three times in the papers mentioned in Art. 182, par. 3. The first publication should take place at least three months, the last at least one month, before expiration of the time given for payment. When the right to participate in profits cannot be transferred without the consent of the company, it is sufficient, instead of public advertisement, to address a single notice to each shareholder whose money is overdue. This notice ought to grant an extension of time of not less than one month from the day of receiving such notice.

"If a shareholder does not pay his call in spite of such notice, he must be declared deprived of his rights to profits, as well as to his instalments already paid. Such declaration must be made by advertisement in the company's papers."

Article 153. When a shareholder does not pay a call after the association has taken all necessary steps mentioned in Art. 152, he loses his rights.

In such case, the association must make a call to each transferor of the share and require him to pay within a certain period of time not less than two weeks. The transferor who first makes payment on such call acquires the share.[1]

When no transferor makes payment, the association shall sell the share at auction. If the sale results in a deficit, the company is entitled to look to the former shareholder. If such shareholder does not pay within two weeks, the association may look to any transferor for such payment.[2]

The provisions of this article do not affect the right of the association to claim damages and any penalty stipulated in the articles of association.[3]

[1] Here the original transferor of the share is treated as warranting that the transferee will pay the call. According to the French law of 1867 and the Codes of Spain and Switzerland, the liability of a transferor of shares as a warrantor is extinguished when one-half of the amount of the shares has been paid up. The first Japanese Commercial Code also adopted this principle. But in France, this law was abolished in 1893, and now most jurisdictions under the continental system make a transferor of shares responsible as long as they have not been fully paid up. For instance, Art. 220 of the German Commercial Code reads as follows:—

"To the extent that a shareholder omits to pay his call on shares, the last holder, and each one previously registered as such in the register of shares is responsible to the company; every registered holder of shares is only responsible for the amount his successor omits to pay.

"Such responsibility arises when payment has not been made by the latter before expiration of one month of his receiving notice, and advice that such notice has been given, has been forwarded to his legal predecessor."

"The new certificate is sent to the former holder on payment of the money owing. . . ."

[2] The German Commercial Code also provides that the former shareholder remains responsible to the association for the loss that it may sustain, not only on account of the non-payment of this one call but for all subsequent calls.

[3] Identical with Art. 218, par. 3, of the German Commercial Code.

Article 154. A transferor of shares is exempted from any liability mentioned in Art. 153 after two years have elapsed since the transfer has been entered in the book of shareholders.

Identical with Art. 220, par. 4, of the German Commercial Code.

Article 155. A certificate may be made out to bearer on the demand of its holder, provided that the amount of the share has been fully paid.

A share to bearer may be again changed into a personal share at any time on the demand of the shareholder.

This article is derived from Art. 179, pars. 2 and 3, Art. 183, par. 2, of the German Commercial Code.

Sub-Section 3.—The Organization of the Association.

A.—The General Meeting of Shareholders.

Article 156. When a general meeting of shareholders is called, a notification shall be given to each shareholder two weeks before the date appointed for this meeting.

The notification shall state the purpose of the meeting and the matters which are to be discussed.

In case the association has issued shares to bearer, public notice of the call for the general meeting of shareholders and the particulars mentioned in the last paragraph shall be given three weeks before the date appointed for the meeting.

Provisions similar to this article will be found in Arts. 255 and 256 of the German Commercial Code.

Article 157. A regular meeting of shareholders shall be called once a year at a definite time by the directors of the association.

If a *société anonyme* distributes profits more than once a year, a general meeting shall be called when each distribution takes place.

Art. 253, par. 1, of the German Commercial Code provides that a general meeting of shareholders is convened by the directorate in so far as the law and the articles of association do not give this right equally to other persons.

Article 158. The regular meeting is to inspect the documents submitted by the directors and the report of the auditors and pass resolutions concerning the distribution of profits or interest.[1]

The general meeting may appoint special inspectors for the purpose of inspecting the books submitted by the directors.[2]

[1] Corresponds to Art. 260, par. 1, of the German Commercial Code.

[2] Corresponds to Art. 266, par. 1, of the German Commercial Code.

Article 159. A special meeting of shareholders is called by the directors in case of necessity.

Corresponds to Art. 253, par. 2, of the German Commercial Code.

Article 160. The shareholders representing not less than one-tenth of the capital may request the directors to call a special meeting by filing an application in writing with the directors, stating the purpose of such meeting and the reason for calling it.

If the directors do not call the meeting within two weeks after such application, these shareholders may call the meeting with the permission of the court.

Identical with Art. 254, pars. 1 and 4, of the German Commercial Code except that in the latter such shareholders need not represent one-tenth of the capital, but only represent one-twentieth of the capital.

Article 161. A resolution at a general meeting is passed by the majority of the votes of the shareholders present,[1] unless this Code or the articles of association provide to the contrary.

Holders of certificates to bearer cannot vote unless their certificates have been deposited with the association a week before the date appointed for the meeting.

A shareholder may vote by proxy; but the holder of such a proxy must produce a written instrument to the association in order to prove his authority.[2]

Those who have special interests in the resolution of the general meeting cannot vote.[3]

[1] Thus, a resolution is not passed by the majority of the shareholders, but by the majority of their votes. One shareholder may have hundreds of votes, if not limited according to Art. 162, *infra*. This provision is identical with Art. 251, par. 1, of the German Commercial Code.

[2] Identical with Art. 252, pars. 3 and 4, of the German Commercial Code.

[3] Thus, the directors have no right to vote when a resolution is presented concerning the approval or disapproval of the account submitted by them. Art. 252, par. 5, of the German Commercial Code provides that whoever may, as a result of a resolution to be passed, be discharged or freed from an obligation cannot take part personally in voting, nor exercise the right of voting on some one else's account. But in Japan, a director may vote a proxy for other shareholders, even if he is interested in such a resolution.

Article 162. Each shareholder has one vote for one share; but the number of the votes of a shareholder who owns more than ten shares may be limited by the articles of association.

Derived from Art. 252, par. 1 and 2, of the German Commercial Code.

Article 163. If a general meeting is called or a resolution passed in violation of the law or ordinances or the articles of association, any shareholder may apply to the court for a decree annulling such resolution.

This application shall be made within a month after the resolution.[1]

If the application is made by a shareholder other than a director or an auditor he must deposit his certificates, and on the application of the association he is required to furnish an adequate security.[2]

[1] The first two paragraphs of this article are derived from Art. 271, pars. 1 and 2, of the German Commercial Code. But in Germany the shareholder who brings such suit must have disagreed with the resolution passed.

[2] Art. 272, par. 4, of the German Commercial Code provides that the court may order, if asked, that the shareholder bringing the action shall furnish security to the association by reason of possible damage resulting to it.

B.—Directors.

Article 164. Directors are appointed from the shareholders[1] by the general meeting of shareholders.[2]

[1] The principle that the directors must be shareholders is derived from the French system of law. The Codes of Switzerland and Portugal adopt the same principle. In Italy and Belgium, the directors must deposit a certain amount of shares with the company, though it is quite immaterial whether the shares belong to the director depositing them or to other persons. According to this article and Art. 168 *infra*, the Japanese adopt the French as well as the Italian and Belgian principle. There is no similar provision in the German Commercial Code.

[2] In Germany, the directors are usually appointed by the auditors, but the law does not provide by what organ the directors shall be appointed. It is a French theory that the directors are appointed by the general meeting of shareholders.

Article 165. The board of directors shall consist of three or more persons.

This is derived from Belgium. In Germany and most jurisdictions in Europe even a single director is sufficient. See Art. 231, par. 2, of the German Commercial Code.

Article 166. The term of office of a director shall not be longer than three years; but he may be reappointed at the expiration of such term.

The same provision is found in the Codes of Portugal and Argentine; but in these countries a director cannot be

re-appointed after the expiration of the term. According to the German Commercial Code there is no restriction upon the term of office of a director, though in some other countries such term is limited to four, five or six years.

Article 167. A director may be dismissed at any time by the general meeting of shareholders, but in case the term of office has been fixed and he is dismissed before the expiration of such term without reasonable cause, he may claim damages arising from such dismissal.

Art. 231, par. 3, of the German Commercial Code provides that the appointment of a member of the directorate can always be revoked without prejudice to the right to the compensation agreed upon.

Article 168. The directors shall deposit with the auditors the number of certificates the articles of association direct.

See notes to Art. 164, *supra*.

Article 169. Unless the articles of association provide to the contrary, the management of the business of the company is concluded by the majority of the directors. The appointment and dismissal of a manager is subject to the same rule.

Art. 232, par. 1, of the German Commercial Code reads as follows:—

"For formal notices, especially having reference to the signature of the directorate, the co-operation of all the members of the directorate is necessary, in default of contrary provision in the articles of association. The directorate can nevertheless authorize certain of its members to conclude

specified business transactions or certain kinds of transactions. . . ."

Article 170. Each director represents the association.[1]

The provisions of Art. 62 are applicable to directors.[2]

[1] Art. 232, par. 2, of the German Commercial Code reads as follows:—

"When each member of the directorate is not authorized by the articles to individually represent the company, it may be stipulated in the articles that members of the directorate may represent the company with the co-operation of an authorized representative, when several of them cannot act together. The council of supervision (auditors) can also be authorized by the articles to give certain members of the directorate power to represent the company alone or with a representative."

[2] Corresponds to the provisions of Art. 231, par. 1, and Art. 235, par. 2, of the German Commercial Code.

Article 171. The directors shall keep at the principal office as well as any branch establishment [copies of] the articles of association, and the minute book of the general meeting of shareholders, and at the principal office the book of shareholders and the book of bonds.

Shareholders and the creditors of the association may at any time during business hours demand the inspection of these documents or books.

Art. 239 of the German Commercial Code provides that the directorate must see that all necessary books are kept. The keeping of the book of bonds is derived from the English system of law.

Article 172. The following particulars shall be entered in the book of shareholders:—

1. The names and residences of the shareholders.
2. The number of shares owned by each shareholder and the serial numbers of the certificates.
3. The amount already paid on each share and the date on which such payment was made.
4. The date on which a share was acquired.
5. If certificates to bearer have been issued, their total number, serial numbers, and the dates on which they were issued.

Article 173. The following particulars shall be entered in the book of bonds:—

1. The names and residences of the bond-holders.
2. The serial number of each bond.
3. The total amount of the bonds.
4. The amount of each bond.
5. The rate of interest of the bonds.
6. In what manner and at what time the bonds are to be repaid.
7. The date on which a bond was issued.
8. The date on which a bond was acquired.
9. If bonds to bearer have been issued, their total number, serial numbers, and the dates on which they were issued.

Article 174. As soon as one half of the capital of a *société anonyme* has been lost, the directors must call a general meeting of shareholders and make a report of the conditions to such meeting.[1]

If a *société anonyme* is in such a condition that its

property is insufficient to pay its debts, the directors must directly apply to the court for a declaration of bankruptcy.[2]

[1] Derived from Art. 240, par. 1, of the German Commercial Code.

[2] Art. 240, par. 2, of the German Code reads as follows:—

"When the company is insolvent, the directorate ought to petition to wind up; it is pronounced bankrupt when it is shown by the annual balance sheet or by one taken at any time, that the profits (assets) do not exceed the liabilities."

Article 175. A director without the consent of the general meeting of shareholders cannot carry on commercial transactions within the scope of the business of the association or become a member of unlimited liability of any other business association doing the same business either on his own account or on account of third persons.

If a director carries on commercial transactions in violation of such provisions, the general meeting of shareholders may consider such transactions as done for the association.

If the general meeting fails to exercise this right within two months after any one of the auditors has been informed of such transactions or one year has elapsed after the transactions, it can no longer enforce such right against the director.

This article is identical with Art. 236 of the German Commercial Code.

Article 176. A director cannot transact business with the association either on his own account or on

account of third persons without the permission of the auditors.

The French and Italian Codes provide that the stockholders must authorize the transaction and that an account of it must be rendered annually. There is no such restriction upon the directors under the German Commercial Code. On the contrary, such transactions are absolutely prohibited in Portugal and Argentine.

Article 177. If a director acts in violation of the law or ordinances, or the articles of association, he is liable for damages to third persons even if he acts in accordance with a resolution of the general meeting of shareholders.

This provision is not applicable to a director who has presented his objection [to the resolution] in the general meeting of shareholders and has given notice thereof to the auditors.

In Germany as a general rule the directors are not directly liable to the third persons, though they are jointly and severally liable to the company for damages resulting from their acts contrary to their obligations. See Art. 241, of the German Commercial Code. On the contrary, in Portugal and Argentine the directors are absolutely liable to third persons for their breach of duty.

The principle that the directors are only liable to third persons in case the law or the articles of association are violated, as under this article, is derived from the French as well as the English system of law.

Article 178. If the general meeting of shareholders resolves to bring an action against the directors, or the shareholders representing not less than one tenth of the capital apply to the auditors

for such an action in case the general meeting disapproves of it, the association shall bring the action within one month after the day of the resolution or application.[1]

The shareholders who make such application shall deposit their certificates and upon the demand of the auditors shall furnish an adequate security.[2]

When the action fails, these shareholders are liable for damages to the association only.[3]

[1] According to Arts. 268 and 269 of the German Commercial Code, claims of the association concerning the direction of its affairs against members of the directorate and the auditors must be enforced when a general meeting of shareholders has decided on it by a simple majority, or when a minority representing one tenth of the capital has demanded it, and in the latter case, proceedings must be begun within three months after the general meeting.

[2] Art. 269, pars. 2 and 3, of the German Commercial Code reads as follows:—

"The minority, during the course of the proceedings, must deposit shares amounting to one tenth of the capital, and the shareholders composing such minority must show authentically that the shares have been in their possession for six months previously to the general meeting."

"The defendant may demand, on account of the loss he may be put to, that the minority should furnish a guarantee, the extent to be left entirely to the discretion of the Court. . . ."

[3] Thus the plaintiff is not liable for damages to the directors. Art. 269, par. 4 and 5, of the German Commercial Code provides that the minority is obliged to find the costs so far as the association is concerned; and if the shareholders have acted in bad faith, they are jointly and severally liable to the defendant for any damage he may sustain on account of an unfounded charge.

Article 179. The amount of compensation to be received by the directors is fixed by the general meeting of shareholders, if it has not been fixed by the articles of association.

C.—Auditors.

Article 180. The term of office of an auditor is one year, but he may be re-appointed at the expiration of the term.

A *société anonyme* consists of three organs. The board of directors is the organ of representation which may be likened to the executive body of a state. The general meeting of shareholders is a will-organ which may be compared to a legislative body. Though the latter is the highest organ and has power to supervise the former, a general meeting of shareholders is only a temporary organ and is usually called by the directors. It is therefore regarded as necessary to have a permanent organ to exercise the power of supervision which the general meeting of shareholders owing to its temporary character cannot exercise. For this reason, the German Commercial Code recognizes the existence of a board of auditors and the Japanese Code adopts this system. Again, under the present Code, inspectors may be also appointed either by the court or by the general meeting of shareholders, but these are only temporary officers appointed for the purpose of inspecting certain particulars and their power is far more limited than that of the auditors. In France as well as in England, only such temporary inspectors are recognized, there being no such permanent organ as the board of auditors. See Art. 234 of the German Commercial Code.

Article 181. The auditors may at any time require the directors to make a report of the business, or may examine the business of the association and the condition of its property.

Art. 246, par. 1, of the German Commercial Code reads as follows:—

"The council of supervision (auditors) must supervise the carrying on of the business of the company in all its branches, and to this end must inquire into the progress of the company's affairs. It can always demand a report on this subject from the directorate and look into the books and papers of the company, as well as what money is standing to its name in the bank and the amount of valuables and goods it possesses. It ought to examine the annual accounts, the balance sheets and the proposals how to divide the profits, and make a report on all these points to the general meeting."

Article 182. The auditors may call a general meeting of shareholders when they think necessary.[1] This general meeting may appoint special inspectors to examine the business of the association and the condition of its property.[2]

[1] Corresponds to Art. 246, par. 2, of the German Commercial Code.

[2] Because the report of the auditors may not be trustworthy.

Article 183. The auditors shall examine the documents submitted to the general meeting of shareholders by the directors and express their opinion to such general meeting,

A similar provision will be found in Art. 243, par. 2, of the German Commercial Code.

Article 184. An auditor cannot act at the same time as a director or manager; but when there is a vacancy among the directors, an auditor may be appointed to act temporarily as a director by an

agreement of both the directors and the auditors. An auditor acting as director in such a case cannot discharge the duty of an auditor without the approval of the general meeting of shareholders mentioned in Art. 192, par. 1.

This article is derived from Art. 248 of the German Commercial Code.

Article 185. If the association brings an action against its directors or *vice versa*, the auditors represent the association for such action; but the general meeting of shareholders may appoint other persons to represent it.

When the shareholders who represent not less than one tenth of the capital apply for bringing an action against the directors, a special representive may be appointed.

This article is identical with Arts. 247, par. 1, 268, par. 2, of the German Commercial Code. But in Germany when the responsibility of the auditors is in question, they have the right to proceed against the directors without the authority of the general meeting or even against its will. See Art. 247, par. 2, of the same Code.

Article 186. When the auditors neglect their duties, they are liable for damages to the company and third persons.

Derived from Art. 249 of the German Commercial Code.

Article 187. If the general meeting of shareholders resolves to bring an action against the auditors, or the shareholders representing not less

than one tenth of the capital apply to the directors for such action in case the general meeting disapproves of it, the association shall bring the action within one month after the day of the resolution or application. In such case, the general meeting may appoint persons other than the directors to represent the company and when the shareholders who represent not less than one tenth of the capital apply for bringing such action, a special representative may be appointed.

The shareholders who make such application shall deposit their certificates and upon the demand of the directors shall furnish an adequate security.

If the action fails, those shareholders are liable for damages to the association only.

See notes to Art. 178, *supra*.

Article 188. The office of an auditor is terminated on a declaration of his bankruptcy or incompetency.

A director's office also terminates on his bankruptcy or incompetency, but there is no such provision for a director in the Commercial Code, for a director being an agent falling under Art. 653 of the Japanese Civil Code, which provides that an attorneyship terminates on the death, or bankruptcy, of either the principal or the agent, or on the declaration of incompetency of the agent, it is a matter of course that the office of a director is vacated by his bankruptcy or incompetency. Thus, the special provisions of this article may mean that the auditors are not agents within the meaning of Art. 653 of the Civil Code, though some writers maintain that such a provision is quite unnecessary, since an auditor may be held as a *quasi* agent within the meaning of Art. 656 of the Japanese Civil Code.

Article 189. The provisions of Arts. 164, 167 and 179 are applicable to the auditors.

That is, the auditors must be appointed from the members by the general meeting of shareholders; they can be dismissed by the general meeting; the compensation which they receive is to be fixed by the meeting. Arts. 243, pars. 1 and 4, and 245, pars. 2 and 3, of the German Commercial Code are identical with these provisions.

Sub-Section 4.—Accounts of the Association.

Article 190. The directors shall submit the following documents to the auditors a week before the day appointed for the regular meeting of shareholders:—

1. Inventory.
2. Balance sheet.
3. Report of the business of the association.
4. An account of gains and losses.
5. Proposals concerning the sinking fund, and the distribution of profits or interest.

Art. 260, par. 2, of the German Commercial Code reads as follows:—

"The directorate must, within the first three months of the financial year, present a balance sheet of the preceding year to the council of supervision (auditors) and with such council's observations to the general meeting; also an account of profit and loss, with a report showing the financial state and condition of the company."

Article 191. The directors shall keep at the principal office of the association the documents mentioned in Art. 190 and the report of the auditors

before the day appointed for the regular meeting of shareholders.

Shareholders and the creditors of the association may at any time during business hours demand an inspection of such documents.

Art. 263, pars. 1 and 2, of the German Commercial Code reads as follows:—

"The papers mentioned in Art. 260, par. 2, must be deposited at the offices of the company for the convenience of shareholders and for their inspection, at least two weeks before the general meeting.

"Every shareholder has the right to demand delivery, at least two weeks before the day of the general meeting, of a copy of the balance sheet, of the account of profit and loss, of the observations of the council of supervision (auditors) and of the report on the condition of the company."

Article 192. The directors shall submit the documents mentioned in Art. 190 to the regular meeting of shareholders and ask for their approval.

The directors shall publish the balance sheet after such approval has been obtained.

According to Art. 265 of the German Commercial Code, the balance sheet and the account of profit and loss must be published by the directorate in the papers of the company immediately after their approval, and such publication must be placed in the trade register.

Article 193. When the regular meeting has given the approval mentioned in Art. 192, the association is considered to have released the responsibility of the directors and the auditors unless they have acted dishonestly.

I. e. The documents are thus affirmed, in the absence of fraud; if mistakes are discovered afterwards, the directors and auditors are not liable.

Article 194. Whenever profits are distributed, the association shall set apart one twentieth of such profits as a sinking fund until it amounts to one fourth of the capital.

When shares have been issued above the nominal value, the excess amount shall be added to the sinking fund until it amounts to one fourth of the capital.

This is called the legal sinking fund, which is recognized by the Codes of Germany, France and other continental countries. But the amount of this fund is different in different jurisdictions. In Germany and France, a *société anonyme* must set apart one twentieth of the profits earned until the sinking fund amounts to one tenth of the capital.

Article 195. A *société anonyme* cannot distribute profits unless losses have been made good and the amount of sinking fund mentioned in Art. 194, par. 1, has been set apart.

If profits have been distributed in violation of this provision, the creditors of the association may demand that the distributed profits be refunded.

Article 196. If, according to the nature of the business of the association, its business cannot be commenced within two or more years after the registration mentioned in Art. 141, par. 1, has been made at the place of the principal office, the association may provide in the articles of association that a certain amount of interest shall be paid to the

shareholders until the commencement of the business; but the rate of this interest shall not exceed the legal rate.

Such a provision of the articles of association must be sanctioned by the court.

This is an exception to the rule of Art. 195, under which no distribution can be made unless losses have been made good and the legal sinking fund has been set apart. The interest spoken of is known to the German law as *Bauzinsen* (construction interest); that is, in an association carrying on a gigantic constructive work, as a railroad or canal, certain shareholders are allowed to receive interest before the commencement of the business. This principle is also recognized by Hungary, Italy, Portugal, Switzerland and other jurisdictions.

Article 197. Profits or interest must be distributed in proportion to the amount paid on the shares according to the articles of association; but this provision is not applicable where the association has issued preferred shares.

Thus, if a shareholder has paid more money on his shares than he ought to have paid according to the articles of association, he is not entitled to any distribution for the excess payment; for the distribution must be made in proportion to the amount paid on the shares "according to the articles of association," not merely in proportion to the amount paid on the shares. Again, a shareholder who holds more shares but has paid less on them is entitled to a less amount of distribution than he who holds less shares and has paid more on them; for the distribution must be made "in proportion to the amount paid on the shares" and not merely in proportion to the number of shares.

In Germany there were three principles of law on which profits were distributed: first, a distribution was made in proportion to the amount paid on the shares; second, a distribution was made in proportion to the amount paid on the shares according to the articles of association, and if a shareholder had paid a greater amount than the general shareholders, he was entitled to a certain amount of interest on the excess payment; third, a distribution was made in proportion to the numbers of shares. In Japan the third principle is also adopted, if there is no special provision in the articles of association in regard to the payment on the shares.

Art. 214 of the present German Commercial Code reads as follows:—

"The amount of profit is calculated proportionately to the amount of the value of the shares.

"When the calls on shares are not paid in the same proportion, shareholders, preliminary to receiving the profits, take four per cent on the amount of their payment; if the profit of the year is insufficient for that, distribution is made at a proportionately reduced rate. . . .

"The articles of association may provide for another method of division of profits."

Article 198. The court may appoint inspectors for the purpose of inspecting the business of the association and the condition of its property on application by shareholders representing not less than one tenth of the capital.

The inspectors shall report the result of the inspection to the court. In such case the court may order the auditors to call a general meeting of shareholders, if necessary.

This article corresponds to Arts. 266, par. 2, and 267, par. 2, of the German Commercial Code.

Sub-Section 5.—Bonds.

Article 199. A company cannot invite subscription for bonds without a resolution passed according to the provisions of Art. 209.

There are no special provisions for issuing bonds in the German Commercial Code. The issuing of bonds in that country, being an operation within the scope of the business of the association, may take place at the discretion of the directors if not otherwise provided in the articles of association. In Italy, Belgium and Portugal the issuing of bonds is regulated by the Commercial Codes. In Japan there was once a statute in regard to issuing bonds, but it was abolished in 1890 and all the regulations thereof were inserted in the Commercial Code.

A bond, within the meaning of this Code, is mere evidence of debt, and not necessarily secured by a mortgage. Thus, in case of insolvency, a bondholder would have no better right than an ordinary creditor, and a holder of a bond issued earlier would have no better right than a holder of a bond issued later. Practically, it is no easy matter for a *société anonyme* to raise money by issuing such bonds. In order to make up the deficiency of the Commercial Code, two statutes were passed afterwards; that is, the Law of Trust Companies Dealing with Secured Bonds, and the Law of the Mortgage of Manufactories. The former is modelled on the law of the United States.

Article 200. The total amount of the bonds issued shall not exceed the amount which has been paid up on the shares.

If it appears in the last balance sheet that the existing property of the association is less than the amount which has been paid up on the shares, the

total amount of the bonds cannot exceed the amount of the property.

Article 201. The amount of each bond shall not be less than twenty *yen*.

Article 202. If it is stipulated that the amount to be repaid to the bondholders shall exceed the nominal value of the bonds, the excess amount to be repaid on each bond shall be uniform.

Article 203. When a *société anonyme* invites subscriptions for bonds, the following particulars shall be published by the directors:—

1. The particulars mentioned in Art. 173, 3–6.
2. The trade name of the association.
3. If bonds have been issued before, the total amount which has not been paid back.
4. The value of the bonds issued and the lowest market value.
5. The capital of the association and the total amount of shares which has been paid up.
6. The amount of the existing property of the association according to the last balance sheet.

Derived from English Companies Act of 1900, as well as the Codes of Switzerland and Italy.

Article 204. When all the bonds have been subscribed, the directors shall cause the total amount of the bonds to be paid up.

The directors shall register at the place of the principal office and the place of the branch estab-

lishment the particulars mentioned in Art. 173, 3–6, within two weeks after the total amount of the bonds has been paid up according to the provision of the preceding paragraph.

Article 205. A bond must bear a serial number and contain the particulars mentioned in Art. 203, Nos. 1 and 2, with the signature of the directors.

Article 206. No transfer of a personal bond can be set up as a defence against the association or third persons, unless the name and residence of the transferee have been entered in the book of bonds and his name written on the bond.

Bonds, like shares, are divided into personal bonds and bonds to bearer. See note to Art. 150, *supra.*

Article 207. The provisions of Art. 155 are applicable to bonds.

Sub-Section 6.—The Alteration of Articles of Association.

Article 208. The articles of association can be altered only by a resolution of the general meeting of shareholders.

Art. 274, par. 1, of the German Commercial Code provides that alterations can only be effected by a resolution of a general meeting; but the undertaking of alterations which only consist of mere wording may be conferred on the auditors by such a resolution. The doctrine that the articles of association can be freely altered by the general meeting of shareholders is adopted by Austria, Italy, Belgium, Switzer-

land and Sweden. It is quite contrary to the doctrine adopted by the English system of law.

Article 209. The alteration of the articles of association is effected by a majority of the votes of the shareholders present, and the shareholders present must represent at least one-half the shareholders in number as well as in interest.[1]

If such a quorum is not present, the shareholders present may pass a temporary resolution[2] by a majority of their votes. Notice of such a temporary resolution shall be given to each shareholder; and in case certificates to bearer have been issued, such resolution shall be published; and within a period not less than one month, a second general meeting of shareholders shall be called.

In the second general meeting of shareholders, the approval or disapproval of the temporary resolution will be made only by a majority of the votes of the shareholders present.

The provisions of the preceding paragraphs are not applicable to the case where the resolution contemplates a change in the nature of the business of the association.

[1] This method of passing a resolution is different from the general rule of Art. 161. In such case, under Art. 275 of the German Commercial Code, the resolution ought to be passed by a majority representing at least three-quarters of the capital represented at the time of voting. Thus, an alteration of the articles of association can be much more easily effected in Japan than in Germany.

[2] This method of passing a resolution is derived from France. There is no such provision in the German Commercial Code.

Article 210. The capital of an association shall not be increased before the total amount of shares has been paid up.

Derived from Art. 278, par. 1, of the German Commercial Code. The same provision will be found in the Commercial Codes of Austria, Hungary, and Spain. But such issuing of new shares before the total amount of shares has been paid up is not prohibited by the French Code.

Article 211. A *société anonyme* may issue preferred shares only in case the capital of the association is increased, provided the articles of association permit such shares to be issued.

Thus, a *société anonyme* cannot issue preferred shares before the total amount of the original shares has been paid up; that is, preferred shares cannot be issued when the association is formed. There is no such restriction in the German Commercial Code.

Article 212. In case a *société anonyme* has issued preferred shares, if any alteration of the articles of association may be prejudicial to the preferred shareholders, the resolution shall be passed not only by the general meeting of the ordinary shareholders, but also by that of the preferred shareholders.

The provisions in regard to the general meeting of shareholders are applicable to the meeting of the preferred shareholders.

Derived from Art. 278, par. 3, of the German Commercial Code.

Article 213. In case a *société anonyme* has increased its capital, as soon as the payment men-

tioned in Art. 129 has been made on all the new shares the directors must call a general meeting of shareholders, and make a report on the issue of the new shares.

Article 214. The auditors shall examine the following particulars and make a report thereon to the general meeting of shareholders:—

1. Whether the total amount of new shares has been subscribed.
2. Whether the payment mentioned in Art. 129 has been made on each new share.
3. If property other than money has been contributed, whether the number of shares issued in consideration of such property is reasonable.

The general meeting of shareholders may appoint special inspectors for the purpose of making the examination and the report mentioned in the last paragraph.

Article 215. If the general meeting of shareholders finds that the number of shares issued in consideration of property other than money is unreasonable, the meeting may reduce the number. In such case, the preferred shareholder may make payment in money.

Art. 279 of the German Commercial Code reads as follows:—

"When an addition is made to the increased capital other than in cash, or when, at the time of such addition, payment is made corresponding to the interest taken by the company in such an addition, the resolution relating to increase of capital must specify what actual article is brought in in place

of cash, or what thing is brought into account, the person from whom the company acquires such thing, and the number of shares to be given in return for such article brought in or the indemnity to be granted for the thing brought into account.

"Every agreement relating to the above enumerated subjects which has not been arrived at by a resolution of the general meeting is of no effect as against the company."

Article 216. In case some shares have not been subscribed or the payment mentioned in Art. 129 has not been made, the directors shall be jointly liable for such subscription or payment. This provision is applicable where the subscription has been rescinded.

Thus, when the capital is increased, the directors are looked upon as the promoters when the association is formed. See Art. 136, *supra*.

Article 217. The association shall register the following particulars at the place of the principal office and the place of any branch establishment within two weeks after the conclusion of the general meeting of shareholders called according to the provision of Art. 213:—

1. The total amount of the increase in capital.
2. The date on which the resolution to increase the capital was passed.
3. The amount paid on each new share.
4. If preferred shares have been issued, the rights of the preferred shareholders.

Before the said registration has been made at the place of the principal office, new certificates cannot

be issued, and a transfer of new shares, or even a promise to transfer, cannot be made.

Similar provisions to this article will be found in Arts. 280, 284, 286, 287, of the German Commercial Code.

Article 218. When new shares are issued, the date on which a registration was made at the place of the principal office according to Art. 217, No. 1, shall be set forth in the certificates.

When preferred shares are issued, the rights of their holders shall be designated in the certificates.

Article 219. The provisions of Arts. 127–130, 140, 142 and 147, par. 2, are applicable where new shares are issued.

Article 220. When a resolution to decrease the capital is passed by the general meeting of shareholders, the method by which the capital is to be decreased shall be resolved at the same time.[1]

The provisions of Arts. 78–80 are applicable where the capital is to be decreased.[2]

[1] Art. 288, par. 3, of the German Commercial Code provides that the resolution ought at the same time to define the object of such reduction, especially if such reduction is destined for the partial repayment to the shareholders, and in what manner the measure is to be carried out.

[2] Derived from Art. 289 of the German Commercial Code.

Sub-Section 7.—Dissolution.

Article 221. A *société anonyme* is dissolved,—

1. In the cases mentioned in Art. 74, Nos. 1, 2, 4, 6 and 7;

2. By a resolution of the general meeting of shareholders;

3. When the shareholders become less than seven.

According to Art. 292 of the German Commercial Code, a company is only dissolved by expiration of the term fixed by the articles, by a resolution of the general meeting and by bankruptcy.

Article 222. A resolution of the general meeting of shareholders in regard to the dissolution or consolidation [or absorption] of the association shall be passed in accordance with the provisions of Art. 209.

In Germany, such a resolution should be passed by a majority of at least three-quarters of the capital voting.

Article 223. When a consolidation or absorption is to take place, a public notice thereof may be given and the transfer of personal shares may be suspended during a period not more than one month before the day of the general meeting of shareholders, and during this meeting.

When a resolution of consolidation or absorption has been passed by the general meeting of shareholders, the shareholders cannot transfer their personal shares after such resolution until a registration is made at the place of the principal office according to the provisions of Art. 81.

Article 224. When a *société anonyme* is dissolved, except in the case of bankruptcy, the directors must without delay give notice thereof to the shareholders and if certificates to bearer have been issued a public notice thereof must be given.

Article 225. The provisions of Arts. 76 and 78–82 are applicable to a *société anonyme*.

Sub-Section 8.—Liquidation.

Article 226. When a *société anonyme* is dissolved, except in the case of consolidation or absorption or of bankruptcy, the directors will become liquidators, unless the articles of association provide to the contrary or other persons are appointed by the general meeting as liquidators.

If there are no such liquidators as mentioned above, the court will appoint liquidators on the application of any person interested.

This article corresponds to Art. 295 of the German Commercial Code.

Article 227. As soon as the liquidators assume their offices they must examine the condition of the property of the association, make an inventory and balance sheet and submit them to the general meeting of shareholders for their approval.

In such case the provisions of Arts. 158, par. 2, and 192, par. 2, are applicable.

This article is derived from Art. 299 of the German Commercial Code.

Article 228. A liquidator who has been appointed by the general meeting of shareholders may be dismissed at any time by the same meeting.

In case of necessity, the court may dismiss the liquidators on the application of the auditors or

shareholders representing not less than one tenth of the capital.

This article is derived from Art. 296 of the German Commercial Code.

Article 229. The remaining property shall be distributed to the shareholders in proportion to the amount paid on the shares according to the articles of association; but this provision is not applicable where the company has issued preferred shares, for which there have been special provisions.

Art 300, par. 2, of the German Commercial Code provides that the partition is made in proportion to the amount of the shares, unless there are several classes of shares enjoying different rights.

Article 230. When the liquidation is completed, the liquidators must without delay make a report and submit it to the general meeting of shareholders for their approval.

In such case the provisions of Arts. 158, par. 2, and 193 are applicable.

Article 231. If a general meeting of shareholders is called or a resolution passed in such a manner as to violate the law or ordinances, or the articles of association, the liquidators shall apply to the court for a decree annulling such resolution.

Article 232. If, after the formation of a *société anonyme* and the commencement of its business, it is found out that such formation is absolutely void,[1]

liquidation shall take place as in the case of dissolution; in such case the court will appoint liquidators on the application of any person interested.[2]

[1] For instance, there may have been less than seven promoters; some important particulars imposed by the law may have been omitted in the articles of association; the promoters may have failed to call for the first payment on the shares, or failed to take necessary proceedings, such as the report they should make to the preliminary meeting of shareholders, or the appointment of directors and auditors by such meeting, or the examination which should be made by the directors and auditors. Unlike the Codes of France and Portugal, where the cases in which the formation of the association is void are enumerated, the Code of Japan allows the extent of irregularity which shall render void the organization of the association to be determined by the judges.

[2] Art. 311 of the German Commercial Code provides that when the nullity of a *société anonyme* is registered in the trade register, the enactments applicable to its dissolution must be applied by analogy to the liquidation of its affairs.

Article 233. The books of the association, its business correspondence and all documents connected with the liquidation shall be preserved for ten years after the completion of the liquidation has been registered at the place of the principal office. The custodian of these books and documents is appointed by the court on the application of the liquidators or any person interested.

Derived from Art. 302, par. 2, of the German Commercial Code.

Article 234. The provisions of Arts, 84, 89–93, 95, 97, 99, 159, 160, 163, 176–178, 181, 183–185

and 187 of this Code and Arts. 79 and 80 of the Civil Code are applicable to the liquidation of a *société anonyme*.

The reference to the Civil Code means that the liquidators must give public notice at least three times during two months to the creditors, who must present their demand within a period of not less than two months; and in case they present their demand after that period, they can only claim against such property as remains undistributed to the members after the other debts have been paid. Similar provisions exist in Art. 297 of the German Commercial Code.

SECTION 5.—SOCIÉTÉ EN COMMANDITE PAR ACTIONS.

Article 235. A *société en commandite par actions* is composed of members of unlimited liability and shareholders.

Art. 320, par. 1, of the German Commercial Code provides that at least one of the members of a *société en commandite par actions* assumes unlimited liability with regard to creditors of the association, while the rest are interested only to the extent of their subscription to the capital of the association.

Article 236. The provisions for a *société en commandite* are applicable to a *société en commandite par actions* so far as the following particulars are concerned:—

1. The mutual relation between members of unlimited liability.

2. The relation between members of unlimited liability and shareholders and third persons.

3. The retirement of members of unlimited liability.

Besides the particulars above mentioned, the provisions for a *société anonyme* are applicable to a *société en commandite par actions* except in case there are contrary provisions in the present chapter.

This article, except No. 3 of par. 1, corresponds to Art. 320, pars. 2 and 3, of the German Commercial Code.

Article 237. The members of unlimited liability shall act as promoters, and make and sign the articles of association, in which shall be inserted the following particulars:—

1. Those mentioned in Art. 120, Nos. 1, 2, 4, 6 and 7.
2. The total amount of the shares.
3. The names and residences of the members of unlimited liability.
4. The nature and value or basis of valuation of the contributions made by the members of unlimited liability other than the amount paid for shares.

Art. 321 of the German Commercial Code reads as follows:—

"The terms of the articles ought to be fixed by at least five persons in legal form or through a notary. The members personally responsible are all obliged to participate in the drawing up of the deed; besides these, only those may become parties to it who have subscribed for shares as shareholders.

"The amount of shares subscribed for by each interested party must be shown on the deed.

"Those who have fixed the terms of the articles, or those who have brought in capital in a shape other than money, are looked upon as the promoters of the company."

As to the particulars which must be contained in the articles of association, see Art. 322 of the same Code.

Article 238. The members of unlimited liability shall invite subscriptions for the shares.[1]

A certificate of subscription shall contain the following particulars:[2]—

1. Those mentioned in Arts. 122, 126, par. 2, Nos. 1 and 4, and 237.

2. When the members of unlimited liability have subscribed for shares, the number of shares subscribed by each member.

[1] Here the members of unlimited liability act as promoters and invite subscription for the shares in the same manner as in the successive formation of a *société anonyme*. But in Germany, even the shareholders of such an association can be promoters, and, therefore, a simultaneous formation of the company is recognized.

[2] Derived from Art. 323 of the German Commercial Code.

Article 239. At the preliminary meeting of shareholders auditors shall be appointed.

Members of unlimited liability cannot be appointed auditors.

Because the auditors are to represent the general meeting of shareholders as distinguished from the members of unlimited liability.

Identical with Art. 328, par. 5, of the German Commercial Code.

Article 240. Members of unlimited liability may attend the preliminary meeting of shareholders and express their opinions; but they cannot vote, even if they have subscribed for shares.

The shares subscribed by members of unlimited liability or contributions made by them are not counted in regard to votes.

The provisions of the preceding paragraphs are applicable to the general meeting of shareholders.

Derived from Art. 323, par. 3, and Art. 327, par. 1, of the German Commercial Code.

Article 241. The auditors shall examine the particulars mentioned in Arts. 134, par. 1, and 237, No. 4, and make a report to the preliminary meeting of shareholders.

Article 242. The association shall register at the place of its principal office and the place of any branch establishment the following particulars within two weeks after the conclusion of the preliminary meeting of shareholders:—

1. Those mentioned in Art. 120, Nos. 1, 2, 4, 7, and Art. 141, par. 1, Nos. 2–6.
2. The total amount of the shares.
3. The names and residences of the members of unlimited liability.[1]
4. The nature of the contributions of the members of unlimited liability other than the amount paid on shares and the value of the property contributed by them.
5. The names of the members of unlimited liability who are to represent the association, if such representative members have been appointed.[2]
6. The names and residences of the auditors.

[1] Derived from Art. 323, par. 5, first sentence, of the German Commercial Code.

[2] Derived from Art. 323, par. 5, second sentence, of the German Commercial Code.

Article 243. The provisions for the promoters of a *société anonyme* are applicable to members of unlimited liability who are to represent the association, with the exception of the provisions of Arts. 164–168, 175 and 179.

Art. 325 of the German Commercial Code reads as follows:—

"The enactments relating to the directorate of a limited liability company are applicable by analogy to the members personally responsible so far as they concern,—

"1. The notices, deposits and declarations to be made in the trade register;

"2. The calling of a general meeting;

"3. The drawing up, presentation and publication of the balance sheet and profit and loss account, as well as the presentation of the report upon the condition of the company;

"4. Any action taken against the resolution of a general meeting;

"5. The procedure for nominating examiners for verifying the balance sheet, or for the verification of the facts concerning the foundation or carrying on of the business of the company, as well as the obligations to the examiners and council of supervision (auditors);

"6. The summons to be addressed to creditors in the event of a reduction of capital;

"7. The claiming of any damages by the company sustained in the carrying on of its business;

"8. The opening of bankruptcy proceedings;

"9. Penal responsibility and condemnation to pay fines."

Article 244. Whenever in the case of a *société en commandite* the unanimous agreement of the members is necessary, an agreement of the members of unlimited liability is necessary as well as a resolution of the general meeting of shareholders.

The provisions of Art. 209 are applicable to the resolution mentioned above.

Identical with Art. 327, par. 2, of the German Commercial Code.

Article 245. The auditors are responsible for making the members of unlimited liability enforce the resolution of the general meeting of shareholders.

This is the only point on which an auditor of a *société anonyme* is different from an auditor of a *société en commandite par actions*. But this does not mean that the auditors of a *société en commandite par actions* may compel the members of unlimited liability to carry into effect the resolutions of the general meeting of shareholders, since the meeting is no longer the highest will organ of the association as in case of a *société anonyme*. If an agreement of the members of unlimited liability is necessary to carrying out a resolution of the meeting, the auditors must recommend it to the members of unlimited liability. If these members fail to carry out a resolution with which they have agreed, it is the duty of the auditors to urge them to act in accordance with the resolution as well as the agreement, but if the members of unlimited liability have never agreed to the resolution of the meeting of shareholders, the resolution fails.

Corresponds to Art. 328, par. 1, of the German Commercial Code.

Article 246. A *société en commandite par actions* is dissolved by the same causes as a *société en nom collectif* except in the case mentioned in Art. 83.

Derived from Art. 330 of the German Commercial Code.

Article 247. In case all the members of unlimited liability have retired, the general meeting of share-

holders may, by a resolution passed according to the provisions of Art. 209, continue the company as a *société anonyme*. In such case, resolutions shall be passed in regard to the particulars necessary for the formation of a *société anonyme*.

In such case the provisions of Art. 118, par. 2, are applicable.

Article 248. When a dissolution takes place through any other cause than consolidation, absorption, bankruptcy, or a decree of the court, liquidation is executed by all the members of unlimited liability or by those appointed by such members acting with those appointed by the general meeting of shareholders, unless there are special provisions in the articles of association.

The appointment of liquidators by the members of unlimited liability is concluded by their majority.

The number of liquidators appointed by the general meeting of shareholders shall be the same as that of all the members of unlimited liability or their heirs, or that of the persons appointed by the members of unlimited liability.

Art. 331, par. 1, of the German Commercial Code provides that so long as it is not otherwise provided by the articles, liquidation is brought about by all the members of unlimited liability together with one or several persons chosen by the general meeting acting as liquidators.

Article 249. The members of unlimited liability may at any time dismiss the liquidators appointed by themselves.

The provisions of Art. 248, par. 2, are applicable to the dismissal of liquidators.

Art. 331, par. 2, of the German Commercial Code provides that each member of unlimited liability may also demand that the nomination or dismissal of the liquidators be authorized by the court.

Article 250. The provisions of Art. 102 are applicable to the members of unlimited liability of a *société en commandite par actions*.

Article 251. In regard to the accounts mentioned in Arts. 227, par. 1, and 230, par. 1, the liquidators shall obtain not only the approval of the general meeting of shareholders, but also the approval of all the members of unlimited liability.

Article 252. A *société en commandite par actions* may be changed into a *société anonyme* in accordance with the provisions of Art. 244.

Identical with Art. 332, par. 1, of the German Commercial Code.

Article 253. When the organization of the association is altered according to Art. 252, the general meeting of shareholders shall pass resolutions in regard to the particulars necessary for the formation of a *société anonyme*. In this general meeting even the members of unlimited liability have a right to vote in proportion to the number of shares to be subscribed by them.[1]

In such case the provisions of Arts. 78 and 79, pars. 1 and 2 are applicable.[2]

[1] Art. 332, pars. 3 and 4, of the German Commercial Code reads as follows:—

"The interests of the majority of shareholders voting for the change ought to represent at least one quarter of the capital, not including that portion formed by shares belonging to members of unlimited liability.

"The resolution ought to define the rules necessary for carrying through the change, as well the method of nominating and constituting the directorate."

[2] Corresponds to Art. 334, pars. 1 and 2, of the German Commercial Code.

Article 254. After the creditors of the association have consented to the alteration of its organization or after the association has performed the duties imposed by Art. 79, par. 2, the dissolution of the *société en commandite par actions* shall be registered at the place of its principal office and the place of any branch establishment within two weeks; and as to the *société anonyme*, a registration shall be made in accordance with the provisions of Art. 141, par. 1.

SECTION 6.—FOREIGN BUSINESS ASSOCIATIONS.

This section relates to any business associations formed in foreign countries, not merely to *sociétés anonymes* formed in foreign countries.

Article 255. If a foreign business association[1] establishes its branch office in Japan, it shall make the same registrations and public notifications as the business associations of the same kind or the most similar kind formed in Japan.[2]

A foreign business association which establishes its branch office in Japan shall appoint a representative in Japan, and at the time of registration of the branch office, shall register his name and residence.

The provisions of Art. 62 are applicable to a representative of a foreign business association.

[1] There are no special provisions by name for foreign business associations in the German Commercial Code. Such special provisions for foreign business associations can only be found in the law of 1873 of Belgium and the Codes of Hungary, Italy, Portugal and Argentine. The present section is modeled on the law of the latter countries.

[2] Art. 202 of the Code of Procedure in Non-actionable Matters reads as follows:—

"When a foreign business association establishes its branch office in Japan, an application for registration must be made by the representative of such business association and he must designate his name and residence in a written application and file it with the court together with the following documents:—

1. Documents showing the existence of the principal office of the association.

2. Documents certifying the qualification of the representative.

3. The articles of association of the association or any documents by which the nature of the association may be ascertained.

"The documents mentioned above shall have been acknowledged before the authorities of the native country of such business association or before a Japanese consul."

Article 256. If whatever must be registered according to Art. 255, pars. 1 and 2, occurs in a foreign country, the period of time for the registration begins as soon as the notice thereof is received.

Article 257. When a foreign business association begins to maintain a branch office in Japan before a registration is made at the place of the branch office, the existence of the association may be denied by third persons.

Article 258. If a foreign business association has its principal office in Japan or its principal object is to carry on business in Japan, it must be subject to the same provisions as a business association formed in Japan, even if it is formed in a foreign country.

"What is a foreign business association?" is a mooted question in Japan which has puzzled the minds of many jurists. Some maintain that the Japanese Code has adopted the "law standard test"; that is, whether a business association is foreign or domestic depends entirely upon the law under which it is formed. Some insist that Japan has adopted the "domicile test"; that is, if the principal office of the association is within Japanese territory, it is a domestic business association, otherwise it is a foreign one.

But under the present article, it is quite plain that Japan adopts the "place of formation" test; that is, a domestic business association is a business association formed in Japan; and any business association formed outside the territory of Japan is a foreign business association. However, since a business association formed in Japan must be subject to the Japanese law, the natural consequence is that the Code at the same time has adopted the "law standard test." Again, since the principal office of any association mentioned in this Code always means the principal office in Japan, it naturally has adopted the "domicile test." Thus, the Japanese law has adopted the "place of formation" test as the principal test and the "law standard test" and the "domicile test" as accessory tests.

According to the decision of the international conference in regard to *sociétés anonymes* held in Paris, 1889, and the report of the International Law Association held in Hamburg, 1891, the "domicile test" seems to have been universally recommended; and, indeed, many Japanese writers claim that Japan has adopted this principle. But, if so, it would be a matter of course that any business association having its principal office in Japan is a domestic association and it would have been unnecessary for this article to declare that a business association formed in a foreign country having its principal office in Japan is subject to the same provisions as a similar association formed in Japan.

Article 259. The provisions of Arts. 147, 149, 150, 155, par. 1, 206, 207 and 217, par. 2, are applicable to the issue of shares and the transfer of shares or bonds of a foreign company in Japan. In such case the branch office first established in Japan is considered as a principal office.

Article 260. If a representative of a foreign business association establishing a branch office in Japan commits any act contrary to the public order or good morals during the management of the business of the association, the court may upon the application of the attorney-general or by its own executive power order the branch office to be closed.

SECTION 7.—PENAL PROVISIONS.

Article 261. Promoters, members managing the business of a business association, directors, representatives of foreign business associations, auditors or liquidators are punished by a fine of from five *yen* to five hundred *yen* in the following cases:—

1. When they neglect to make the registrations provided for in this Book.

2. When they neglect to make public notifications or notices provided for in this Book or make false public notifications or notices.

3. When they without reasonable cause refuse the inspection of the books which are allowed to be inspected by the provisions of this Book.

4. When they hinder examinations provided for in this Book.

5. When they begin to make preparations for opening business in violation of the provisions of Art. 46.

6. When they omit to make certificates of subscription or omit to set forth the necessary particulars in the certificates or make a misrepresentation in the certificates, in violation of the provisions of Arts. 126, par. 2, and 238, par. 2.

7. When they issue certificates in violation of the provisions of Art. 147, par. 1, or Art. 217, par. 2.

8. When they omit to set forth the necessary particulars in a certificate or bond or make a misrepresentation thereof.

9. When they omit to keep at the principal office or any branch establishment the articles of association, the book of shareholders, the book of bonds, the minute-book of the general meeting of shareholders, the inventories, the balance sheets, the business reports, the accounts of gains and losses, the proposals concerning the sinking fund and the distribution of profits or interest; or they omit to set

forth the necessary particulars, or make a misrepresentation thereof.

10. When they omit to call a general meeting of shareholders in violation of the provisions of Arts. 174, par. 1, or 198, par. 2.

See Sect. 3, Chapter VI, Penal Provisions, Arts. 312–319 of the German Commercial Code. But the German provisions are for a *société anonyme* alone.

Article 262. Promoters, members managing the business of a business association, directors, representatives of foreign business associations, auditors, or liquidators are punished by a fine of from ten *yen* to one thousand *yen* in the following cases:—

1. When they make misrepresentations to the public authorities or to the general meeting of shareholders, or conceal facts from them.

2. When they carry out a consolidation, a disposition of property of the association, a reduction of the capital or an alteration of its organization in violation of the provisions of Arts. 78–80.

3. When they hinder the examination made by inspectors.

4. When they acquire shares or take them as security or cancel shares, in violation of the provisions of Art. 151.

5. When they issue certificates to bearer in violation of the provisions of Art. 155, par. 1.

6. When they neglect to apply for a declaration of bankruptcy in violation of the provisions of Art. 174, par. 2, or Art. 81 of the Civil Code.[1]

7. When they omit to set apart a sinking fund in violation of the provisions of Art. 194 or make distributions in violation of the provisions of Art. 195, par. 1, or Art. 196.

8. When they invite subscriptions for bonds in violation of the provisions of Art. 200.

9. When they act contrary to an order of the court issued according to the provision of Art. 260.

10. When they make payment to certain creditors within the period mentioned in Art. 79 of the Civil Code[2] or distribute property of the company in violation of the provision of Art. 95 of this Code.

[1] See notes to Art. 91, par. 3, *supra.*

[2] See note to Art. 234, *supra.*

BOOK III.

COMMERCIAL TRANSACTIONS.

SECTION 1.—GENERAL PROVISIONS.

Article 263. The following are commercial transactions:[1]—

1. Transactions aiming at the acquisition for a consideration of movables,[2] immovables or securities[3] with the intention[4] of disposing of them for profit; or the disposal of the movables, immovables or securities thus acquired.[5]

2. Contracts for the supply of movables or securities[6] which are to be acquired from other persons, and transactions aiming at the acquisition for a consideration of such movables or securities for the performance of such contract.[7]

3. Dealings on the exchange.[8]

4. Transactions concerning bills, notes, checks[9] and other commercial papers.[10]

[1] These are absolute commercial transactions. See notes to Art. 4, *supra.*

[2] In former times, any transaction relating to immovable property was not treated as commercial. Thus, Art. 275 of the old German Commercial Code and Art 262 of the Hungarian Commercial Code expressly declare that any contract relating to immovable property is not a commercial transaction. But, in the present business world, immovable property

is very often acquired or disposed of for the purpose of gaining profit; and therefore it acquires nearly as much "commercial character" as personal property and may be the object of a commercial transaction. However, Art. 1 of the present German Commercial Code still excludes immovables as an object of commercial transactions.

[3] "Securities" are held to be certificates of shares, and bonds issued by government, public or private corporations. Other commercial papers, such as bills, notes, bills of lading, warehouse receipts, etc., are not securities within the meaning of this article.

[4] Thus, whether a transaction is commercial or non-commercial depends on such an intention at the time of the transaction. If a gentleman buys some goods with the intention of consuming them himself but afterwards changing his mind intends to sell them for profit, the transaction of purchase does not by this change of intention become a commercial transaction and the commercial law has no application. In such a case it is very difficult for a vendor to find out the intention of the vendee, and the application of either the Commercial Code or the Civil Code may result in an unexpected damage to the vendor.

This is the natural consequence or defect of the theory adopted by those Codes based on the French system of jurisprudence; that is, the theory which recognizes a difference between an absolute commercial transaction and a relative commercial transaction. See notes to Art. 4, *supra*.

[5] Derived from Art. 632, par. 1, of the French Commercial Code, Art. 271, par. 1, of the old German Commercial Code, and Art. 3, par. 1, of the Italian Commercial Code.

[6] Here immovable property is excluded, for from its nature it is practically never made the subject of such a contract.

[7] Derived from the Commercial Codes of France, Italy, and the old German Commercial Code.

[8] According to the Exchange Act of Japan, none but certain traders may transact business in any exchange.

As dealings on exchange are confined to traders, it was unnecessary to especially provide that "dealings on the exchange" are absolute commercial transactions.

[9] Since the law pertaining to bills, notes and checks in Japan, instead of being the subject of a special statute as in Germany, is part of the Commercial Code, it is necessary to apply the general principles of the Code to all transactions relating to such instruments, irrespective of the character of the parties to the transactions.

[10] The commercial papers spoken of are way bills, warehouse instruments, and bills of lading. The term must be strictly construed as equivalent to the term "negotiable instruments." A contract containing as one of its provisions a promise to pay money would not be a "commercial paper" within the meaning of this article.

Article 264. The following transactions, if carried on as a business, are commercial transactions except in those cases where goods are manufactured or services rendered only for the purpose of earning wages:[1]—

1. Transactions aiming at the acquisition for a consideration or at the hiring of movables or immovables with the intention of letting them; or the letting of movables or immovables thus acquired or hired.[2]

2. Transactions concerning the manufacturing or improving of goods for other persons.[3]

3. Transactions concerning the supplying of electricity or gas.

4. Transactions concerning carriage.[4]

5. The making of a contract for doing work or furnishing labor.[5]

6. Transactions concerning publishing, printing or photographing.[6]

7. The conduct of any public house for the purpose of entertaining guests.[7]

8. Money changing or other banking business.[8]

9. Insurance.[9]

10. Acceptance of deposits.[10]

11. Transactions concerning brokerage or commission.[11]

12. Acceptance of agency for commercial transactions.[12]

[1] These are relative commercial transactions. See notes to Art. 4, *supra*.

Art. 1 of the German Commercial Code reads as follows:—

"A trader within the meaning of this Code is he who carries on a trade.

"Every undertaking having one of the following enumerated objects is held to be a trade:—

"(I) The buying and re-selling of movable goods or valuables, it making no difference whether the goods are re-sold in the condition in which they are received or whether they undergo any transmutation or preparation previous to such re-sale.

"(II) Any undertaking having for its object the transformation or preparation of goods on account of any third party, so far as such operation exceeds the limit of mere manual labor.

"(III) Any insurance business.

"(IV) Any banking or money changing business.

"(V) Any undertaking to transport goods or persons by sea, any carrier's business or one having for its object the transportation of persons over land or by canal, as well as the business of towing.

"(VI) The business of commission merchants, forwarding agents, and bonders of goods.

"(VII) The business of agents and brokers.

"(VIII) The business of publisher, as well as all matters relating to trade in books and objects of art.

"(IX) The business of printing so far as it exceeds mere manual labor."

[2] But according to Art. 632 of the French Commercial Code and Art. 3 of the Italian Commercial Code, these are held to be absolute commercial transactions.

[3] Derived from Art. 632, par. 2, of the French Commercial Code, Art. 272, par. 1, of the old German Commercial Code, and Art. 3, par. 8, of the Italian Commercial Code.

[4] Any contract of carriage is a relative commercial transaction, whether the goods or persons may be carried by land or by sea. This is derived from Art. 632, par. 2, of the French Commercial Code, and Art. 3, par. 13, of the Italian Commercial Code. According to the old German Commercial Code, marine transportation was held to be an absolute commercial transaction, though land transportation was a relative commercial transaction. But the present German Code has abandoned the difference between an absolute commercial transaction and a relative commercial transaction as well as the difference between marine transportation and land transportation.

[5] Here the "work" denotes any work done to certain immovable property, such as building houses, bridges, etc.; and the "labor" means that only physical labor is furnished, the contractor not being responsible for the accomplishment of a particular work.

This is derived from Art. 3, par. 7, of the Italian Commercial Code.

[6] Derived from Art. 272, par. 5, of the old German Commercial Code, and Art. 3, par. 10, of the Italian Commercial Code, except that the word "photographing" has been added by the Japanese legislators.

[7] Derived from Art. 632, par. 3, of the French Commercial Code, and Art. 3, par. 9, of the Italian Commercial Code.

[8] Derived from Art. 632, pars. 4 and 5, of the French Commercial Code, Art. 272, par. 2, of the old German Commercial Code, and Art. 3, par. 11, of the Italian Commercial Code.

[9] Mutual insurance is excepted. According to Art. 271, par. 3, of the old German Commercial Code, a contract of insurance was an absolute commercial transaction. In Italy, even mutual insurance is treated as an absolute commercial transaction. See Art. 3, pars. 19 and 20, of the Italian Code.

[10] *I.e.* The care of property for reward, as in a warehouse. Derived from Art. 259, par. 4, of the Hungarian Commercial Code, and Art. 3, pars. 23 and 24, of the Italian Commercial Code. There is no such provision in the French and old German Commercial Codes.

[11] Derived from Art. 632, pars. 2 and 4, of the French Commercial Code, Art. 272, pars. 3 and 4, of the old German Commercial Code, and Art. 3, pars. 20 and 22, of the Italian Commercial Code.

[12] *I.e.* Assuming to represent a certain trader as his agent. Derived from Art. 632, par. 3, of the French Commercial Code, and Art. 3, par. 21, of the Italian Commercial Code.

Article 265. Transactions done by a trader for the sake of his business are commercial transactions.[1]

The transactions of a trader are presumed to be done for the sake of his business.[2]

[1] These are accessory commercial transactions. For instance, when a warehouse company deposits money with a bank, or a common carrier makes an insurance contract with an insurance company, these are accessory transactions on the part of the warehouse or the common carrier, though at the same time they are relative transactions on the part of the bank or the insurance company.

[2] For instance, if the proprietor of a manufacturing company buys a certain amount of coal for the sole use of his family, the principles of the Commercial Code will be applied if the

presumption cannot be rebutted by proof. In case part of the coal is for the family and the other part for the manufacturing company, the whole transaction must be treated as a commercial transaction under the present article and Art. 3, *supra*.

This article corresponds to Arts. 343 and 344 of the German Commercial Code.

Article 266. Even though an agent for a commercial transaction has not disclosed the fact that he is acting for his principal, the transaction has effect against the principal; but if the other party did not know that the agent was acting for the principal, his right to claim performance against the agent will not be affected.

This is an exception to Art. 100 of the Civil Code, according to which such a transaction would have no effect against the undisclosed principal and be treated as done on account of the agent himself, unless the other party knew or had reason to know the fact that the transaction was done on account of the principal.

Article 267. An attorney for a commercial transaction may do acts not expressed in the attorneyship contract, when he acts within the scope of the transaction and not contrary to the object of the attorneyship.

Article 268. An authority arising from an attorneyship contract for a commercial transaction is not terminated by the death of the principal.

According to Art. 111 of the Civil Code, the authority will be terminated by the death, incompetency or bankruptcy of the principal.

Article 269. When an offer for a contract is made between parties present, it will lose its effect if the offeree does not accept it immediately.

According to the principle of the Civil Code, such an offer to make a contract will remain effective until it is refused or accepted by the offeree. Thus, if the offeree does not refuse it and leaves it alone for a certain time, he may suddenly accept it afterwards, and a valid contract may be completed by such acceptance. But under the present article, there is no existing contract in such case, for the acceptance is too late.

"Parties present" means that the offer is made in the presence of the offeror and the offeree or that the idea of the offeror can be instantly transfered to the offeree. Thus, if the conversation between the parties is carried on through an interpreter or by telephone, this will be construed as "parties present," but if the offer is made through a messenger or by telegraph, such offer must be held as between "parties absent" within the meaning of the next article.

Article 270. When an offer for making a contract is made between parties absent and no time for its acceptance is fixed by the offeror, it will lose its effect if the offeree does not give notice of acceptance within a reasonable time.[1]

In such case the provision of Art. 523 of the Civil Code is applicable.[2]

[1] According to Art. 524 of the Civil Code, if an offer is made between parties absent and no time for its acceptance is fixed by the offeror, he cannot withdraw the offer within a reasonable time necessary for receiving the notice of acceptance; that is, though, after a reasonable time necessary for receiving the notice of acceptance, the offeror may withdraw the offer, the mere fact that the offeree has given no notice

of acceptance does not make the offer lose its effect. Neither does the offer lose its effect by a mere lapse of the time necessary for receiving the notice of acceptance unless the offeror manifests a will to withdraw it. The consequence of the principle of the Civil Code is, therefore, that the offeror is bound by his offer for a longer period than the offeror under the Commercial Code.

[2] Art. 523 of the Civil Code provides that a delayed acceptance may be treated by the offeror as a new offer from the offeree.

Article 271. When an offer to a trader for a contract which is within the scope of his business is made by a person with whom the trader regularly deals, he shall give notice of acceptance or refusal without delay. If he neglects to give such notice, he is deemed to have accepted the offer.

According to the principle of the Civil Code, the offeree is under no obligation to give notice of acceptance or refusal and the mere fact that he gives no notice does not make him liable as if he had accepted the offer.

Art. 362, par. 1, of the German Commercial Code reads as follows:—

"When a trader whose business comprises the transaction of business for a third party receives a commission, relating to such kind of transaction, from a person with whom he has such business relations, he is bound to answer him without delay, and his silence is considered acceptation of the commission. It is the same when a trader having offered his services to a third person to look after certain business, receives from such third person a commission to do so."

Article 272. When an offer is made to a trader for a contract which is within the scope of his business, and together with such offer goods are received,

the trader shall safely keep the goods at the expense of the offeror, even if the offer is refused.

But this will not be applied to the case where the value of the goods is not sufficient to cover the expense of their keeping or the trader may suffer a damage by keeping them.

For instance, explosives, etc.

The general principle of the Civil Code is, that the offeree receiving such goods is under no obligation to send them back or keep them for the offeror.

Art. 362, par. 2, of the German Commercial Code reads as follows:—

"Such trader (offeree) even if he has refused the commission, is no less bound to take proper measures to guarantee any goods sent to him from all damage, at the sender's expense, to the extent for which he may expect reimbursement and without prejudice to himself."

Article 273. When several persons incur a debt arising from a commercial transaction for one or all of them, they are severally and jointly liable for such debt.[1]

If, in case of a surety, the debt has arisen from a commercial transaction of the principal debtor,[2] or the suretyship is a commercial transaction,[3] the principal debtor and the surety are severally and jointly liable for the debt, even though they assume it by separate acts.[4]

[1] According to Art. 427 of the Civil Code, in case there are several debtors each debtor is only liable for his proportionate share, in the absence of a manifestation of will to the contrary; that is, in a civil transaction a joint liability is not presumed unless there is a special contract between the

parties. This provision is not adopted from European counties, but based on the business custom of Japan. According to Art. 427 of the German Civil Code the principle of joint liability is applied to a civil transaction as well as to a commercial transaction.

If A and B join together and buy a certain amount of rice from a farmer, A being a rice dealer, on his part the transaction is commercial. B, a non-trader, buys the rice for his own use, and therefore, on his part, the transaction is non-commercial. But under the present article both A and B are severally and jointly liable to the farmer, for the debt arises from "a commercial transaction on account of one of them."

A transaction, in order to be subject to the principle of joint liability under the present article, must be a commercial transaction on the part of one or all of the debtors from which their obligation arises. If it is only a commercial transaction on the part of creditors, the principle of joint liability has no application. According to Art. 3, the provisions of this Code are applicable to both parties if the transaction on the part of one of them is a commercial transaction. But it does not follow that the non-commercial transaction of the other party is by this article changed into a commercial transaction. Thus, if A and B join together and borrow a certain amount of money from a bank for their domestic expenses, A and B are not severally and jointly liable, for this is only a commercial transaction on the part of the bank and the transaction from which the debt arises is still non-commercial and subject to Art. 427 of the Civil Code.

[2] Thus, if the debt has arisen from a commercial transaction of the creditor only, the principle of Art. 427 of the Civil Code is still applicable.

[3] *I.e.* When a trader for the sake of his business assumes a suretyship, or in other words, when the suretyship is an accessory commercial transaction. See Art. 265. In such case, whether the transaction of the principal debtor is com-

mercial or non-commercial is immaterial; the principal and the surety are severally and jointly liable.

[4] According to Arts. 452 and 453 of the Civil Code a surety may insist that the creditor exhaust his legal remedies against the principal debtor before demanding payment from the surety. Again, if there are several sureties, each surety is only liable for his proportionate share in accordance with the principle of Art. 427 of the Civil Code.

This paragraph is derived from Art. 281, par. 2, of the old German Commercial Code.

Article 274. When a trader has carried on a commercial transaction within the scope of his own business on behalf of another person, he may demand a reasonable compensation.

Under the Civil Code such a person cannot demand a compensation unless there is an agreement between parties.

Derived from Art. 354, par. 1, of the German Commercial Code.

Article 275. When money is lent between traders, the lender may demand legal interest.[1]

When a trader pays money within the scope of his own business on behalf of another person, he may demand legal interest thereon from the day of its advancement.[2]

[1] Under the Civil Code interest cannot be demanded unless there is an agreement between the parties.

Corresponds to Art. 353 of the German Commercial Code.

[2] Corresponds to Art. 354, par. 2, of the German Commercial Code.

Article 276. In regard to debts arising from commercial transactions, the rate of legal interest is six per centum per annum.

The rate of legal interest under the Civil Code is five per centum per annum.

The rate of legal interest under the German Civil Code is four per centum per annum, but under the German Commercial Code is five per centum per annum. The French and Italian Codes are the same as the German Codes.

Article 277. The provisions of Art. 349 of the Civil Code are not applicable to a pledge created as security for a debt arising from a commercial transaction.

If a pledgor cannot pay his debt when due, the pledgee may sell the security by auction; if the money arising from the sale is not enough to satisfy him, he may demand the rest, and if the amount of the money is more than the debt, he is obliged to return the difference to the debtor. This is the general principle of the civil law.

But, it is the Japanese custom that when a debtor borrows money on security, he generally makes a special agreement that on his default in payment the pledgee shall get the title to the property and therefore dispose of it at his will. When the draft of the Japanese Civil Code was being passed, the Diet insisted that a provision must be inserted to prohibit such a contract and make it illegal. In this they succeeded, and Article 349 of the Civil Code was thus adopted.

The provision of Art. 349 of the Civil Code is not only an unnecessary interference with the banking business, but is also contradictory to the Pawnshop Act, by which the contract made between a pledgor and pledgee as mentioned above is recognized. For these reasons the present article of this Code provides, in order to meet the demand of the business world, that the Civil Code shall not apply. The result is that in commercial transactions when a person borrows money, the lender may insist on his giving a pledge far above the value of the loan, which on failure to pay the loan promptly will become the absolute property of the lender.

Article 278. When the place in which an obligation arising from a commercial transaction is to be performed is not fixed by the nature of the transaction or by a manifestation of the will of the parties, the delivery of specified property shall be made at the place in which the property exists at the time of the transaction, and any other performance shall be made at the present seat of business of the creditor, or if there is no seat of business, at his residence.

Payment of commercial paper payable to order or to bearer shall be made at the present seat of business of the debtor, or if there is no seat of business, at his residence.

A branch office is treated as the seat of business where the transaction in which the obligation originated took place at the branch office.

These provisions are substantially the same as Art. 484 of the Civil Code.

In Germany the principle of *dette quérable* is adopted; that is, an obligation is generally performed at the residence of the obligor except a pecuniary obligation which must be performed at the residence of the creditor. See Art. 324 of the old German Commercial Code, and Art. 269 of the German Civil Code. The same principle is also adopted in France. See Art. 1247 of the French Civil Code. On the contrary, in Japan the principle of *dette portable* is adopted; that is, an obligation is generally performed at the residence of the obligee, as provided by the present article and Art. 484 of the Civil Code. But as to negotiable instruments, the principle of *dette quérable* is adopted, as provided in the present article, paragraph 2.

Article 279. The debtor on commercial paper payable to order or to bearer, even if its payment

must be made at a definite time, is responsible for his delay only from the day when the holder of such paper at the time of maturity presents it for payment.

According to Art. 412 of the Civil Code, the debtor is responsible for his delay from the day on which the debt is due, if the time of payment is fixed. But a negotiable instrument is a presentation paper (*Präsentations papier*) and the debt is due as soon as the creditor presents it to the debtor. The natural consequence of this is that a negotiable debt is always a *dette quérable;* for if it were a *dette portable* the debtor might be unable to find the creditor.

Article 280. The provisions of Arts. 278, par. 2, and 279 are applicable to the debt mentioned in Art. 471 of the Civil Code.

The paper referred to is paper payable to a particular person designated in the paper or at the same time payable to its bearer.

Article 281. In case a commercial paper payable to order or bearer, the object of which is the payment of money or the consignment of any other property,[1] has been lost, the original holder, after taking the procedure of a public summons,[2] may make the debtor deposit the subject-matter, or, provided the creditor gives a suitable security, he may even enforce a performance in accordance with the contents of the paper.[3]

[1] This expression is rather unnecessary, for a paper whose object is to render service can hardly be a negotiable instrument.

[2] The holder must present a copy or the substance of the instrument to the court and explain how the instrument

has been lost. The court will give a public notification, requiring the person who has acquired the instrument to appear in the court. If no such person appears during six months, the court will declare that the lost instrument shall be void. See Arts. 780, 781, 782 and 783 of the Code of Civil Procedure.

[3] This is an exception to the fundamental principle that in order to set up a claim upon a negotiable instrument it is necessary to present the instrument to the debtor; for here the creditor can enforce his right even though the instrument is not in his possession. But, of course, the debt must be due.

The procedure of a public summons, as above mentioned, will take six months. During this period of time the debtor may dispose of the subject-matter or become a bankrupt to the prejudice of the creditor. For this reason, the present article gives the creditor a right either to make the debtor deposit the subject-matter or to enforce a performance according to the content.

This article is derived from Art. 73 of the Commercial-paper Act of Germany, Art. 305, par. 2, of the old German Commercial Code, and Art. 365, pars. 2 and 3, of the present German Commercial Code.

Article 282. The provisions of Arts. 441, 457, 461 and 464 are applicable to a commercial paper payable to order, the object of which is the payment of money or the consignment of any other property.

The articles referred to are provisions for bills, notes and checks. See *infra*.

Article 283. When business hours are fixed by law or custom, the performance of an obligation can be made or demanded only during such business hours.

Derived from Arts. 358 and 359 of the German Commercial Code.

Article 284. When a debt, arising from a transaction between traders which on both sides is a commercial transaction, is at the time of maturity, the creditor may retain such property of the debtor as comes into the possession of the creditor through a commercial transaction between them, until the debt is satisfied. But this is not applicable to the case where there is a different manifestation of will.

Derived from Art. 369 of the German Commercial Code. See notes to Art. 41, *supra*.

Article 285. A debt arising from a commercial transaction is barred by prescription if the creditor does not claim it for five years, except in those cases where there are special provisions in this Code. But if a shorter period is fixed by law, such provision will be enforced.

According to Art. 167, par. 1, of the Civil Code a debt is barred if the creditor does not claim it for ten years.

SECTION 2.—SALE.

Article 286. In case of a sale between traders, if the vendee refuses or is unable to accept the subject-matter the vendor may deposit it,[1] or after he has notified the vendee to accept it within a reasonable time, may sell it by auction. In such case the vendor must without delay give notice thereof to the vendee.

In case the goods are liable to deteriorate, he may sell them by auction without such notification.

The vendor having sold the subject-matter by

auction as mentioned above shall deposit the money arising from the sale; but he may appropriate the whole or part of it as purchase money.[2]

[1] As to the method and procedure of depositing such goods, see Arts. 495 and 496 of the Civil Code and the Deposit Act.

[2] This article corresponds to Art. 374 of the German Commercial Code.

Article 287. If from the nature of the sale or from the manifestation of the will of the parties, the object of the contract cannot be accomplished unless by performance at a certain time or within a certain period of time,[1] and one party lets the time elapse without performing the contract, it is deemed to have been terminated, unless the other party directly demands performance.[2]

[1] For instance, a person orders a banquet for the celebration of a certain festival, etc.

[2] *I.e.* Unless immediately after the expiration of the time or at the end of the delay agreed on, he has given notice to the other party that he insists on execution of the contract.

Corresponds to Art. 376, par. 1, of the German Commercial Code.

Article 288. In the case of a sale between traders, the vendee having received the subject-matter must examine it without delay, and if any defect in quality or deficiency in quantity is discovered, he must instantly give notice to the vendor; otherwise, he cannot terminate the contract, reduce the price, or demand damages on the ground of the defect or deficiency.[1] In case there are defects in the

subject-matter which cannot be discovered at once and the vendee discovers them within six months, the same rule is applicable.

These provisions are not applicable where the vendor has acted in bad faith.[2]

[1] According to the Civil Code, such a vendee has a right to demand the reduction of the price, the termination of the contract or damages within a year, but as to whether he is obliged to examine the goods and give notice thereof to the vendor, there is no special provision.

[2] This article corresponds to Art. 377 of the German Commercial Code.

Article 289. In cases arising under Art. 288, the vendee, even though he terminates the contract, shall safely keep or deposit the subject-matter of the sale at the expense of the vendor. But where the goods are in danger of deterioration or loss, he shall sell them by auction with the permission of the court and shall safely keep or deposit the money arising from such sale.

When the vendee has sold the goods by auction as mentioned above, he shall give notice thereof to the vendor without delay.

In case the seats of business, or if there are no such seats, the residences of the vendor and vendee are situated in the same *shichosen*, the provisions of the last two paragraphs are not applicable.

Corresponds to Art. 379 of the German Commercial Code.

Article 290. The provisions of Art. 289 are applicable to cases where the goods delivered by the

vendor to the vendee are different from the goods ordered. If the amount of the goods delivered exceeds that of the goods ordered, the same rules are applicable to the excess amount.

Corresponds to Art. 378 of the German Commercial Code.

SECTION 3.—CURRENT ACCOUNTS.

Article 291. A contract of current account is completed when two traders or a trader and a non-trader who regularly deal with each other agree that the whole amount of the debts and credits arising from their dealings within a certain period of time shall be set off and the balance paid.

According to Art. 291 of the old German Commercial Code both parties to a contract of current account must be traders. This is derived from Art. 355 of the present German Commercial Code.

Article 292. If debts and credits arising from bills, notes, checks, or any other commercial papers have been entered in a current account, on the default in payment of the debtor on such papers the parties may exclude the item relating to such debt from the current account.

The general rule is that any item entered in the current account cannot be freely struck out by the parties, irrespective of the *causa* on which an obligation is based. But in the present article the law provides an exceptional rule in favor of the holder of a commercial paper who cannot get payment thereof and yet who is liable for the consideration of such paper as a debt entered in the current account against him.

Of course, he may seek his remedy at law; but it is more convenient for him to exclude the item from the current account.

Article 293. When the parties have not fixed a period at the end of which a set-off is to take place, such period shall be six months.

The legal period is based on the commercial usage of Japan. Art. 355, par. 2, of the German Commercial Code provides that the settlement of account is made once a year unless there is an agreement to the contrary.

Article 294. After the parties have recognized an account which contains each item of the debts and credits, they can no longer object to any item, except in the case of error or omission.

Article 295. On the balance arising from the set-off, the creditor may demand legal interest from the day when the account is closed.

A right to claim interest on each item from the day when the item was entered in the current account is not affected by this provision.

Derived from Art. 355, par. 1, of the German Commercial Code.

Article 296. Each party may terminate the contract of current account at any time. In such case the party may instantly close the account and demand the balance.

Derived from Art. 355, par. 3, of the German Commercial Code.

SECTION 4.—SOCIÉTÉ TACITE.

Article 297. A contract of *société tacite* is completed when the parties agree that one of them [dormant partner] shall make a contribution for the business of the other [proprietor] and share any profits arising from his business.

A *société tacite* is only a contract and does not create a juristic person though it resembles a *société en commandite*. However, it differs from a civil partnership under the Japanese Civil Code. The latter being a common enterprise of all the partners, they are separately liable to third persons; the former being the business of the proprietor, but not of the dormant partner, he is only liable to the proprietor for his contribution, but not to third person, for the debts arising from the business.

Under the German Commercial Code *société tacite* [*stille-geselschaft*] is a section of the book on companies, and not a part of the book on commercial transactions as under the present Code.

Article 298. The contribution made by a dormant partner of a *société tacite* becomes the property of the proprietor of the business.

The dormant partner has neither rights against nor duties in favor of third parties in regard to the transactions of the proprietor.

This article corresponds to Art. 335 of the German Commercial Code.

Article 299. If the dormant partner has allowed his last name or full name to be used in the trade name of the proprietor or his own trade name to be used

as the trade name of the proprietor, he is jointly liable with him for the debts arising after such use.

See Arts. 65 and 116, *supra*.

Article 300. The dormant partner cannot demand a distribution of profits unless his contribution, when impaired by losses, has been made good.

The dormant partner is under no obligation to contribute a new fund to make up the losses. This article simply means that when his contribution is impaired by losses, he is not entitled to profits unless the business has become prosperous and the former losses have been thus made good.

Article 301. If the contract of *société tacite* has failed to stipulate for the period of the duration of the *société* or has stipulated that it shall last as long as the life of one of the parties, either party may terminate the contract at the end of a business year, but a notice must be given six months before such termination.

In case of necessity, either party may terminate the contract at any time irrespective of whether the original contract has or has not stipulated for the period of the duration of the *société*.

This article is derived from Art. 339 of the German Commercial Code.

Article 302. The contract of *société tacite* is terminated,—

1. When the enterprise of the *société* is accomplished or its accomplishment becomes impossible;

2. On the death or incompetency of the proprietor;

3. On the bankruptcy of the proprietor or the dormant partner.

See Arts. 74 and 117, *supra.*

Article 303. When the contract of *société tacite* is terminated, the proprietor shall return to the dormant partner the amount of his contribution,[1] but if his contribution has been impaired by losses, it is sufficient to return the remaining amount.[2]

[1] Even if the property of the *société* has been increased to a great amount, the dormant partner, unlike a member of a *société en nom collectif* or a *société en commandite* or a partner of a civil partnership, is only entitled to the amount contributed. However, a dormant partner being a creditor of the proprietor may compete with other creditors, though he has no lien on the amount contributed by him.

[2] Derived from Art. 340, pars. 1 and 3, of the German Commercial Code.

Article 304. The provisions of Arts. 108, 111 and 115 are applicable to a *société tacite.*

Corresponds to Arts. 335, par. 1, 337 and 338 of the German Commercial Code.

SECTION 5.—BROKERAGE.

Article 305. A broker is he who undertakes as a business to negotiate commercial transactions between other persons as a middleman.

Art. 93, par. 1, of the German Commercial Code provides that any person who, in the course of his profession, without

being intrusted to do so by a specific engagement, or permanently, undertakes as an intermediary to make contracts of buying and selling of goods or valuables, of insurance, transport of goods, bottomry, freight, or other commercial transactions, has the rights and duties of a broker.

Under the German Commercial Code, brokerage as well as commercial agency is a section of the book on commerce in general, and not a section of the book on commercial transactions as under the present Code.

Article 306. A broker in a transaction negotiated by him is not authorized to receive payment or any consignment on behalf of the parties. But this provision is not applicable where there is a different manifestation of will or a different custom.

In other words, he is not a commercial agent, who is a representative as well as a middleman.

Corresponds to Art. 97 of the German Commercial Code.

Article 307. When a broker has received a sample in a transaction negotiated by him, he shall keep it until the transaction is completed.

Art. 96 of the German Commercial Code reads as follows:—

"The broker, if the parties have not excused, nor local custom with reference to the description of goods has not exempted him, must keep samples of all goods sold by him by sample, when any have been sent him, until they have been accepted without objection to their quality, or the transaction is closed in any other way. He must make the sample recognizable by a distinctive label."

Article 308. As soon as a transaction has been concluded between the parties, the broker must make memoranda containing the names or trade names of the parties, the date of the transaction and

a summary of its character, and after signing the memoranda, must deliver one to each party.

Except where the parties are to perform the contract directly, the broker must require each party to sign a memorandum and then must deliver the memorandum so signed to the other party.

If one of the parties does not accept or sign the memorandum, the broker must instantly give notice to the other party.

This article is identical with Art. 94 of the German Commercial Code.

Article 309. The broker shall enter the particulars mentioned in Art. 308 in his account books.

The parties may at any time demand from the broker a copy of the account relating to the transaction negotiated for them.

This article corresponds to Arts. 100 and 101 of the German Commercial Code.

Article 310. If one of the parties has ordered the broker not to disclose his name or trade name to the other party, the broker shall not enter his name or trade name in the memoranda mentioned in Art. 308, par. 1, and the copy mentioned in Art. 309, par. 2.

Article 311. When the broker has not disclosed the name or trade name of one party to the other, he himself is responsible to the other for the performance of the contract.

Corresponds to Art. 95, pars. 1 and 3, of the German Commercial Code.

Article 312. The broker cannot demand compensation unless the procedure mentioned in Art. 308 has been finished.

Each party is equally liable for the broker's compensation.

Art. 99 of the German Commercial Code provides that if it is not agreed between the parties who is to pay brokerage, half is payable by each party in the absence of local custom to the contrary.

SECTION 6.—COMMISSION MERCHANTS.

Article 313. A commission merchant is he who undertakes as a business to sell or buy goods[1] in his own name[2] on account of other persons.[3]

[1] It is construed that securities must be included in the word "goods." Art. 383 of the German Commercial Code provides that a commission merchant is he who undertakes as his profession to buy or sell goods or paper securities in his own name on account of a third person.

[2] Thus, he acquires rights and assumes duties arising from the transaction. In this point he is different from a commercial agent, who sells and buys in the name of his principal.

[3] Art. 387 of the German Commercial Code provides that if a commission merchant brings a transaction to a more successful termination than was imposed on him by the principal, the latter takes all benefit.

A broker on the exchange is not a broker as defined in Art. 305, but a commission merchant within the meaning of the present section, since his business is to sell or buy goods or securities in his own name on account of other persons. Indeed, a broker on the exchange may buy or sell goods on his own account; however, this is not his principal business. Therefore, the present section is applicable to a broker on the exchange except where there are special provisions in the Exchange Act.

Article 314. By selling or buying on account of another, the commission merchant himself acquires rights against and assumes duties in favor of the other party.

As between the commission merchant and his principal, beside the provisions of this section, the provisions for attorneyship and agency are applicable.

Art. 392 of the German Commercial Code provides that claims arising out of business done by a commission merchant can only be sustained against debtors by a principal when they have been transferred to him by the commission merchant. Nevertheless, such claims, even without being transferred, are to be considered as claims of the principal in his relations with the commission merchant or with the latter's creditors.

Article 315. The commission merchant is himself responsible to his principal for the debt arising from selling or buying on account of the latter, if the other party to the transaction fails to perform the contract. But this provision is not applicable where there is a different manifestation of will or a different custom.

Since the principal cannot bring an action directly against the other party, the law imposes on the commission merchant the liability of a guarantor.

Art. 394, par. 1, of the German Commercial Code provides that a commission merchant is answerable for the carrying out of a contract by a third person with whom he has concluded the transaction on account of his principal, if he has undertaken this responsibility or it was the trade custom in the place when it was made.

Article 316. In case a commission merchant has sold goods for a lower price or bought them for a higher price than that fixed by his principal, if the commission merchant bears the difference, such selling or buying is valid against the principal.

Corresponds to Art. 386, par. 2, of the German Commercial Code.

Article 317. A commission merchant may make himself a vendor or vendee of the goods which he is to buy or to sell for his principal, if such goods are quoted on the exchange. In such cases the price is determined by the quotation on the exchange at the time when he notifies the principal that he becomes the vendor or vendee.[1]

Even in such case, the commission merchant may demand compensation from his principal.[2]

[1] This is an exception to the general principle of the Civil Code that a party cannot be an agent for both parties in the same juristic act. See Art. 108 of the Civil Code. Since the goods have a market value on the exchange, it is impossible for the commission merchant to commit a fraud to the prejudice of his principal.

Derived from Art. 400, pars. 1, 2 and 3, of the German Commercial Code.

[2] Corresponds to Art. 403 of the German Commercial Code.

Article 318. The provisions of Art. 286 are applicable where a principal refuses or is unable to accept the goods bought by a commission merchant in pursuance of the order of the principal.

Corresponds to Arts. 388, 389 of the German Commercial Code.

Article 319. The provisions of Arts. 37 and 41 are applicable to a commission merchant.

Corresponds to Arts. 384, par. 2, and 397 of the German Commercial Code.

Article 320. The provisions of this section are applicable to those who enter into transactions other than selling or buying in their own names on account of other persons.

For instance, a person undertakes an advertising business in his own name on account of other persons. Such person is called a quasi commission merchant.

Derived from Art. 406, par. 1, of the German Commercial Code.

SECTION 7.—FORWARDING AGENTS.

Article 321. A forwarding agent is he who undertakes as a business to forward goods in his own name [on account of other persons].

The provisions concerning commission merchants are applicable to forwarding agents unless there are special provisions in this section.

This article corresponds to Art. 407 of the German Commercial Code.

Article 322. A forwarding agent cannot be exempted from liability for loss, injury, or delay of the goods, unless he proves that he and his employees have not failed to use due care in receiving, delivering and safe-keeping the goods, in choosing carriers or other forwarding agents, and in other matters relating to the carriage of the goods.

Art. 408, par. 1, of the German Commercial Code reads as follows:—

"A forwarding agent is bound to bring to bear the care of a good business man in effecting the transport, especially in choosing carriers, shipowners, and intermediary forwarding agents; he must take care of the interests of the sender and obey his instructions."

Article 323. A forwarding agent may demand compensation as soon as the goods have been delivered to the carrier.[1]

When the amount of freight has been fixed by the forwarding contract, the agent cannot demand an extra compensation unless there is a special agreement.[2]

[1] Identical with Art. 409 of the German Commercial Code.

[2] Because in such case a compensation is usually included in the amount of freight fixed.

Identical with Art. 413, pars. 1 and 2, of the German Commercial Code.

Article 324. A forwarding agent may retain the goods only for the debts which are connected with such goods, such as the compensation, freight, and any other advance made for his principal.

Thus, his right of retaining goods is the same as that of a common carrier, but differs from that of a commercial agent, a commission merchant, or similar rights between traders. The sphere of the former is much narrower than that of the latter.

Art. 410 of the German Commercial Code provides that the forwarding agent possesses a right of lien over goods, for the price of transport, commission and out-of-pocket expenses for advances made for the goods to the extent that they are

in his possession or that he can dispose of them by means of bills of lading, freight and warrants.

Article 325. In case several agents are successively employed in forwarding the goods, each succeeding agent is obliged to exercise the rights of his predecessor.

In such cases, the successor having made payment to the predecessor acquires the rights of the latter.

For instance, when the first forwarding agent desires to exercise his right of lien on the goods which are in the hands of the second forwarding agent, the latter must retain such goods for the former. If the second agent pays the debt due to the first agent by the principal, the right of lien is transferred to the second agent.

This article is derived from Art. 411, pars. 1 and 2, of the German Commercial Code.

Article 326. A forwarding agent having made payment to the carrier acquires the rights of the latter.

For instance, the right of lien belonging to a carrier is transferred to the second forwarding agent, if he pays the debt due to the carrier by the first agent.

Derived from Art. 411, par. 3, of the German Commercial Code.

Article 327. A forwarding agent may make himself a carrier unless there is a special agreement. In such case, the forwarding agent has the same rights and duties as a carrier.

Identical with Art. 412 of the German Commercial Code.

Article 328. The responsibility of a forwarding agent is extinguished by prescription when one year has elapsed since the consignee received the goods.

In case the goods are totally lost, the time mentioned above begins to run from the day when he should have delivered the goods.

The provisions of the last two paragraphs are not applicable where the forwarding agent has acted in bad faith.

This article is identical with Art. 414, pars. 1, 3 and 6, of the German Commercial Code.

Article 329. Any claim of a forwarding agent against the principal or consignee is barred by prescription after one year has elapsed.

Article 330. The provisions of Arts. 338 and 343 are applicable to a forwarding agent.

SECTION 8.—COMMON CARRIERS.

Article 331. A common carrier is he who undertakes as a business to carry goods or passengers by land, rivers, lakes, harbors, or bays.

Art. 425 of the German Commercial Code provides that a carrier is he who, as a business, undertakes to bring about the carriage of goods by land, river, or inland water courses. But in Germany there is a statute as to carriage by river or inland water courses.

"Carriage by railway" is an independent section under the German Commercial Code. In Japan there are several statutes and ordinances in regard to railways, but no such section in the Commercial Code. The present section is also

applicable to a railway company, in the absence of special provisions in statutes and ordinances.

Carriage by sea is excluded from the present section, since it is the subject of the fifth book of the Code. The scope of the said "lakes, rivers, harbors and bays" is fixed by the minister of communication. See Art. 122 of the Code for the Carrying Out of the Commercial Code and the ordinances of the Department of Communication.

Sub-Section 1.—Carriage of Goods.

Article 332. On the application of the common carrier, the consignor of the goods shall furnish him with an invoice.[1]

An invoice shall contain the following particulars with the signature of the consignor:[2]—

1. The nature of the goods, their weight or bulk, and the nature of the packages, their number and marks.
2. The destination of the goods.
3. The name or trade name of the consignee.
4. The place where the invoice is made, and the date on which it is made.

[1] The purpose of the invoice is to give the consignee a chance to know the nature of the carriage contract.

[2] According to Art. 426 of the German Commercial Code, an invoice, besides the particulars mentioned in this article, must contain the name and address of the carrier; the description of the papers which must accompany the goods for the purposes of custom house, taxing office and police examination; provisions made for the rate of carriage, and if the latter has been paid in advance, a note of such payment; and any special agreements made on other points, especially regarding the time in which the transport is to be effected,

regarding the damages payable in the case of late delivery and the repayment of expenses due on the goods.

Article 333. On the application of the consignor, the common carrier shall furnish him with a way-bill.[1]

A way-bill shall contain the following particulars with the signature of the common carrier:[2]—

1. Those mentioned in Art. 332, par. 2, Nos. 1–3.
2. The name or trade name of the consignor.
3. The freight.
4. The place where the way-bill is made and the date on which it is made.

[1] A way-bill is a receipt for goods; it is identical with a bill of lading in marine commerce.

[2] A way-bill is a negotiable instrument. The rights and duties of the parties are determined only by the wording of the instrument. A valid way-bill must contain all the particulars mentioned in this article without a single omission.

This article is identical with Arts. 444 and 445 of the German Commercial Code, except that a way-bill under the German Code must contain the name and address of the carrier and the provisions relating to the price of transport and sums to be deducted from the goods, as well as, in the case of paying the cost of transport in advance, a memorandum noting such payment.

Article 334. When a way-bill has been made, the relationship between the common carrier and the holder of the bill in regard to the business of carriage is governed by the terms of the way-bill.

Art. 446 of the German Commercial Code reads as follows:— "The way-bill regulates the relationship between the

carrier and the consignee; the provisions of the contract of transport not set out in the way-bill have no effect as regards the consignee, unless such way-bill expressly refers to it. The relationship between the carrier and the sender is regulated by the contract of transport."

Article 335. The assignment of a way-bill by indorsement has the same effect as the assignment of the goods.

Corresponds to Art. 450 of the German Commercial Code.

Article 336. When the whole or part of the goods are destroyed by circumstances beyond the control of the parties, the common carrier cannot in so far as the goods have been destroyed demand the freight. If he has received the whole or part of the freight, he shall return it.

When the whole or part of the goods are destroyed by reason of their nature or defects or by the fault of the consignor, the common carrier may demand the whole amount of the freight.

Article 337. A common carrier cannot be exempted from liability for loss, injury or delay of the goods unless he proves that he himself, the forwarding agent,[1] their employees and any other persons occasionally employed for the carriage of the goods have not failed to use due care in receiving, delivering, safe-keeping, and carrying the goods.[2]

[1] A common carrier may be responsible for the act of a forwarding agent, in case they are jointly liable under Art. 339 *infra*.

[2] Art. 429, par. 1, of the German Commercial Code provides that a carrier is responsible for damage for loss or deterioration in value to goods from the moment he receives them till the time they are delivered, as well as for delay in delivery, unless such loss, deterioration, or delay result from circumstances which the precaution of a careful carrier could not avoid.

Art. 431 of the same Code provides that a carrier is responsible for an offence commited by his own servants or by other persons whom he may use to effect the carriage, to the same extent as if it were his own personal fault.

Article 338. A common carrier is not liable for damage for loss or injury to money, securities, or any other valuable property unless the consignor made a clear declaration of their nature and value when he applied for their carriage.

Identical with Art. 429, par. 2, of the German Commercial Code.

Article 339. In case several carriers are successively employed in carriage, they are jointly liable for the loss, injury or delay of the goods.

Art. 432 of the German Commercial Code reads as follows:—

"When a carrier has sent to another carrier goods whose transport he has undertaken to effect, so that the latter may continue such transport, the first carrier is responsible for the carriage till delivery to the consignee.

"The second carrier, by the sole fact of his taking over the goods and original invoice, accepts the conditions of the said invoice; he undertakes the personal responsibility of effecting the carriage according to such conditions.

"If one of the interested carriers paid indemnity by virtue of the preceding enactments, he has a right of action against the author of such damage.

"If the author of such damage cannot be discovered, each of the carriers is bound to share in paying for the damage in proportion to his share of the carriage, unless he can show that such damage was not done during such part of the carriage as was effected by him."

Article 340. When the goods are totally lost, the measure of damage is determined by the value at the destination of the goods on the day when the goods should have been delivered.

In case the goods are partially destroyed or injured, the measure of damage is determined by the value at the destination of the goods on the day when the goods were delivered. But in case of delay, the provisions of the previous paragraph are applicable.

The freight or other expenses which need not be paid on account of the loss or injury of the goods may be deducted from the amount of damages mentioned in the previous paragraphs.

Art. 430 of the German Commercial Code reads as follows:—

"When the contract stipulates that the carrier owes an indemnity for the total or partial loss of the goods, such indemnity will amount to the current trade value, or, in default of a current trade value, to the current value of goods of the same kind and the same nature in the locality and at the time delivery ought to have been made; a deduction must be made of what is saved on account of such loss in custom duty and other costs as well as charges for carriage.

"In case of damage the indemnity will consist of the differences between the selling value of the goods in their damaged condition and their current trade value or the current value of goods of the same kind and nature in the locality and at the time agreed upon for delivering them;

a deduction may be made of the saving effected upon custom house duty and other costs as well as charges for carriage.

"When damage results from the fraud or pure negligence of the carrier compensation for the whole damage may be demanded from him.

Article 341. When the goods are destroyed or injured through the malicious intent or gross negligence of the common carrier, he is responsible for full damages.

Derived from Art. 430, par. 3, of the German Commercial Code, *supra*.

Article 342. The consignor or the holder of a way-bill may require the common carrier to stop the carriage, to return the goods, or to make any other disposition of them. In such case, the common carrier may demand payment for the freight in proportion to the service already performed, for the advance made by him, or for any other expenses arising from such disposition.

The right of the consignor mentioned in the previous paragraph is extinguished as soon as the consignee demands the delivery of the goods after they arrive at their destination.

Art. 433 of the German Commercial Code reads as follows:—

"The sender may order the carrier to hold the goods, or return them, or deliver them to another consignee than the one indicated in the invoice. Any additional expense resulting from such orders must be paid to the carrier.

"The right of the sender over the goods is lost when, after the arrival of the goods at the place they are to be delivered, the invoice is sent to the consignee, or, if the latter, in con-

formity with Art. 435 brings an action against the carrier. In such case, the carrier must only follow the instructions of the consignee and is responsible for the goods to the latter."

Art. 428, par. 2, of the same Code reads as follows:—

"If the starting or continuation of the journey is temporarily hindered through no fault on the part of the sender, the latter may withdraw from the contract; he is, however, bound, if the carrier is not to blame, to indemnify him for the expense of preparing for the journey, of re-unloading and of the portion of the journey already accomplished. The amount of the indemnity is regulated by local custom; in default of local custom an indemnity according to the circumstances will be allowed."

Article 343. As soon as the goods arrive at their destination, the consignee acquires the rights of the consignor.[1]

When the consignee accepts the goods, he is obliged to pay the freight or any other expenses to the common carrier.[2]

[1] The expression that "the consignee acquires the rights of the consignor" does not mean that the rights of the consignor are transferred to the consignee; for after the goods have arrived and before the consignee has demanded their delivery the consignor still has a right to stop the carriage, to return the goods or to make any other disposition of them under Art. 342. The present provision is really a corrupted form of Art. 435 of the German Commercial Code which reads as follows:—

"After the arrival of the goods at the place of their destination, the consignee may maintain in his own name against the carrier, either in his own interest or in that of a third party, any rights arising from the contract of carriage, on condition that he himself has fulfilled all its conditions.

"He is especially entitled to ask the carrier to hand over the invoice and to deliver the goods."

"This right is lost when the sender has given instructions to the carrier contrary to those permitted by Art. 433." [See notes to Art. 342, *supra*.]

[2] Art. 436 of the German Commercial Code provides that by accepting the goods and the invoice, the consignee is bound to pay the carrier in accordance with the terms of such invoice.

Article 344. In case a way-bill has been made, delivery of the goods cannot be demanded unless the bill is surrendered.

Corresponds to Art. 448 of the German Commercial Code.

Article 345. If the consignee cannot be found, the common carrier may deposit the goods.

In such case, if the consignor fails to give orders to the carrier in regard to the disposition of the goods after the carrier has fixed a reasonable time and notified the consignor to give such orders within that time, the carrier may sell the goods by auction.

As soon as the carrier has deposited or sold the goods as mentioned above, he shall give notice to the consignor.

Art. 437 of the German Commercial Code reads as follows:—

"If the consignee of the goods cannot be found or refuses delivery, or if there is any obstacle to delivery, the carrier ought immediately to notify the sender and take his orders.

"If this, however, cannot be done owing to circumstances, or if the sender has delayed in giving his instructions, or if the order given cannot be executed, the carrier has the right to send the goods to a public warehouse or deposit them in any other place equally secure. He can, when the goods are liable to deteriorate by keeping, or if there is danger in delaying, have them sold in conformity with pars. 2 and 4 of Art. 373.

'When such consigning or sale has taken place, the carrier ought to immediately give notice to the sender and consignee unless such a thing is impossible. If he omits to do so, he is answerable in damages."

Article 346. The provisions of Art. 345 are applicable where the consignee refuses to accept the goods.

When the common carrier is about to sell the goods by auction he shall fix a reasonable time and notify the consignee to accept the goods within that time, after which time he shall then give the notification to the consignor as mentioned in Art. 345, par. 2.

In such case, the carrier must also give notice of the deposit or auction to the consignee without delay.

See notes to Art. 345, *supra*.

Article 347. The provisions of Art. 286, pars. 2 and 3, are applicable to the cases mentioned in Arts. 345 and 346.

See notes to Art. 345, *supra*.

Article 348. The responsibility of a common carrier is extinguished when the consignee accepts the goods without condition and pays the freight and other expenses. But this rule is not applicable when, in the case of injury or partial loss which cannot be discovered at once, notice thereof is given to the carrier within two weeks from the day of delivery.

These provisions are not applicable when the carrier has acted in bad faith.

This article is derived from Art. 438 of the German Commercial Code.

Article 349. The provisions of Arts. 324, 325, 328 and 329, are applicable to a common carrier.

Except in the case of Art. 329, this article is derived from Arts. 440, 441, 442 and 439 of the German Commercial Code.

Sub-Section 2.—Carriage of Passengers.

Article 350. A carrier of passengers cannot be exempted from liability for any injury suffered by a passenger through the carriage unless he proves that he and his employees have not failed to use due care in the carriage.

In determining the measure of damages the court must take into consideration the circumstances of the party injured and of the members of his family.

There is no separate section for carriage of persons in the German Commercial Code, except that Art. 472 of that Code provides that provisions relating to the transport of persons effected by railways are determined by the regulations affecting railway traffic.

Article 351. A carrier of passengers is responsible as a carrier of goods for the baggage which has been delivered to him by a passenger, even though a separate freight is not charged.

The provisions of Art. 286 are applicable where the passenger does not demand the delivery of the

baggage within one week from the day when it arrives at its destination, but it is unnecessary to give a notification or notice to a passenger whose residence or temporary residence is unknown.

Article 352. If a passenger's baggage has not been delivered to the carrier, the carrier is not responsible for its injury or loss, unless he or his employees have committed a fault.

SECTION 9.—DEPOSIT.

Sub-Section 1.—General Provisions.

Article 353. When a trader receives a deposit in the course of his business, he shall use the due care of a good manager even though he receives no compensation.

The provisions of Arts. 353–356 are special provisions for a trader who in the course of his business receives things for safekeeping. Perhaps it is improper to call them general provisions for deposit, since they are in no way connected with the warehousing business. There are no such provisions in the German Commercial Code.

Article 354. A proprietor of a hotel, restaurant, bath, or any other place for the purpose of entertaining guests cannot be exempted from liability for the loss or injury of the things which the guests have deposited with him, unless he proves that such things have been lost or injured by unavoidable circumstances.

When things are lost or injured which a guest has brought with him, even though they have not been

deposited with the proprietor, he is liable if they have been lost or injured through the negligence of himself or his employees.

The proprietor cannot be exempted from liability by a notice that he will not be responsible for things brought by the guests.

Article 355. The proprietor is not responsible for the loss of or injury to money, securities or any other valuable property unless the guest has deposited them with the proprietor with a clear declaration of their nature and value.

Article 356. The liability mentioned in Arts. 354 and 355 is extinguished by prescription when one year has elapsed since the proprietor returned the things deposited or the guest took away the things which he had brought.

If the things are totally lost, the period of time mentioned in the last paragraph begins to run from the time when the guest leaves the place.

The provisions of the last two paragraphs are not applicable where the proprietor has acted in bad faith.

Sub-Section 2.—Warehousing.

Article 357. A warehouseman is he who undertakes as a business to keep goods in a warehouse for other persons.

Identical with Art. 416 of the German Commercial Code.

Article 358. On the application of the depositor, the warehouseman shall furnish him with a *récépisse* and a *warrant* for the goods deposited.

The provision for two instruments is derived from the law of France, Belgium, Hungary, Italy and Austria. The *récépisse* represents the rights of ownership in the goods deposited and is issued for the purpose of facilitating the depositor in making an assignment of the goods; the *warrant* is an instrument issued for the purpose of facilitating the depositor in making a pledge of the goods. The warehouseman must issue the two instruments at the same time and to the same depositor. The depositor or the holder of the two instruments may pledge the goods by an indorsement of the *warrant* and subsequently may sell his remaining rights in the goods by an indorsement of the *récépisse*. He may dispose of the two instruments at the same time; but he cannot dispose of a single *warrant* after the *récépisse* has been indorsed to the vendee, or in other words, he cannot sell the complete title of the *récépisse* without the surrender of the *warrant*.

Those provisions of the present section relating to the *récépisse* and the *warrant* are not derived from the German Commercial Code. The Codes of Germany and Spain adopt the *Einscheinsystem:* that is, one instrument system. They recognize the issuing of the *récépisse*, but not the other instrument which is for the sole purpose of pledging the goods. Thus, if the depositor wants to pledge the goods, he may indorse the *récépisse:* but after pledge, he can no longer sell his remaining rights by an indorsement of the *warrant* as under the French system.

Article 359. A *récépisse* and a *warrant* shall contain the following particulars, bearing a serial number and signed by the warehouseman:—

1. The nature of the goods received, their quality, and quantity, and the nature of the packages, their number and marks.
2. The name or trade name of the depositor.
3. The place where the goods are kept.

4. The charge for keeping the goods.

5. If the period of time for which the goods are to be kept has been fixed, such period.

6. If the goods received have been insured, the amount insured, the period of time for which the insurance is effected, and the name or trade name of the insurer.

7. Where and when the instruments were made.

Article 360. When a warehouseman has furnished the depositor a *récépisse* and a *warrant*, he shall enter the following particulars in his books:—

1. Those mentioned in Art. 359, Nos. 1, 2, and 4–6.

2. The serial number of the instruments and the date on which they were made.

It is not only the duty of a warehouseman arising from Art. 25 *supra*, but is also necessary in the case of Art. 366 *infra*, where the instruments are lost.

Article 361. The holder of a *récépisse* and of a *warrant* may require the warehouseman to divide the goods deposited and to furnish him with a separate *récépisse* and a *warrant* for each part thus divided. In such case, the holder shall return the original *récépisse* and *warrant* to the warehouseman.

The holder must bear the expenses arising from the division of the goods and from furnishing the new instruments.

Article 362. When a *récépisse* and a *warrant* have been made, the relationship between the warehouseman and the holder in regard to the business of

warehousing is governed by the terms of the instruments.

See Art. 334 and notes.

Article 363. When a *récépisse* and a *warrant* have been made, the goods deposited cannot be disposed of unless by means of the instruments.

Article 364. Even though a *récépisse* and a *warrant* are issued to a particular person designated in the instruments, they may be transferred or pledged by indorsement, unless indorsement is expressly prohibited by the wording of the instruments. So long as the holder of a *récépisse* has not used the *warrant*, he shall not separately assign the two instruments to different persons.

There are two ways, either of which may be taken by the holder of the two instruments: he may indorse the *récépisse* and at the same time surrender the *warrant* to the indorsee; or he may first indorse the *warrant* to one person and then indorse the *récépisse* to another. But he cannot first indorse the *récépisse* to one person and then indorse the *warrant* to another, for as soon as he indorses the *récépisse*, he has no longer any rights in the goods deposited.

Article 365. The assignment of a *récépisse* by indorsement has the same effect as the assignment of the goods deposited.

Art. 424 of the German Commercial Code reads as follows:—

"When a warehousekeeper has given a warehouse receipt transferable by indorsement, and has taken the goods on deposit, the handing over of the warehouse receipt to him who, by virtue of such receipt, has the right to take over such

goods, confers the same rights of property in the goods as the delivery of the goods themselves."

The said receipt is the only warehouse instrument recognized by the German Code and this article is the only provision for a warehouse instrument under that Code.

Article 366. When a *récépisse* or a *warrant* has been lost, its holder may require the warehouseman to furnish him a new one, provided he gives an adequate security. In such case, the warehouseman shall enter the fact in his books.

Article 367. When the first indorsement for the purpose of pledge is made, the amount of the debt, its interest, and the time of payment, shall be inserted in the *warrant*.

Unless the amount of the debt, its interest and the time of payment have been inserted in the *récépisse* and the *récépisse* has been signed by the first pledgee, he cannot set up his right of pledge against third parties.

For instance: A, the holder of the two instruments, indorses the *warrant* to B for a certain debt due B. B, owing to his ignorance, does not insist on inserting in the *récépisse* the amount of the debt, its interest, the time of payment and his signature. A afterwards indorses the *récépisse* to C, who, judging from the face of the instrument, believes that A has a complete title to the goods, and, owing to his negligence, fails to demand the surrender of the *warrant*. A, after thus receiving double value for the goods, becomes a bankrupt. B, the pledgee of the goods, tries to sell the goods for the debt. C, the holder of the *récépisse*, sets up his claim as owner of the goods. C has a good title to the goods under the present article.

Article 368. If a holder of a *warrant* cannot get payment when the debt is due, he shall have a protest made in accordance with the provisions for bills, notes and checks.

A protest is made by a notary public or a sheriff on the application of the holder of the instrument. See Arts. 514–517, *infra*.

Article 369. The holder of the *warrant* cannot require the goods to be sold by auction before a week has elapsed from the day on which the protest is made.

The reason is, that during this period of time the holder of the *récépisse* may have a chance to know that the goods will be sold by the pledgee.

Article 370. The warehouseman, after deducting the expenses of the auction, the taxes imposed on the goods, the charge of the warehouse, and other expenses or advances from the amount of money acquired from the auction, shall pay the remaining amount to the holder of the *warrant* on the surrender of the instrument.

If any surplus shall remain after deducting the amount of the said expenses, taxes, charges and advances, as well as the amount of the debt paid to the holder of the *warrant* with interest and the expenses of the protest, the warehouseman shall pay the surplus to the holder of the *récépisse* on the surrender of the instrument.

Art. 421 of the German Commercial Code provides that a warehousekeeper has a right of lien on the goods for warehousing exprenses, so far as he has them in his possession, and

can dispose of them by means of bills of lading, freight bills or warrants.

Article 371. If the money acquired from the auction is not sufficient to pay the whole amount of the debt designated in the *warrant*, the warehouseman shall enter the amount paid to the holder on the instrument, and return it to the holder, and at the same time the warehouseman shall enter the fact in his books.

Article 372. The holder of a *warrant* must first receive payment out of the goods deposited, and if not satisfied, he may demand the shortage from the debtor and the other indorsers.

Article 373. If the holder of a *warrant* who is not paid when the debt is due, fails to have a protest made or fails to apply for the sale of the goods by auction within two weeks after making the protest, he loses his claim against the indorsers.

The holder has a right to demand payment from any one of the indorsers.

Article 374. The claim of a holder of a *warrant* against the debtor and the other indorsers is barred by prescription if the holder does not exercise his right for one year from the time when the debt was due.

Article 375. A depositor or a holder of a *récépisse* may at any time within business hours require the warehouseman to let him examine the goods, take

samples, or make any dispositions necessary for the preservation of the goods.

A holder of a *warrant* may at any time within business hours require the warehouseman to let him examine the goods.

Art. 418 of the German Commercial Code provides that the warehousekeeper must allow the depositor during office hours to examine the goods, take samples and take all necessary precautions for their safety.

Article 376. A warehouseman cannot be exempted from liability for the loss or injury of the goods deposited unless he proves that he and his employees have not failed to use due care in keeping the goods.

Article 377. A warehouseman cannot demand payment of compensation, advances and other expenses for the goods deposited unless he makes the demand at the time when the goods are taken out of the warehouse. But in case part of the goods are taken out, he may demand a proportional amount.

Art. 420 of the German Commercial Code reads as follows:—

"A warehousekeeper has the right to the agreed rent, or the rent usual in the locality where the warehouse is, to reimbursement for transport and custom house expenses, as well as to money spent on account of the goods to the extent that he has considered circumstances demanded it.

"Among the sums due to a warehousekeeper, disbursements made in ready money must be immediately repaid.

"The other warehousing expenses must be paid three months after the delivery of the goods, or, if they are withdrawn before, at the time of such withdrawal.

"When the goods are only partially withdrawn, only a proportionate amount of expenses are to be paid, unless the goods remaining on deposit are enough to cover warehousing expenses."

Article 378. If the period of keeping the goods has not been fixed by the parties, a warehouseman shall not return the goods unless six months have elapsed from the day when they were stored in the warehouse. But in case of necessity, he can return them at any time.

Art. 422, par. 1, of the German Commercial Code reads as follows:—

"A warehousekeeper cannot ask a depositor to take back his goods before the expiration of the time agreed on, and if no time has been agreed upon, before the expiration of three months from delivery. If a certain period of time has not been agreed on, or if the depositor has kept the goods at the warehouse beyond the time agreed on, he can only demand the taking away of the goods after one month's notice."

Article 379. When a *récépisse* and a *warrant* have been made, the return of the goods cannot be demanded unless the instruments are surrendered.

Article 380. A holder of a *récépisse*, though before the debt designated in the *warrant* is due, may deposit with the warehouseman the whole sum of the debt with interest to the time of maturity and require the goods to be returned to him.

The amount deposited according to the previous provision shall be paid to the holder of the *warrant* on the surrender of the instrument.

The holder of the *récépisse* may make payment to the holder of the *warrant* with interest to the time of maturity and require him to surrender the *warrant*. But since the *warrant* is negotiable, it is often no easy matter to find its holder.

Article 381. The provisions of Art. 286 are applicable when a depositor or a holder of a *récépisse* refuses, or is unable to receive the goods deposited.

Article 382. The provisions of Art. 348 are applicable to a warehouseman.

Article 383. The responsibility of a warehouseman for the loss or injury of the goods deposited is extinguished by prescription after one year has elapsed from the day when the goods were taken out from the warehouse.

In case the goods are totally lost, the period of time mentioned above begins to run as soon as the warehouseman gives notice thereof to the holder of the *récépisse*, or if such holder is unknown, to the depositor.

The provisions of the previous paragraphs are not applicable where the warehouseman has acted in bad faith.

This article is derived from Art. 423 of the German Commercial Code.

SECTION 10.—INSURANCE.

Sub-Section 1.—Insurance Against Loss.

A.—General Provisions.

Article 384. A contract of insurance against loss is completed when one party agrees to indemnify

the other for a loss arising from a certain accident, and the other party agrees to pay a premium.

There are no provisions for insurance in the book of commercial transactions of the German Commercial Code. However, most of the provisions of the present section, except those relating to fire insurance, carriage insurance and life insurance, are derived from the German Commercial Code, Book IV, Maritime Commerce, Section 10, Marine Insurance.

Book V, Section 5, *infra*, relates to Marine Insurance, but the general provisions of this section are also applicable to Marine Insurance.

Article 385. Only such an interest as can be estimated in money may be the subject of a contract of insurance.

Art. 778 of the German Commercial Code provides that any interest that can be estimated in money, which any one has in a ship, may be the subject of a marine insurance.

Article 386. If the sum insured exceeds the value of the subject-matter of insurance, the excess amount is void.

Art. 786 of the German Commercial Code reads as follows:—

"The insurance value of the insured article is its full value.

"The amount insured for cannot be more than the value of the thing insured.

"The insurance has no legal value for the amount that the sum insured for exceeds the value of the thing insured."

Article 387. In case two or more contracts of insurance are made on the same subject-matter and at the same time, and the sums insured exceed the value of the subject-matter, each insurer is respon-

sible for an amount in proportion to the sum respectively insured by him.[1]

When the dates of such contracts are the same, the contracts are presumed to have been made at the same time.[2]

[1] For instance: the value of the insurable interest is $5,000. The sum insured by A is $4,000 and at the same time the interest is insured by B for the sum of $3,000. A is only responsible for 4/7 of $5,000 and B for 3/7 of $5,000.

[2] This article is identical with Art. 787 of the German Commercial Code.

Article 388. When two or more contracts of insurance are made after one another, the prior insurer is first responsible for the loss. If the amount insured by the prior insurer is not sufficient to cover the whole loss, the subsequent insurer is responsible.

Corresponds to Art. 788 of the German Commercial Code.

Article 389. When the whole insurable interest has been insured, a subsequent contract of insurance may be made in the following cases:—

1. When it is agreed that the right against the prior insurer shall be transferred to the subsequent insurer.

2. When it is agreed with the subsequent insurer that the whole or part of the right against the prior insurer shall be waived.

3. When the subsequent contract is on the condition that the prior insurer fails to indemnify for the loss.

Because in these cases the insured can never get a double amount of indemnity, and it is necessary for him to make a subsequent contract of insurance in case he thinks the prior insurer is not reliable.

Corresponds to Art. 789 of the German Commercial Code.

Article 390. When two or more contracts of insurance are made at the same time or after one another, the waiving of the right against one of the insurers has no effect on the rights or the obligations of the other insurers.

Because, otherwise, the prior insurer might conspire with the insured to the prejudice of the subsequent insurer, or in case one of the insurers becomes insolvent, the insured would waive his right against him and throw a burden upon the other insurer.

Identical with Art. 791 of the German Commercial Code.

Article 391. When part of the insurable interest has been insured, the insurer is responsible for the loss according to such proportion as the sum insured bears to the value of the subject-matter.

For instance: the insurable interest is $1,000. The sum insured is $800. The interest is partly lost and its value is reduced to $500. The insurer is responsible for $400. Thus: $\frac{\text{Sum insured}}{\text{Insurable interest}} \times \text{amount of loss} = \text{amount indemnified by}$ the insurer.

Identical with Art. 792 of the German Commercial Code.

Article 392. When the value of the subject-matter has been greatly diminished during the continuance of insurance, the *preneur* may require the insurer to reduce the sum insured and the premium.

But the reduction of the premium is valid only for the future.

If a commission merchant makes a contract of insurance with an insurance company on behalf of his principal, the company is the insurer, the principal is the insured, and the merchant is the *preneur d'assurance*. If the merchant makes the contract on his own account, he is still the *preneur*, but at the same time he is the insured. Thus, the word *preneur* under this Code applies to a person who makes a contract of insurance either for himself or for third persons, or, in other words, who may or may not be the insured.

Article 393. The amount of the loss for which the insurer is to indemnify is determined by the value at the place where and at the time when the loss happened.[1]

The expenses necessary for the calculation of the loss must be borne by the insurer.[2]

[1] See Arts. 656 and 657, *infra*, and their notes.

[2] Identical with Art. 834, par. iv, of the German Commercial Code.

Article 394. When the parties have determined the value of the subject-matter, the insurer cannot demand a reduction of the amount of indemnity unless he proves that the value is exceedingly exaggerated.

Derived from Art. 793, pars. 1 and 2, of the German Commercial Code.

Article 395. An insurer is not responsible for a loss caused by war or any insurrection, unless there is a special agreement between the parties.

According to Arts. 820, 848 and 849 of the German Commercial Code, an insurer takes all the risks to which the ship or cargo is exposed during the insurance, and especially he takes the risks of war and orders of the authorities, unless the parties have agreed to the contrary. See Art. 654, *infrar*, and its notes.

Article 396. An insurer is not responsible for a loss caused by the nature or the defects of the subject-matter, or by its natural wear and tear, or by the malicious intention or gross negligence of the *preneur* or the insured.

Derived from Art. 821, pars. 1, iii and iv, of the German Commercial Code.

Article 397. If at the time of making a contract of insurance, one of the parties or the insured knows that the accident will not happen or that the accident has already happened, such contract shall be void.

Corresponds to Art. 785 of the German Commercial Code.

Article 398. If at the time of making a contract of insurance, the *preneur* by his malicious intention or gross negligence conceals certain material facts or makes a misrepresentation in regard to such material facts, such contract shall be void, unless the insurer knows the facts or ought to know them.

Derived from Arts. 806, 807 and 808 of the German Commercial Code.

Article 399. In case a contract of insurance is totally or partly void, the *preneur* and the insured

acting in good faith and without gross negligence, the insured may require the insurer to return the whole or part of the premium already paid.

Corresponds to Art. 895 of the German Commercial Code.

Article 400. In case the parties to a contract of insurance have fixed a particular amount of premium for a particular risk, if such risk is extinguished during the continuance of insurance the *preneur* may require the premium to be reduced for the future.

Article 401. A contract of insurance may be made on behalf of another person. In such case the *preneur* is liable to the insurer for the payment of the premium.

Derived from Arts. 781, par. 1, and 812, par. 2, of the German Commercial Code.

Article 402. If a *preneur* making a contract of insurance on behalf of another person without having any authority from him does not disclose such fact to the insurer, the contract shall be void.[1] If such fact is disclosed, the insured immediately acquires the benefit of the contract.[2]

[1] The purpose of this provision is to prevent a wager insurance.

Art. 782, par. 2, of the German Commercial Code provides that in the absence of this notice to the insurer, the want of previous authority cannot be rectified by the fact that the insured afterwards accepts the contract of insurance.

[2] Art. 782, par. 3, of the German Commercial Code provides that when such notice has been given, the obligation of the

insurer, so far as the insurance is concerned, does not depend upon the subsequent acceptance by the insured.

Article 403. On the application of the *preneur*, the insurer shall furnish him with a policy.

The policy shall contain the following particulars with the signature of the insurer:—

1. The subject-matter of insurance.
2. The risk taken by the insurer.
3. The value of the subject-matter, if fixed.
4. The sum insured.
5. The premium and the method of its payment.
6. If the duration of the insurance contract has been fixed, its beginning and its end.
7. The name or the trade name of the *preneur*.
8. The date of the contract.
9. The place where and the date when the policy was made.

Corresponds to Art. 784 of the German Commercial Code.

Article 404. If the insured assigns the subject-matter of insurance, it is presumed that the rights under the contract of insurance have been assigned at the same time.

If the risk is greatly changed or increased by such assignment, the contract of insurance becomes void.

Art. 899, pars. 1 and 2, of the German Commercial Code reads as follows:—

"When a thing that has been insured is alienated, rights belonging to the assured in the terms of the insurance contract, even with reference to future accidents, may be transferred to the new owner; such transfer authorizes the new owner to enforce all claims against the insurer, as if no alienation

had taken place and as if the assured himself were enforcing his claims.

"The insurer is not liable for risks which would not have arisen if alienation had not taken place."

Article 405. When the insurer is adjudged bankrupt, the *preneur* may require an adequate security to be furnished or he may terminate the contract of insurance.

If the *preneur* chooses to terminate the contract, such termination is valid only for the future.

The provisions of the previous paragraphs are applicable where the *preneur* is adjudged bankrupt, unless he has paid up the whole amount of the premium.

Art. 898 of the German Commercial Code reads as follows:—

"Should the insurer become insolvent, the assured can, at his option, either retire from the contract, or re-demand or retain all the premium, or make another contract at the expense of the insurer.

"He, however, can make no use of this right if there is sufficient guarantee that the obligations of the insured will be fulfilled, before he has retired from the contract or made a new one."

Article 406. When a *preneur* making a contract of insurance on behalf of another person is adjudged bankrupt, the insurer may require the insured to pay the premium, unless the insured has waived the rights under the contract of insurance.

Corresponds to Art. 812, par. 3, of the German Commercial Code.

Article 407. Before the responsibility of the insurer begins to run,[1] the *preneur* may terminate or reform the contract of insurance.[2]

[1] For instance, in the case of carriage insurance, the risk begins to run as soon as the carrier receives the goods. See Arts. 423, 659 and 660, *infra*.

[2] Art. 897 of the German Commercial Code provides that there can be no cancelling when the risks have already begun to run for the insurer.

Article 408. If, before the responsibility of the insurer begins to run, circumstances are changed, but not by the act of the *preneur* nor by that of the insured, into such a condition that the risk taken by the insurer for the whole or part of the subject-matter will not arise, the insurer shall refund the whole or part of the premium already received.

For instance: in the case of carriage insurance, before the goods are delivered to the railway company, the railway is destroyed by flood and the carriage becomes impossible. In such a case, the insured may require the premium to be refunded.

Art. 894, par. 1, of the German Commercial Code reads as follows:—

"When the assured abandons altogether or in part, the undertaking for which the insurance was effected, or without his assistance, the thing insured, or any part of it, does not find itself exposed to the risks incurred by the insurer, the premium may be re-demanded or retained in whole or in part, subject to compensation due to the insurer."

Article 409. In cases falling under Arts. 407 and 408, the insurer may claim a compensation equal to one half of the premium refunded.

Art. 894, par. 2, of the German Commercial Code reads as follows:—

"Such compensation (cancelling dues), apart from agreement to the contrary or local custom where the contract was made, consists in one half per cent of the whole sum insured, or of a proportionate part of the latter, and if the premium does not amount to one per cent of the sum insured, in one half of the entire premium or a proportionate part of it."

Article 410. If the risk taken by the insurer is greatly changed or increased during the continuance of insurance through the fault of the *preneur* or the insured, the contract of insurance becomes void.

Article 411. If the risk taken by the insurer is greatly changed or increased during the continuance of insurance without the fault of the *preneur* or the insured, the insurer may terminate the contract of insurance. But such termination is valid only for the future.

In such case, if the *preneur* or the insured has knowledge of the fact that the risk has been greatly changed or increased, he must without delay give notice thereof to the insurer. If he neglects to do so, the insurer may consider the contract of insurance as void since the change or increase of the risk.

If the insurer has received such notice or has had knowledge of the change or increase of the risk, and he does not terminate the contract of insurance without delay, he shall be treated as if he had confirmed the contract.

Article 412. On the happening of a loss caused by the risk taken by the insurer, the *preneur* or the

insured having knowledge of such loss shall give notice thereof to the insurer without delay.

Art. 818 of the German Commercial Code reads as follows:—"Every accident, directly the contracting party, or the assured if he knew of the insurance, receives news of, ought to be notified to the insurer, in default of which the insurer is authorized to deduct from the indemnity such amount by which it might have been reduced if notice had been given in good time."

Article 413. When the subject-matter of insurance suffers a loss for which the insurer is liable, he cannot be exempted from liability even if the subject-matter is afterwards destroyed by a risk for which he is not liable.

Identical with Art. 844 of the German Commercial Code.

Article 414. The insured must make every effort to prevent a loss, but the insurer is liable for the necessary or useful expenses and advances made for that purpose, even though the amount of such expenses and advances exceeds the sum insured.

In case the insurer is liable under this article, the provision of Art. 391 is applicable.

According to Arts. 840 and 834 of the German Commercial Code, the insurer is not liable to compensate for damage except to the amount of the sum insured, but he is bound to reimburse the necessary expenses which have been incurred for salvage or for avoiding greater damage, even if the total indemnity exceeds the sum insured, and the measures taken have no effect.

Article 415. In case the subject-matter of insurance is totally destroyed, if the insurer pays up the

sum insured he acquires the rights which the insured had in the subject-matter. But in case only part of the insurable interest has been insured, the insurer is entitled to the rights in such proportion as the sum insured bears to the value of the subject-matter.

Article 416. In case a loss is caused by a third person, if the insurer pays the whole amount of indemnity to the insured he acquires the rights of the *preneur* or the insured against the third person up to the limit of the amount paid by him.

If the insurer pays part of the amount of indemnity to the insured, he can exercise his right against the third person only so far as the right of the *preneur* or the insured is not injured.

Corresponds to Art. 804 of the German Commercial Code.

Article 417. The obligation to pay the sum insured is barred by prescription after two years have elapsed, and the obligation to pay the premium is barred after one year.

Art. 905 of the German Commercial Code provides that claims of the insurer and the insured arising out of the contract of insurance are lost after five years.

Article 418. The provisions of this sub-section are applicable to mutual insurance unless by its nature their application is impossible.

For instance: according to Art. 404 of this Code, if the insured assigns the subject-matter of insurance, it is presumed that the rights under the contract of insurance have been assigned at the same time; but Art. 40 of the Law of Insurance Business provides that when a member of a mutual insurance

company assigns the subject-matter, the assignee, only after obtaining the agreement of the company, acquires the rights and obligations of the consignor.

B.—Fire Insurance.

Article 419. The insurer is responsible for any loss caused by fire irrespective of its origin, except in the cases of Arts. 395 and 396.

Article 420. The insurer is responsible for any loss to the subject-matter of insurance caused by necessary measures taken for the purpose of extinguishing or avoiding the fire.

Article 421. If a hirer or any other bailee has effected an insurance on the thing bailed for the purpose of receiving an indemnity to cover his liability to pay damages, the owner may directly claim such indemnity from the insurer.

Article 422. In addition to the particulars mentioned in Art. 403, par. 2, a policy of fire insurance shall contain the following facts:—

1. The location and construction of the building insured, and the purpose for which the building is used.

2. If movables are insured, the building in which they are contained must be described in accordance with No. 1.

C.—Carriage Insurance.

Article 423. The insurer is responsible for any loss incurred after the carrier receives the goods

and before they are delivered to the consignee, unless there is a special agreement between the parties.

Article 424. When goods in transit are insured, the insurable interest is their value at the place and time of shipping together with the freight to their destination and other expenses.[1]

Any profit to be made by the arrival of the goods is included in the insurable interest only in case there is a special agreement between the parties.[2]

[1] Same as Art. 657, *infra*. See notes thereto.

[2] Same as Art. 658, *infra*. See note thereto.

Article 425. In addition to the particulars mentioned in Art. 403, par. 2, a policy of carriage insurance shall contain the following facts:—

1. The route and the method of the carriage.
2. The name or the trade name of the carrier.
3. The place where the goods are to be received and delivered.
4. If the period of carriage is fixed, such period.

Article 426. A contract of carriage insurance does not become void, even if under necessity such carriage has been interrupted for a time or the route or the method of carriage has been changed, unless there is a special agreement between the parties.

Sub-Section 2.—Life Insurance.

Article 427. A contract of life insurance is completed when one party agrees to pay a certain amount

of money on the death or living of the other party or of a third person and the other party agrees to pay a premium.

Article 428. The person to receive the sum insured shall be the insured himself, or his heir[1] or relative.[2]

Only a relative of the insured can be an assignee of the rights arising from a contract of life insurance.

If the person to receive the sum insured dies, or his relation to the insured no longer exists, the *preneur* may appoint another person to receive the sum, or require the amount accumulated[3] for the insured to be paid back.

If the *preneur* dies without having exercised the rights mentioned in the last paragraph, the insured is to receive the sum insured.

[1] In order to know who is heir, it is necessary to have a clear knowledge of the organization of a Japanese family. A Japanese family is much more complicated than a European or American family. It consists of a head, his spouse and his relatives, who are living in his house. Sons or even grandsons with their wives usually live with their parents or grandparents. The head of the family is responsible for supporting all the members of the family and at the same time has certain power over them.

The head of the family may be compared to the king of a monarchical government. When he dies, he is succeeded by one heir. This heir is fixed by law according to the following rules:—

1. A child is superior to a grandchild.
2. A male child is superior to a female child.
3. A female child by a legal wife is superior to a male bastard.

4. If there are two children, or two male children, or two children by a legal wife, the elder is superior.

Thus, the eldest son of the head of the family is usually the heir to the headship. If a rich man dies, his eldest son may acquire all the property and the younger son may be a poor man living at the mercy of his elder brother. In case a daughter becomes the head of the family, she may bring her husband to the family and exercise the power of a head over him. However, in the absence of special terms in the marriage contract, the husband will become the head of her family.

In former times, the power of the head of the family was absolute. All the property of the family was the property of the head, even though it might have been earned by some of the members. But since the Civil Code was enforced, the power of the head has been more or less limited. Now, a member of the family, who may be a son or a grandson or any relative of the head, has a right to have separate property. In this respect the development of Japanese law has been somewhat similar to the development of the rights of married women in limitation of the rights of their husbands at the common law. If such a member dies, his property will be divided among his children, and if there are no children, among his grandchildren. Thus, if he has several children, all the children are heirs to his property.

In consequence, there are two kinds of heirs under the Japanese Civil Code: (1) heir to the headship of a family; (2) heir to the property left by a person deceased. The law concerning the former is entirely based on the oriental custom, but the law concerning the latter is similar to the modern European laws.

[2] According to the Civil Code, the word "relative" includes,—

1. Relationship by blood to the sixth degree;
2. Spouse;
3. Relationship by marriage to the third degree;
4. Relationship between an adopted parent and an adopted child;

5. Relationship between a step-parent and a step-child;

6. Relationship between a legal wife and a recognized bastard.

The calculation of the degree is based on the Roman system; that is, the relationship between parent and child is the first degree, and between grandparent and grandchild is the second degree, and so forth; the relationship between brother and brother is the second degree, because the relationship between one brother and the common parents being the first degree, and between the common parents and the other brother being also the first degree, two first degrees make a second degree; the relationship between cousin and cousin is the fourth degree, because the relationship between one cousin and the common grandparents being the second degree and between the common grandparents and the other cousin being also the second degree, two second degrees make a fourth degree, etc.

Though the limitation of the degree of relationship does not differ very much from the European system (in Spain and Belgium also the sixth degree; in Italy, to the tenth degree; in France and Holland, to the twelfth degree; in Germany no such limitation), degrees of consanguinity in Japan are much broader than those in Europe. The Japanese not only recognize the degrees of consanguinity by nature, but also recognize the degrees of consanguinity by law; that is, the relationship between an adopted parent and an adopted child, the relationship between a step-parent and a step-child, and the relationship between a legal wife and a recognized bastard, a bastard, when recognized, being considered as a child of the father and at the same time as a child of the father's legal wife.

Relationship by marriage is confined to the third degree. Thus, the great-grandfather of a husband is still a relative to the wife and the great-grandfather of a wife is still a relative to the husband; but the great-grandfather's father of a husband is not a relative to the wife and *vice versa*.

[3] In case of life insurance, the insurer is not allowed to take the whole amount of the premium as in case of an insurance against loss, but he must reserve a certain amount of the premium as a reserved fund for the insured. If the insurer is exempted from liability under Arts. 395, 431, par. 2, and 433, par. 2, or on the termination of the contract of insurance, he must return such fund to the insured. See Art. 6 of the Law of the Insurance Business and Arts. 15–21 of the Regulations for the Insurance Business.

Article 429. If at the time of making a contract of life insurance, the *preneur* or the insured by his malicious intention or gross negligence conceals certain material facts or makes a misrepresentation in regard to such material facts, such contract shall be void, unless the insurer knows the facts or ought to know them.

Article 430. In addition to the particulars mentioned in Art. 403, par. 2, a policy of life insurance shall contain the following facts:—

1. The nature of the contract of life insurance.
2. The name of the insured.
3. If the person to receive the sum insured has been appointed, the name of such person and his relation to the insured.

Article 431. The insurer is not responsible for the payment of the sum insured in the following cases:—

1. When the death of the insured is in consequence of suicide, duel, or any other criminal act, or is the result of an execution of a capital sentence.
2. When the person to receive the sum insured

has intentionally caused the death of the insured. But if such person is to receive part of the sum, the insurer cannot be exempted from liability to pay the other part.

In the case of No. 1, the insurer shall pay back the amount accumulated for the insured.

Article 432. When the *preneur* or the person to receive the sum insured has knowledge of the death of the insured, he shall give notice thereof to the insurer without delay.

Article 433. The provisions of Arts. 395, 397, 399–401, 403, par. 1, 405–407, 410, 411, 417 and 418 are applicable to life insurance.

When, in cases falling under Arts. 395, 405, 407, 410 and 411, the insurer need not pay the sum insured, he shall pay back the amount accumulated for the insured.

BOOK IV.

NEGOTIABLE PAPER.

SECTION 1—GENERAL PROVISIONS.

Article 434. Negotiable paper within the meaning of this Code includes only bills of exchange, promissory notes and checks.

In France the law pertaining to bills and notes is a part of the Commercial Code, but in Germany there is a separate statute.

Article 435. A person who has signed a paper[1] is responsible according to the language of such paper.[2]

[1] Throughout this Book the expression "paper" is used rather than the somewhat awkward phrase "negotiable paper" or "negotiable instrument."

[2] Thus, evidence contrary to the language of the paper cannot be introduced.

If a person signs a sheet of paper intending it to be filled out as a bill or note and it is so filled, but for a greater amount or to a different payee, the signer is liable. But if one signs a bill or note and it is subsequently stolen from him, the signer is not liable to an innocent purchaser for value.

Article 436. If an agent has signed a paper without disclosing the fact that he is acting for his principal, the principal is not responsible for such paper.

This is an exception to the principle of commercial law mentioned in Art. 266 *supra*, and a revival of the general rule of the Civil Code. See Art. 100 of the Civil Code.

Article 437. A person who has signed a forged[1] or altered[2] paper is responsible according to the language of such forged or altered paper.

A person who has signed an altered paper is presumed to have signed it before its alteration.

The person who has forged or altered the paper, and any person who has acquired it in bad faith or through gross negligence, has no rights under the paper.

[1] A forged paper is a paper the signature of whose drawer or maker has been forged. If the signature of an indorser or an acceptor is forged, it is a forged indorsement, or a forged acceptance, but not a forged paper. The author of a forged paper is not responsible according the language of the paper, for his name does not appear in the paper. The forged drawer or maker is not liable, for his signature appearing in the paper is not his real signature. The only persons held to be liable to a *bona fide* holder under this article are those who sign their names as indorsers, acceptors, sureties, or acceptors for honor.

[2] If he signed the paper before its alteration, he is not responsible according to the language of the altered paper. For instance, when the sum of money is altered from $1,000 to $2,000, he is only liable for $1,000.

Article 438. The right of an incompetent person to rescind a debt on a paper does not affect the other rights and obligations under such paper.

For instance: if an infant indorses a paper, the indorsement may be rescinded according to the general principle of the

Civil Code; but the indorsee has acquired the rights and obligations under the paper, irrespective of such rescission.

A signature induced by fraud or duress may be rescinded; however, the signer can set up such fraud or duress as a defence only against the party who commits the fraud or duress, or who has knowledge of the fact, and not against a *bona fide* holder. See Art. 440, *infra.*

Article 439. Matters not provided in this Book, even though they are mentioned in a paper, will have no effect under such paper.

For instance: according to the English common law, days of grace are recognized, but in Japan a bill or note must be paid on the day of maturity and such day cannot be postponed. If the parties to a bill or note agree that the days of grace under the English law shall be adopted and it is mentioned in the instrument that the payment may be made during three days after the day of maturity, such a statement will have no effect against a *bona fide* holder, since the days of grace are not provided in this Book.

Article 440. A debtor on a paper cannot set up matters not provided in this Book as a defence against a person making a claim under the paper,[1] except such matters as can be directly set up against him.[2]

[1] For instance: if the defence of the debtor is on the ground that the signature was induced by fraud, such defence is not good, since fraud is not a matter provided in this Book.

[2] This article means that the debtor may set up what would be expressed by English common lawyers as an equity against the person who demands payment, but not an equity against the original payee or one of the indorsers. Thus the law in Japan is similar to the law in the United States.

which is no more than saying that in both countries bills and notes are negotiable.

Article 441. A paper cannot be taken back from any person who has acquired it without bad faith or gross negligence.

So far as the holder has acted in good faith and without gross negligence, he has acquired a good title under Art. 192 of the Civil Code even if he has acquired the paper without consideration.

Article 442. Presentation of a paper for acceptance or payment, making a protest, and any other acts for the purpose of exercising or preserving a right under a paper against a person interested, shall take place at the seat of business, or in the absence of such seat of business, at the residence or temporary residence of such person, unless with the consent of such person these acts may be done at any other place.[1]

If the seat of business, the residence or temporary residence of the person interested is unknown, the notary public or sheriff[2] who is to make a protest shall inquire of the government office or any other public office at that place about the matter.

If it cannot be found in this manner, he may make a protest at his office or at the government office or any other public office.

[1] Art. 278, *supra*.

[2] A sheriff is an officer attached to the lowest court and appointed by the minister of justice. On the application of the parties, he is to serve notices, sell property or make protests. Under the command of the court, he is to serve

judicial documents, collect fines or sell forfeited property. In a criminal case, if not a flagrant offence, a summons must be first served on the defendant by the sheriff; but if the defendant fails to appear, or in case of necessity, a warrant of production or a warrant of detention must be served by a policeman. See Arts. 1–3 of the Statute of Sheriffs, Arts. 94–100 of the Statute on the Organization of Courts, and Art. 76 of the Code of Criminal Procedure.

Article 443. Claims against an acceptor or a maker of a promissory note are barred by prescription after three years have elapsed from the day of maturity; the holder's right of recourse against the prior parties, after six months from the day when the protest was made; and an indorser's right of recourse against the prior parties, after six months from the day when he paid the party who exercised his right of recourse.

Article 444. Even after a debt on a paper has been barred by prescription or by failing to take certain necessary proceedings, the holder does not lose his right of recourse against the maker, or the drawer, or the acceptor for the value received.

Since the prescription provided in this book is particularly short, the law gives the holder, as a special favor, the right to recover from the person who is primarily liable for a longer period of time. But the debt on the paper has been barred forever, and can never revive again. The right of the holder under the present article is an ordinary creditor's right which can be enforced by an ordinary action, but not by the special action under Arts. 494–496 of the Code of Civil Procedure.

The right arising under the present article will be again barred by prescription after ten years have elapsed, since

it is neither a debt on a paper which must be barred after three years or six months, nor a debt arising from a commercial transaction which must be barred after five years.

SECTION 2.—BILLS OF EXCHANGE.

Sub-Section 1.—The Drawing of a Bill of Exchange.

Article 445. A bill of exchange shall contain the following particulars with the signature of the drawer:—

1. Words making the paper distinguishable as a bill of exchange.
2. A certain sum of money.
3. The name or trade name of the drawee.
4. The name or trade name of the payee.
5. An unconditional order to pay.
6. The date of drawing.
7. A certain day of maturity.
8. The place of payment.

Article 446. If the sum mentioned in the principal part of a bill of exchange differs from that mentioned in the other part, the sum mentioned in the principal part is the sum of the bill.

What is the "principal part" is a question of fact and will be decided by the court.

Article 447. The drawer of a bill may make himself the payee[1] or drawee.[2]

[1] For instance: if a merchant in Yokohama exports goods from Japan to New York, he may draw a bill of exchange making the vendee in New York the drawee, and himself

the payee; then he may go to a bank in Yokohama, apply for discount, and receive the price of the goods.

[2] For instance: a trader in his principal office may draw a bill payable at his branch establishment. Since the branch establishment is not a different person, the drawer is at the same time the drawee. In England such a bill may be treated as a promissory note, but in Japan it is still a bill of exchange.

Article 448. The drawer may designate in the bill of exchange "a referee in case of need" at the place of payment.

When the acceptance is refused, the holder, after having a protest made, must first demand the acceptance from "the referee in case of need" before he can exercise his right against the prior parties. See Art. 500, *infra*.

Article 449. A bill of exchange payable to bearer cannot be drawn unless the sum of the bill is not less than thirty *yen*.

Because, if there were no such limitation, a business man of good credit might issue many bills for small amounts and use them as currency.

Article 450. The maturity of a bill shall be on either one of the following days:—

1. On a fixed day.
2. On a fixed day after date.
3. At sight.
4. On a fixed day after sight.

Article 451. If the drawer has not fixed the day of maturity in the bill of exchange, the bill is payable at sight.

Article 452. If the drawer has not fixed the place of payment, the place of payment is the place of the residence of the drawee which has been stated in the bill of exchange.

If such residence is not stated, the bill is invalid.

Article 453. If the place of payment differs from that of the residence of the drawee, a certain person responsible for the payment instead of the drawee may be named in the bill.

Article 454. The drawer may state in the bill of exchange that it shall be payable at a particular location in the place of payment.

Sub-Section 2.—Indorsement.

Article 455. Even though a bill of exchange is issued to a particular person designated in the bill, it may be transferred by indorsement, unless indorsement is prohibited by the drawer in the bill.

Article 456. When a drawer, acceptor, or indorsee acquires the bill of exchange, he may again transfer it by indorsement.

Article 457. An indorsement is made by writing the name or trade name of the indorsee and the date of the indorsement on the bill of exchange, or its copy, or its allonge, with the signature of the indorser.

An indorsement may be made by simply signing the name of the indorser. In such case, the bill of exchange may thenceforth be transferred by mere delivery.

Article 458. The indorser, at the time of the indorsement, may designate in the bill of exchange "a referee in case of need" at the place of payment.

Article 459. The indorser, at the time of the indorsement, may mention on the bill that he does not assume any liability on it.

Article 460. If the indorser at the time of the indorsement mentions on the bill that further indorsements are prohibited, he is not liable on the bill to parties subsequent to his indorsee.

Thus, even though further indorsements are prohibited by an indorser, the bill still may be indorsed. The indorsers, except the one who has prohibited further indorsements, are still liable on the bill to the subsequent parties.

Article 461. If an indorsement has been made by simply signing the name of the indorser, the holder of the bill may make himself the indorsee.

Article 462. If the holder of a bill makes an indorsement after the time for making a protest for non-payment has elapsed,[1] the indorsee acquires only the rights of his indorser.[2] In such case the indorser is not liable on the bill.

[1] A protest for non-payment must be made on the day of maturity or within two days after the day of maturity. See Art. 487, *infra*. Theoretically, a bill must be negotiated before the day of maturity. However, as after the day of maturity and before the time for making a protest has elapsed, the holder may still exercise his rights against his prior parties, the law treats an indorsement made within that time as an ordinary indorsement.

[2] Thus, if the right of the indorser on the bill is defective, the indorsee can acquire no better right than his, because the law discourages such an indorsement, though it does not make it invalid.

Article 463. The holder may indorse the bill for the purpose of pledging it to the indorsee or for the purpose of authorizing the indorsee to collect it. In such case the purpose shall be mentioned in the indorsement.

Such indorsee may indorse the bill again for the same purpose.

He can pledge it or indorse it for collection but cannot transfer the title absolutely.

Article 464. The holder of an indorsed bill cannot exercise his rights unless there is an unbroken series of indorsements. But if the bill has been indorsed by simply signing the name of the indorser, the subsequent indorser is deemed to have acquired the bill by such blank indorsement.

Sub-Section 3.—Acceptance.

Article 465. The holder of a bill may at any time present it to the drawee for acceptance.

Article 466. The holder of a bill payable on a fixed day after sight shall present it to the drawee for acceptance within one year, but the drawer may fix a shorter period for presentation.

If the holder does not prove by a certificate of protest that he has made such presentation as men-

tioned above, he loses his rights under the bill against the prior parties.

Article 467. If the holder presents a bill payable on a fixed day after sight, and the drawee does not accept it or does not write the date of acceptance on the bill, the holder shall have a protest made within the period for presentation. In such case, the date on which the protest is made is considered as the day of presentation.[1]

If the holder fails to have a protest made, he loses his rights under the bill against the prior parties.

In case the acceptor does not write the date of acceptance on the bill, if the holder fails to have a protest made, the last day of the period for presentation is considered as the day of presentation.[2]

[1] Thus, by that day, the maturity of the bill payable on a fixed day after sight may be determined.

[2] Because in such case the acceptor is still liable, but payment cannot be demanded from the acceptor unless the maturity of the bill payable on a fixed day after sight is determined according to this provision.

Article 468. Acceptance is made by a written declaration on the bill and by adding the signature of the drawee.

If the drawee has signed the bill, he is deemed to have accepted it.

Article 469. The drawee may accept part of the sum designated in the bill.

Except in the case mentioned above, if the drawee has given a conditional acceptance, he is deemed to

have refused acceptance, but he is responsible according to the language of his acceptance.

According to the French Commercial Code, a conditional acceptance is absolutely void. In Austria a conditional acceptance is treated as an absolute acceptance. But in Germany as well as in Japan, such an acceptor is responsible according to what he has accepted, though the holder may choose to exercise his right of recourse against the prior parties.

Article 470 The drawee by his acceptance of the bill is liable on the day of maturity for the payment of the sum accepted.

Article 471. In case the acceptor does not pay the bill, the amount to be paid to the holder or to an indorser or the drawer, who has made payment on recourse, is determined by the provisions of Arts. 491 and 492.

Article 472. If the place of payment differs from that of the residence of the drawee, and a certain person responsible for the payment instead of the drawee has not been named in the bill by the drawer, the drawee may at the time of acceptance name such person in the bill. If such person is not named, he himself is responsible to pay at the place of payment.

In such case the drawer may mention in the bill that it shall he presented for acceptance. In consequence of this, if the holder does not prove by a certificate of protest that such presentation has been made, he loses his rights under the bill against the prior parties.

The purpose of the presentation is to give the drawee a chance to name a certain person responsible for the payment instead of himself.

Article 473. The drawee, at the time of acceptance, may state in the bill that it shall be payable at a particular location in the place of payment.

Sub-Section 4.—Collateral Security.

Article 474. If the drawee does not accept the bill, the holder may require the prior parties to give him adequate collateral security for the sum of the bill and expenses.

If the drawee accepts part of the sum of the bill, the holder may claim from the prior parties adequate collateral security for the rest of the sum and expenses.

In Germany and other jurisdictions under the German system of law, when the acceptance of a bill is refused, the holder cannot directly exercise his right of recourse against the prior parties as under the English system, but he can only require the prior parties to give him sufficient collateral security. Thus, if all the prior parties refuse to give him such collateral, still he cannot sue them on the bill, but must sue for the collateral. When the bill is due and payment is refused, he can sue on the bill. Under the French system, however, if a bill is not accepted, the holder may directly take recourse against the prior parties or require them to give sufficient collateral security.

Article 475. When the holder desires to exercise his right under the preceding article, he must have a protest made for non-acceptance and must without

delay give notice of his claim for collateral security to the party from whom he desires to take security.

Article 476. If an indorser receives a notice of the claim for collateral security from a subsequent party, the indorser may require the prior parties to give him adequate collateral security for the sum to be secured by him and expenses.

In such case, the indorser must without delay give notice of his claim for security to the party from whom he desires to take collateral security.

Article 477. The person who receives notice of the claim for collateral security under Arts. 474–476 must without delay give adequate collateral security on the surrender of the certificate of protest for non-acceptance. But he may deposit an adequate amount of money instead of giving security.

Article 478. When a prior party has given collateral security or made a deposit, it is deemed to have been done in order to discharge the duty of any subsequent party to give any other security or make any other deposit and at the same time to give a right to any subsequent party to the security given or the deposit made.[1]

When the holder or an indorser has given the notice mentioned in Arts. 475 or 476, par. 2, it is deemed to have been given for all the parties subsequent to the person who receives it.[2]

[1] Thus, when a bill is "secured" by a prior party, any one of the subsequent parties may insist that further security need not be given; and any one of the subsequent parties

may exercise his right on the security given when he has a right against any other prior party. In a word, it is unnecessary to give double security for a single bill, the acceptance of which has been refused.

[2] For instance: A draws a bill payable to B which is indorsed to C and then to D. Upon non-acceptance, D gives a notice to B demanding a collateral security. D, after giving such notice, indorses the instrument to E. If E intends to demand collateral security from B, as his indorser D does, it is unnecessary for E to give any other notice to B. If E intends to demand security from C, C under Art. 476, par. 1, may again require B to give collateral security, and it is unnecessary for C to give such notice as mentioned in Art. 476, par. 2, because D's notice is deemed to have been given for the benefit of C, D, and E,—the parties subsequent to B, who receives such notice.

Article 479. Any collateral security given in accordance with Art. 477 will lose its effect and money deposited under the same article may be taken back in the following cases:—

1. When the bill is unconditionally accepted afterwards.

2 When the sum of the bill and expenses are paid.

3. When the person who has given the security or made the deposit or his prior party has made payment on recourse.

4. When the rights under the bill are barred by prescription or by failing to take necessary proceedings.

5. When within one year from the day of maturity, the right of recourse has not been exercised against the person who has given the security or made the deposit.

The right of recourse spoken of is the right of recourse of an indorser, since the holder's right of recourse has been barred after six months from the day of protest. The indorser's right of recourse is also barred by the lapse of six months; but if each indorser successively exercises his right of recourse, it may take several years.

Article 480. In case the acceptor is adjudged bankrupt, if he does not give any adequate collateral security, the holder of the bill may require "the referee in case of need" to accept it; but he must have a protest made and give notice thereof to the referee without delay.

If no referee is mentioned in the bill, or the referee does not give an unconditional acceptance, the holder may claim adequate collateral security from the prior parties. In such case the provisions of Arts. 474–478 are applicable.

Article 481. Any security given in accordance with Art. 480, par. 2, will lose its effect and money deposited under the same paragraph may be taken back in the following cases:—

1. When the "referee in case of need" gives an unconditional acceptance afterwards.
2. When the acceptor gives an adequate security afterwards.
3. In the cases mentioned in Art. 479, Nos. 2–5.

Sub-Section 5.—Payment.

Article 482. The holder of a bill payable at sight shall present it for payment within one year from its date; but the drawer may fix a shorter period for presentation.

If the holder does not prove by a certificate of protest that he has presented the bill as mentioned above, he loses his rights under the bill against the prior parties.

Article 483. Payment shall be made on the surrender of the bill.

The payor of the bill may require the holder to note on the bill that he has received payment and to sign his name thereon.

Article 484. Even though the whole amount of the bill has been accepted, the holder cannot refuse part payment.

When part payment has been made, the holder shall note it on the bill; and he must make a copy thereof, and after signing it, deliver it to the payor.

Article 485. If the payment of the bill is not demanded, the acceptor, after the period for making a protest for non-payment has elapsed, may deposit the sum of the bill and exempt himself from liability.

See notes to Art. 462, *supra*.

Sub-Section 6.—The Right of Recourse.

Article 486. If the drawee does not pay the bill the holder may set up a claim for recourse against the prior parties.

Article 487. When the holder desires to exercise his right of recourse, he must present the bill to the drawee for payment, and if refused, must have a

protest made for non-payment on the day of maturity or within two days after that day. In such case, he must give notice thereof to the party against whom he desires to take recourse before or within the next day after the day of protest.

If the holder does not take such proceedings, he loses his rights under the bill against the prior parties.

Article 488. When an indorser receives the notice mentioned in Art. 487, par. 1, from the subsequent parties, he may set up his claim for recourse against the prior parties.

In such case, the indorser must give notice of his claim for recourse to the party against whom he desires to take recourse before or within the next day after the day of his receiving notice.

Article 489. Even though the holder has not had a protest made for non-payment, he does not lose his rights under the bill against a party who has waived protest.

When the holder has had a protest made for non-payment, a party who has waived protest cannot be exempted from liability for the payment of the expenses thereof.

Article 490. In case the place of payment differs from that of the residence of the drawee, if the holder desires to take recourse, he must present the bill for payment to the person who is responsible for the payment instead of the drawee; and if such person has not been named in the bill, to the drawee at the place of payment. In such case, if the person respon-

sible for the payment instead of the drawee or the drawee himself does not pay on presentation, the holder must have a protest made for non-payment at the place of payment, and give notice of his claim for recourse according to the provisions of Art. 487, par. 1.

In case a certain person responsible for the payment instead of the drawee is named in the bill, if the holder fails to take the proceedings mentioned above, he loses his rights under the bill even against the acceptor.

Article 491. The holder may exercise his right of recourse for the following amounts:—

1. The sum of the bill which has not been paid and its legal interest from the day of maturity.

2. The fee for making the protest and other expenses.

In case the place of payment differs from that of the residence of the party against whom recourse is taken, the amount mentioned above is calculated according to the rate of exchange of a bill payable at sight drawn from the place of payment on that of the residence of the party against whom recourse is taken. If there is no such rate from the place of payment on such residential place, the amount is calculated according to the rate of exchange of such a bill drawn on the place nearest to the place of the residence of the party against whom recourse is taken.

For instance: the sum of the bill with interest is $900. The fee for making the protest and other expenses are $100. The holder is entitled to $1,000, if the place of payment is the

same as that of the residence of the party against whom recourse is taken. But suppose, the place being different, the holder in order to obtain discount from the bank, has to draw a return bill from the place of payment on the party against whom recourse is taken according to the provision of Art. 493, *infra*. If the rate of exchange of a bill payable at sight drawn from the place of payment on that of the residence of the party against whom recourse is taken is two per cent lower, the holder may add the amount of $20 to the bill and make the face value $1,020. If the rate is two per cent higher he must reduce the bill by $20 and make the face value $980. In other words the holder is still entitled to $1,000, and the fluctuation of the rate of exchange does not affect his right of recourse.

Article 492. An indorser against whom recourse has been taken may again exercise his right of recourse for the following amounts:—

1. The sum which he has paid and its legal interest from the day of his payment.
2. The expenses which he has paid.

In such case the provisions of Art. 491, par. 2, are applicable.

Article 493. The holder or an indorser, for the purpose of taking recourse, may again draw a bill on a prior party as the drawee of the new bill.

Article 494. A bill drawn by the holder or the indorser under the preceding article shall be a bill payable at sight and the place of payment thereof shall be the place of the residence of the party against whom recourse is taken.

If such a bill is drawn by the holder, the place of payment designated in the original bill shall be the

place of drawing. If such a bill is drawn by an indorser, his residence shall be the place of drawing.

Thus, the setting forth of the place of drawing is a requirement of a return bill, though not a requirement of an ordinary bill.

If the place of the drawing of a bill is in a foreign country, the validity of the drawing is governed by the law of that country. See Art. 125 of the Code for the Carrying Out of the Commercial Code.

Article 495. Recourse shall not be taken unless the bill, the certificate of protest for non-payment and the account of the expenses of the recourse are surrendered.

The party who makes payment on recourse may require the party who receives payment to note on the account of the expenses of the recourse that he has received the money, and to place his signature thereon.

Article 496. The provision of Art. 478, par. 2, is applicable to a claim for recourse.

Sub-Section 7.—Surety.

Article 497. A person who has signed a bill or its copy or allonge for the purpose of becoming a surety for the debt on the bill has the same liability as the principal debtor, even if the principal debt has become void.

For instance, if the signature of the drawer is forged, or the drawer is an infant, the surety is still liable.

In Germany as well as in England there are no special provisions for a surety for a bill or note. Even in Japan, according to the business custom the surety is never expressly named in a bill or note; for an instrument with a surety therein signifies that the principal debtor has no good credit and therefore the circulation of the instrument will be more or less checked. Practically, the principal debtor indorses the instrument to the surety as indorsee, and then from him it is indorsed to any other party. Thus, such surety is really an accommodation party under the English law. But since the fact he is merely a surety does not appear on the face of the bill, he cannot be held liable under the present article, though he is liable to a *bona fide* holder as an ordinary indorser.

Article 498. If it is in doubt for whom a person has become a surety, he is deemed to be the surety of the acceptor; but if the bill has not been accepted, he is deemed to be the surety of the drawer.

See notes to Art. 478, *supra*.

Article 499. When a surety has paid the debt he acquires the rights which the holder has had against the principal debtor and also the rights which the principal debtor would have against the prior parties.

Sub-Section 8.—Intervention.

A.—Acceptance for Honor.

Article 500. In case the holder of a bill has a protest made for non-acceptance, he cannot claim collateral security from the prior parties unless presentation for acceptance has been made to the "referee in case of need" who is named in the bill.

If the "referee in case of need" does not accept the bill, the holder shall state such fact in the certificate of protest for non-acceptance.

Thus, acceptors for honor are divided into two kinds: (1) the referee in case of need who is named in the bill; (2) any person who intervenes and accepts the bill for the purpose of saving the honor of the drawer or an indorser. The latter case is identical with "acceptance supra protest" under the English Bills of Exchange Act. In either case, the liability of an acceptor for honor is on the condition that the drawee refuses payment.

Article 501. The holder may refuse an acceptance for honor, if such acceptor is not a "referee in case of need."

I.e. If the holder does not rely on the person who intervenes, he may directly exercise his right of recourse against the prior parties.

Article 502. If acceptance for honor is offered by several persons, the holder may choose any one of them to accept the bill.

Article 503. Acceptance for honor is made by writing such acceptance on the bill with the signature of the acceptor for honor.

If the acceptor for honor does not designate in the bill the person for whose honor he gives such acceptance, the acceptance is deemed to be given for the honor of the drawer.

Because, when the acceptance is given for the honor of the drawer, it will discharge the greatest number of persons from liability.

Article 504. The holder shall have the fact of the acceptance for honor stated in the certificate of protest for non-acceptance, and shall deliver the certificate to the acceptor for honor on his payment of the fee of the protest.

The acceptor for honor must without delay send the certificate of protest to the person for whose honor the acceptance is given.

Because it is necessary for the person for whose honor the acceptance is given to have such certificate of protest in order to demand collateral security from his prior parties.

Article 505. When the drawee does not pay the bill, the acceptor for honor is responsible for the payment of the bill and expenses to the parties subsequent to the person for whose honor the acceptance is given. But if the holder does not present the bill for payment to the acceptor for honor on the day of maturity or within two days after that day, the acceptor for honor is exempted from liability.

Thus, the liability of an acceptor for honor is quite different from that of an ordinary debtor, since the acceptor for honor is not an absolute debtor under the bill.

Article 506. After an acceptance for honor, the holder and any other party subsequent to the person for whose honor the acceptance has been given loses his right to demand collateral security.

Article 507. The person for whose honor an acceptance is given may demand collateral security from his prior parties. In such case, the provisions of Arts. 475–479 are applicable.

For instance: B, an indorsee, indorses a bill to C. C cannot get acceptance from Y, the drawee. X intervenes and accepts the bill for the honor of B. In such case, C can no longer demand collateral security from B under Art. 506. But B can still demand collateral security from his prior party A, for on the part of B, the bill is still non-accepted, and he is subject to the claim of the acceptor for honor, X.

B.—Payment for Honor.

Article 508. In case the holder has a protest made for non-payment, if a "referee in case of need" has been named in the bill or an acceptance for honor has been given, the holder cannot directly take recourse against the prior parties unless he has presented the bill for payment to the acceptor for honor, or if there is no such acceptor or such acceptor does not pay, unless he has presented the bill for payment to the "referee in case of need," on the day of maturity or within two days after that day.

If the acceptor for honor or the "referee in case of need" does not make payment, the holder must have such fact stated in the certificate of protest.

If the holder fails to take the proceedings mentioned in the previous paragraphs, he loses his rights under the bill against the person who has named the "referee in case of need" or the person for whose honor the acceptance has been given and against the parties subsequent to either of such persons.

Payors for honor may be divided into three kinds:—

1. The referee in case of need.
2. The acceptor for honor.
3. Any person who intervenes and pays the bill for the purpose of saving the honor of the drawer, or an indorser or the drawee.

Article 509. The holder cannot refuse payment for honor, even if the payor is not a "referee in case of need" or an acceptor for honor. If he refuses such payment, he loses his rights under the bill against the person for whose honor the payment is offered and against the subsequent parties of such person.

Article 510. If payment for honor is offered by several persons, the holder shall accept the offer of such person as by his payment will be able to discharge the greatest number of persons from liability.

For instance: If X offers his payment for the honor of an indorser B, and Y offers his payment for the honor of an indorser C, B being a party prior to C, X's offer shall be accepted. Again, if Y offers his payment for the honor of the drawer A, and X offers his payment for the honor of the indorser B, Y's offer shall be accepted.

Article 511. If the payor for honor who is not a "referee in case of need" or an acceptor for honor does not designate the person for whose honor the payment is made, the payment is deemed to be made for the honor of the drawer.

This is based on the same principle as the preceding article.

Article 512. The holder shall have the fact of the payment for honor stated in the certificate of protest for non-payment, and shall deliver the certificate and the bill to the payor for honor on his payment of the sum of the bill and expenses.

Article 513. When the payor for honor has made payment, he acquires the rights of the holder against

the acceptor, the person for whose honor the payment has been made, and the prior parties of such person.

Sub-Section 9.—Protest.

Article 514. A protest is made by a notary public or a sheriff on the application of the holder.

Article 515. A certificate of protest shall contain the following particulars with the signature of the notary public or the sheriff:—

1. Those mentioned in the bill, its copy, or allonge.
2. The name or trade name of both the party protested against and the protesting party.
3. The terms of the demand made to the party protested against, and the fact that the party protested against did not comply with the demand, or the reason why such party could not be found.
4. The place where and the date when such demand was made or could not be made.
5. In case the seat of business or the residence or temporary residence of the party protested against is unknown, the fact that inquiry has been made of the government office or other public office.[1]
6. When the protest is made outside the legal place,[2] the fact that the party protested against has agreed thereto.
7. If acceptance for honor or payment for honor has taken place, the nature of such intervention and the name or trade name of the acceptor for honor

or the payor for honor and of the person for whose honor such acceptance was given or payment made.

[1] See Art. 442, par. 2, *supra*.

[2] See Art. 442, par. 2, *supra*.

Article 516. When a claim under a bill is to be made against several persons, it is sufficient to have one protest made for such claim.

Article 517. When a notary public or a sheriff has made a protest, he shall enter the whole contents of the bill in his books.

When a protest is lost, any party interested may require the notary public or sheriff to give him a copy thereof. Such copy will have the same effect as the original protest.

Sub-Section 10.—Bills in a Set and their Copies.

Article 518. The holder of a bill may require the drawer to draw the bill in a set and give him the parts of it. But if the holder is not the payee, he must demand them through the prior parties successively.

When the drawer draws the bill in a set, each indorser must make an indorsement on each part of the set.

There is usually only one copy made of an inland bill, but of foreign bills there are generally several copies made, each containing a condition in effect that it is payable only in case the others are unpaid, and these taken together are called a set or a set of exchange, while a bill so executed is said to be

drawn in a set. The number of copies is usually three, but may be either more or less; each separate copy is known as a part of the bill. The purpose of this is to avoid the delay and inconvenience that may result from the loss or miscarriage of a foreign bill and to facilitate and expedite its transmission.

Article 519. If the parts of a set are not designated as parts of the bill, each part shall be treated as an independent bill.

Article 520. In case a bill is drawn in a set, if payment has been made on one part the other parts will have no effect unless they have been accepted.

A person who has indorsed several parts of a set to different persons or who has accepted several parts of a set cannot be exempted from liability under the bill on any part which has not been surrendered to him at the time of payment.

Article 521. When the holder of a bill in a set has sent a part thereof for acceptance he must note on the other parts where such part will be found.

The holder of the bill thus noted may require the person to whom one part of the bill has been sent for acceptance to return the part to him. If he does not return it, the holder cannot demand collateral security from or take recourse against the prior parties unless he proves by a certificate of protest that such person does not return such part and it is impossible for him to get acceptance or payment on the other part or parts.

Thus, the holder may send a part of the bill to his agent or friend to present it to the drawee for acceptance and at

the same time he may negotiate the bill without awaiting such acceptance. The indorsee, by the note on the bill, may find the person to whom such part has been sent and require him to return it.

Article 522. The holder of a bill may make its copies.[1]

If certain facts are designated in a copy of a bill, they shall be distinguished from facts designated in the original bill.[2]

[1] Copies of a bill must be distinguished from the parts of a set. In England and the United States, no general use is made of copies of bills of exchange. But on the continent of Europe, where a bill is not drawn in sets, copies are negotiated while the original is being forwarded for acceptance.

[2] For instance: indorsements or surety may be written on the face of a copy; they must be in any event made distinguishable from the indorsements or surety written on the back of the original bill.

Article 523. When the holder of a bill has made copies thereof and sent the original bill for acceptance, he must note on the copies where such original bill will be found.

The holder of a copy thus noted may require the person to whom the original bill has been sent for acceptance to return the bill to him.

Article 524. In case the person to whom the bill has been sent for acceptance does not return the bill, the holder of the copy, when he proves such fact by a certificate of protest, may demand collateral security from those who have signed the

copy, or he may take recourse against them on the day of maturity which has been designated in the copy.

SECTION 3.—PROMISSORY NOTES.

Article 525. A promissory note shall contain the following particulars with the signature of the maker:—

1. Words making the paper distinguishable as a promissory note.
2. A certain sum of money.
3. The name or trade name of the payee.
4. An unconditional promise to pay.
5. The date of making
6. A certain day of maturity.
7. The place of making.

Article 526. If the maker of a note does not designate the place of payment in the note, the place of making is the place of payment.

Article 527. The holder of a note payable on a fixed day after sight shall present it to the maker for acceptance within one year, but the maker may fix a shorter period for presentation.

If the holder does not prove by a certificate of protest that he has made such presentation as mentioned above, he loses his rights under the note against any prior party other than the maker.

Article 528. If the holder presents the note payable on a fixed day after sight and the maker does

not state on the note the fact or the date of such presentation, the holder shall have a protest made within the period for presentation. In such case, the date on which the protest is made is considered as the day of presentation.

If the holder fails to have a protest made, he loses his rights under the note against any prior party other than the maker.

In case the maker does not state the date of presentation on the note, if the holder fails to have a protest made, the last day of the period for presentation is considered as the day of presentation.

Article 529. The provisions of Arts. 446, 449–451, 453–457, 459–464, 471, 480–499, 508–517 and 522 are applicable to a promissory note.

SECTION 4.—CHECKS.

Article 530. A check shall contain the following particulars with the signature of the drawer:—

1. Words making the paper distinguishable as a check.
2. A certain sum of money.
3. The name or trade name of the drawee.
4. The name or trade name of the payee, or that the check is payable to bearer.
5. An unconditional order to pay.
6. The date of drawing.
7. The place of payment.

Article 531. The drawer of a check may make it payable to himself.

Article 532. A check is payable at sight.

Article 533. The holder of a check shall present it for payment within a week from its date.

If the holder does not present it for payment within such period of time, he loses his right of recourse against the prior parties.

Thus, at the expiration of one week, he has no right under the check against any person, since a check need not be accepted and the drawee is not the principal debtor.

Article 534. When the holder of a check takes recourse against the prior parties, he need not have a protest made; it is sufficient that he causes the drawee within a week from the date of drawing to note the refusal of payment and the date of such refusal on the check with his signature.

Article 535. When the drawer or the holder of a check draws two parallel lines on its face and inserts the word "bank" or any other word of the same meaning between the lines, the drawee may make payment on such check only to a bank.

If the drawer or the holder inserts the trade name of a particular bank between the lines, the drawee may make payment on such check only to the particular bank. But such bank may appoint any other bank to collect the check by cancelling its own trade name and inserting the trade name of the other bank.

The crossing of checks is derived from England. See Secs. 76–82 of the English Bills of Exchange Act.

Article 536. The drawer of a check shall be punished by a fine of from five *yen* to a thousand *yen* in the following cases:—

1. When he has neither money nor credit in the bank.
2. When the check bears a false date.

Because, if such false date is not prohibited the check will be negotiable a longer time than a week and the rule of Art. 533 *supra* will be destroyed. Thus, the drawer of a postdated check which is so common in this country will be fined in Japan.

Article 537. The provisions of Arts. 446, 452, 455, 457, 459–462, 464, 483, 484, 486–489, 491, 492, 495, 496, 514, 515 and 517 are applicable to a check.

BOOK V.

MARINE COMMERCE.

SECTION 1.—SHIPS AND SHIPOWNERS.

Article 538. Ships within the meaning of this Code are those which are used in a voyage at sea for the purpose of carrying on commercial transactions.

The provisions of this book are not applicable to small boats or to those which are set in motion only or mainly by oars.

Thus, ships sailing on lakes, rivers, harbors, and bays, and even those used in navigation at sea, such as whaling vessels and exploring ships, are not ships within the meaning of this Code.

Article 539. Things entered in the ship's inventory are presumed to be the appurtenances of the ship.

According to the principle of the Civil Code, appurtenances are disposed of by the disposal of the principal matter. Thus, when a ship is assigned, all the things entered in the ship's inventory are also assigned, unless there is a special agreement between the parties. Again, when an insurance is effected on a ship it is presumed that the insurance is also effected on all the things entered in the ship's inventory.

Corresponds to Art. 478 of the German Commercial Code.

Article 540. The shipowner must according to statutory provisions make a registration of the ship and apply for a certificate of its nationality.[1]

The present provisions are not applicable to ships of less than twenty tons or two hundred *koku*.[2]

[1] Since a ship is treated as real property, its ownership must be registered in the court. After such registration the owner may apply to the marine authorities for another registration. The latter application cannot be made without producing the copy of the registration in the court. The certificate of nationality is issued by the marine authorities after the second registration. Any ship without such certificate cannot undertake a voyage under the Japanese national flag.

The purpose of the first registration in the court is to ascertain the title of the ship by a public announcement. Such registration is based on the same principle as the registration of real property. On the other hand, the requirement of the second registration with the marine authorities is based on public policy, not for the purpose of protecting private rights. See the Law of the Registration of Ships; Regulations for the Registration of Ships; Arts. 5, 6, 10–19 and 24 of the Law of Ships and Arts. 17–42 of the Regulations for the Carrying out of the Law of Ships.

[2] Ten cubic feet make one *koku*. See Arts. 8–16 of the Regulations for the Carrying out of the Law of Ships.

Article 541. A transfer of the ownership of a ship cannot be set up as a defence against third persons unless such transfer has been registered and noted on the certificate of nationality.

Article 542. When the ownership of a ship is transferred during its voyage at sea, the profits and losses arising from such voyage belong to the

transferee, unless there is a special agreement between the parties.

Derived from Art. 476 of the German Commercial Code.

Article 543. No attachment or provisional attachment[1] shall be levied on a ship which is ready for a voyage.

This provision is not applicable where the debt is incurred for the purpose of preparing the voyage.[2]

[1] A provisional attachment is an attachment levied on the property of a defendant before a final judgment, where if such attachment were not levied, the execution of the judgment would become impossible or extremely difficult. See Arts. 737–754 of the Code of Civil Procedure.

[2] This article corresponds to Art. 482 of the German Commercial Code.

Article 544. A shipowner may at the end of the voyage exempt himself from liability for acts done by the captain within the scope of his legal authority or for damages done to others by the captain or any other number of the crew in the execution of his duties, by abandoning to the creditor the ship, the freight and the claims for damages or compensations arising from the ship.[1] But this provision is not applicable where the shipowner himself is to blame.

The present provisions are not applicable to the rights of a crew arising from a contract of hire.[2]

[1] There is no jurisdiction in the world under which a shipowner's liability for the act of the captain or any other member of the crew is not limited, but the way of limiting his liability is not always the same. The following are the

different systems other than the American system in regard to the limited liability of a shipowner:—

(1) English system: According to the English law of merchant shipping, a shipowner is liable for a maximum amount of money beyond which he is not liable. This amount is fixed according to the tonnage of the ship and the nature of the subject-matter which is damaged. Thus, for injury to persons, the owner is not liable for more than fifteen pounds per ton; for injury to property, he is not liable for more than eight pounds per ton. The basis of calculation is the registered tonnage with reference to a sailing vessel and the gross tonnage with reference to a steamship. See *The Main* v. *Williams*, 152 U. S. 126–128.

(2) French system: The French law makes a distinction between *fortune de mer* and *fortune de terre*. The former consists of the ship and freight, which can be held liable; the latter is the owner's property on land, which cannot be held liable. The shipowner may abandon the *fortune de mer* to the creditor and free himself from any liability. But if he does not abandon it, he is unlimitedly liable. As soon as such property has been abandoned, it becomes the property of the creditor. Even if the value of the property far exceeds the value of the debt, he can no longer set up any claim to it. This system is also called abandon system. See *The Scotland*, 105 U. S. at p. 28; *Norwich Co.* v. *Wright*, 13 Wallace, pp. 116–119; *The Main* v. *Williams*, 152 U. S. at p. 126.

(3) German system: The Germans also recognize the difference between *fortune de mer* and *fortune de terre*, which they call *Schiffsvermögen* and *Landvermögen*. The creditor can levy on the ship and freight, but he cannot levy on any other property of the owner, even though the owner does not abandon the ship and freight. If the value of the ship and freight exceeds the value of the debt, the creditor must return the excess amount to the owner. This system is called "execution system." See Art. 486 of the German Commercial Code; Wendt's Maritime Legislation at p. 690; Sieveking, The German Law of Carriage of Goods by Sea, pp. 85–96, particularly at page 86.

The first Japanese Commercial Code adopted the German system in regard to the limited liability of a shipowner. See Art. 842 of the same Code. But when it was revised, the Japanese legislators were of opinion that the French system is more elastic and convenient than the German system and therefore the French system was adopted.

[2] *I.e.* The owner is unlimitedly liable to the captain and other members of the crew for their salaries or other claims.

This paragraph corresponds to Art. 487 of the German Commercial Code.

Article 545. If the shipowner starts a new voyage without the consent of the creditor, he can no longer exercise the right mentioned in the preceding article.

Article 546. As between co-owners of a ship, all questions concerning the use of the ship are decided by a majority in interest.

Corresponds to Art. 491, par. 1, of the German Commercial Code.

Article 547. Co-owners of a ship shall bear the expenses necessary for the use of the ship in proportion to the value of their interests.

Corresponds to Art. 500, par. 1, of the German Commercial Code.

Article 548. When the co-owners of a ship have resolved to undertake a new voyage or to make an extraordinary repair of the ship, any co-owner who opposes such resolution may require the other co-owners to buy his interest at a reasonable price.

The co-owner who requires the other co-owners

to buy his interest shall give notice to them or to the ship's husband within three days after the resolution. But if such co-owner has not taken part in the meeting, he may give notice within three days after he receives notice of such resolution.

This article corresponds to Art. 501 of the German Commercial Code.

Article 549. Co-owners of a ship are liable for the debts arising from the use of the ship in proportion to the value of their interests.

Thus, the principle of joint liability under the Commercial Code is not applicable to the shipowners and the principle of proportional liability is revived. See Art. 273, *supra*.

Art. 507, par. 1, of the German Commercial Code provides that co-owners are not responsible as such to third persons, when their personal responsibility is in question, except in proportion to the value of their shares in the ship.

Article 550. A distribution of profits and losses shall be made to the co-owners of a ship at the end of a voyage in proportion to the value of their interests.

Corresponds to Art. 502, pars. 1 and 2, of the German Commercial Code.

Article 551. Even if there is a partnership between the co-owners of a ship, each co-owner may transfer the whole or part of his interest to other persons without the consent of the other co-owners.[1] But this provision is not applicable to the ship's husband.[2]

[1] Thus, the nature of the ownership of a ship is similar to a *société anonyme*.

Corresponds to Art. 503, par. 1, of the German Commercial Code.

[2] *I.e.* If the ship's husband is one of the co-owners, he cannot alienate his interest without the consent of the co-owners.

Article 552. The co-owners of a ship shall appoint a ship's husband.

If a person other than a co-owner of the ship is appointed ship's husband, such appointment shall take place with the agreement of all the co-owners.

The appointment of a ship's husband and the termination of his authority shall be registered.

Corresponds to Art. 492, par. 1, of the German Commercial Code.

Article 553. The ship's husband is authorized to do all acts in court or outside of court on behalf of the co-owners in regard to the use of the ship, except that he is not authorized,—

1. To transfer, abandon, let or mortgage the ship;
2. To effect an insurance on the ship;
3. To undertake a new voyage;
4. To make extraordinary repairs of the ship;
5. To borrow money.[1]

Any restriction on the authority of a ship's husband cannot be set up as a defence against third persons acting in good faith.[2]

[1] Art. 493 of the German Commercial Code provides:—

With reference to a third person, a ship's husband is, by virtue of his appointment, authorized to undertake all transactions and do all acts which the carrying on the business of a co-ownership usually entails.

The authority specially extends to the equipment, maintenance, and letting of a ship, insuring the freight, equipment expenses, expenses of average, as well as such receipt of money as is usual in the conduct of the business of co-ownership.

A ship's husband may to the same extent, represent the co-ownership in legal proceedings.

He may appoint and dismiss the captain; the captain must submit to his order and not to those of the other co-owners.

A ship's husband may not, without being specially authorized, render the co-owners or certain of them liable on bills of exchange, nor borrow nor sell the ship or shares of the ship, nor give it in pledge, nor insure it in whole or in part.

[2] Corresponds to Art. 495 of the German Commercial Code.

Article 554. The ship's husband shall keep a special book and enter therein all the facts in regard to the use of the ship.

The ship's husband at the end of each voyage must without delay render an account of the voyage and submit it to each co-owner of the ship for his approval.

This article is derived from Arts. 498 and 499 of the German Commercial Code

Article 555. If a ship might lose its Japanese nationality by a transfer of the interest of a co-owner or by the loss of his own nationality,[1] the other co-owners have a right to buy such interest at

a reasonable price or to apply to the court for a public auction.[2]

If a ship of a company might lose its Japanese nationality by a transfer of the interest of a member, the other members in the case of a *société en nom collectif*, or the members of unlimited liability in the case of a *société en commandite* or *société en commandite par actions*, have a right to buy such interest at a reasonable price.[3]

[1] In Japan, if one of the co-owners of a ship is an alien, the ship will lose its Japanese nationality. See Art. 1 of the Law of Ships.

[2] Art. 503, par. 2, of the German Commercial Code provides that the alienation of an interest in a ship involving the loss of the right of using the imperial flag cannot be effected without the consent of all the co-owners.

[3] According to the Law of Ships, if one of the members of a *société en nom collectif* is an alien, a ship belonging to such company will lose its Japanese nationality; and, if one of the members of unlimited liability of a *société en commandite* or a *société en commandite par actions* is an alien, the effect will be the same. When a ship belongs to a *société anonyme*, all the directors must be Japanese citizens, otherwise the ship will become a foreign ship. Thus, the transfer of the shares of a *société anonyme* does not affect the nationality of the ship belonging to the company unless the alien transferee is appointed director.

Article 556. When the hiring of a ship has been registered, the contract is valid even against a person who acquires the title of the ship afterwards.

Because the ship is treated as real property. See Art. 605 of the Civil Code.

Article 557. When the hirer uses the ship in a voyage at sea for the purpose of carrying on a commercial transaction, he has the same rights against, and the same obligations to, third persons as a shipowner in regard to the use of the ship.

In such case a right of maritime lien[1] arising from the use of the ship is valid even against the shipowner unless the person having such right has knowledge of the fact that such use of the ship is contrary to the original contract between the hirer and the owner.[2]

[1] See Arts. 680–689, *infra*.

[2] Art. 510 of the German Commercial Code reads as follows:—

"He who fits out on his own account a ship not belonging to him for the purpose of carrying on maritime commerce and sails it himself or hands it over to a captain is considered as owner in his relations with third persons.

"The proprietor has no right to prevent any one claiming a debt against the ship, in the course of its employment, from making good his rights, unless such employment was illegal or the creditor is not acting in good faith."

SECTION 2.—THE CREW.

Sub-Section 1.—The Captain of a Ship.

Article 558. The captain cannot be exempted from liability for damages to the shipowner, charterer, consignor and other persons interested unless he proves that he has used due care in performing his duties.

Even though the captain has acted according to the instructions of the shipowner, he cannot be

exempted from liability to persons other than the shipowner.

This article corresponds to Art. 512 of the German Commercial Code.

Article 559. The captain cannot be exempted from liability for any damage to other persons caused by a mariner in the performance of his duties, unless he proves that he has used due care in supervision.

The word "mariner" used in the present Code denotes any employee of the shipowner on board the ship except the captain, though in some statutes or regulations, such as the law of the correction of mariners and the regulations for the examination of mariners, the same word includes the captain.

Article 560. If the captain under an unavoidable circumstance cannot command the ship, he may appoint another person to perform his duties, unless the law or ordinance provides to the contrary. When such appointment has taken place, the captain is only responsible to the shipowner for the appointment.

Art. 516, par. 2, of the German Commercial Code reads as follows:—

"Even if the captain is prevented through illness or other reasons from conducting the ship, he must not delay starting on or discontinue a voyage; he must, moreover, if time and circumstances permit, get further instructions from the owner, make him aware of the impediment without delay and at the same time take necessary steps, or, if there is no time, get himself replaced by another captain. He is only responsible for his substitute so far as he is to blame in choosing him."

Article 561. The captain must before the starting of a voyage make an inspection of the ship as to whether it is sea-worthy and whether all preparations necessary for the voyage have been properly made.

Derived from Art. 513 of the German Commercial Code.

Article 562. The captain shall keep in the ship the following documents:[1]—

1. The certificate of nationality.
2. The list of the mariners.
3. The ship's inventory.
4. The sea journal.[2]
5. The list of the passengers.
6. All documents in regard to the carriage contract and the cargo.
7. All documents issued from the custom house.

If the ship is not going to foreign countries, it may be provided by ordinance that the documents mentioned in Nos. 3–5 need not be kept in the ship.[3]

[1] Derived from Art. 513 of the German Commercial Code.

[2] Arts. 519 and 520 of the German Commercial Code read as follows:—

"A journal must be kept on every ship, in which all notable events of each voyage ought to be written from the moment when either the freight or the ballast has begun to be taken on board.

"The journal must be kept under the supervision of the captain by the pilot, and if the latter is prevented, by the captain himself or by a capable member of the crew chosen by the captain and under his supervision.

"From day to day must be noted in the journal,—

"The state of the wind and weather.

"The course taken by the ship and the distance traversed.

"The ascertained latitude and longitude.
"The height of water in the pumps.
"In addition there ought to be written in the journal,—
"The depth of water fathomed by the sounding line.
"Every boarding of a pilot, with the time of his arrival and of his leaving.
"Any change in the ship's crew.
"The resolutions passed in a council of officers.
"All accidents happening to a ship or cargo and a description of how they occurred.
"There must also be written all punishable acts committed on the ship and the penalties meted out for them, as well as the births and deaths that take place.
"Entries must be made every day if nothing prevents.
"The journal must be signed by the captain and pilot."

[3] Art. 521 of the German Commercial Code provides that federal states may enact that the keeping of a logbook is not necessary for small boats.

Article 563. The captain shall not leave the ship from the time of the embarkment of the goods and passengers to the time of their disembarkment, unless he has entrusted his duties to the person who may command the ship instead of him, or under an unavoidable circumstance he is obliged to leave the ship without having entrusted them to such person.

Corresponds to Art. 517, par. 1, of the German Commercial Code.

Article 564. As soon as the ship is ready for a voyage, the captain must set sail without delay and must proceed directly to the destination without changing the route already fixed, except in the case of necessity.

Corresponds to Art. 516, par. 1, of the German Commercial Code.

Article 565. During the voyage the captain shall treat the cargo in such a manner as is the most beneficial to all the parties interested.

A party interested may exempt himself from liability in regard to the cargo arising from the act of the captain by abandoning the cargo to the creditor. But this is not applicable where the party interested is himself to blame.

Art. 535 of the German Commercial Code reads as follows:—

"The captain is bound during the voyage to give the greatest possible care to the cargo and the interests of the owners of it.

"When it is necessary to take particular measures to avoid or minimize a loss, he is bound to look after the interests of the owners of the cargo as their representative, to take their instructions as far as possible and to conform to them so far as circumstances permit, or act as he thinks best, and to see to the best of his ability that all those parties interested in the cargo are informed as soon as possible of any accidents, and the measures he has been obliged to take.

"He is specially authorized, in such events to discharge the whole or part of the cargo, and in case of extremity, when an important loss caused by an imminent deterioration cannot be avoided, or for similar reasons, to sell or grant a bottomry bond with the object of procuring the means of preserving it or transporting it further; he may also, in case of arrest or capture, reclaim it, or if taken away from him in any other manner, seek its restitution by legal or other procedure."

Article 566. Outside of the port of registry,[1] the captain is authorized to do all acts in court or outside of court necessary for the voyage.

In the port of registry the captain is only authorized to hire or dismiss mariners unless he is specially authorized.[2]

[1] The port of registry of a ship may be compared to the residence of a person or the seat of business of a trader. Such port is the place where the registrations of the ship in the court and with the marine authorities are made. See Arts. 4 and 5 of the Law of Ships and Art. 2 of the Regulations for the Registration of Ships.

[2] This article corresponds to Arts. 526 and 527 of the German Commercial Code.

Article 567. Any restriction on the authority of the captain cannot be set up as a defense against third persons acting in good faith.

Corresponds to Art. 531 of the German Commercial Code.

Article 568. The captain is not authorized to do the following acts, except they are done for the purpose of defraying the expenses of repairs of the ship, of assistance or *sauvetage*,[1] or other expenses necessary for the continuance of the voyage:[2]—

1. The mortgage of the ship.
2. Borrowing money.
3 Selling or pledging the whole or part of the cargo, except in cases falling under Art. 565, par. 1.

When the cargo has been sold or pledged by the captain, the amount of damages is determined by the value at the port of disembarkment at the time when the cargo should have arrived. But all expenses which need not be paid must be deducted from such value.[3]

[1] The words "assistance" and "*sauvetage*" are often used in this Book. Assistance is to save another ship at sea which is about to wreck; *sauvetage* is to save another ship at sea which has already suffered wreck. In the former, the ship

is still under the control of the crew; in the latter the crew has abandoned the ship. Such difference is originally derived from the French *Ordonnance de la Marine* issued by Louis XIV in 1681.

[2] Art. 528 of the German Commercial Code reads as follows:—

"The captain cannot borrow, buy on credit, or conclude credit operations of any kind, except when it is necessary for preservation of the ship and for finishing the voyage, and then only to such an extent as necessity compels.

"He cannot contract a bottomry loan except when it is necessary for finishing the voyage, and then only to such an extent as necessity compels.

"The validity of the transaction concluded neither depends on the actual employment of money, nor the choice made by the captain among several ways of getting credit, nor that the necessary money was at the disposal of the captain, unless the third person acted in bad faith."

See Art. 535 of the same Code quoted in note to Art. 565 *supra*.

Again, Art. 538 of the same Code reads as follows:—

"Outside the cases provided for by Art. 535, the captain cannot borrow on a bottomry bond, on the cargo, or partially dispose of it by selling or any other manner, except in case of necessity with a view to continuing the voyage."

[3] See Art. 340, par. 3, *supra*.

Article 569. If the captain without special authority has made advances out of his own pocket or incurred debts in his own name for the purpose of the voyage, the shipowner may exercise his right mentioned in Art. 544 against such captain.

Corresponds to Art. 532 of the German Commercial Code.

Article 570. When the ship becomes unrepairable outside of the port of registry, the captain may

sell the ship by auction with the permission of the marine authorities.

Art. 530 of the German Commercial Code reads as follows:—

"The captain only has authority to sell the ship in case of absolute necessity, or only after it has been so decreed by the local court after hearing experts and having consulted with the German consul, if there is one.

"If there is no authority, judicial or any other kind, in the place to make an inquiry, the captain, for his own justification, ought to get the opinion of experts, and if that is not possible, furnish himself with other proofs.

"The sale must be effected publicly."

Article 571. A ship is considered as unrepairable in the following cases:—

1. When the ship cannot be repaired at its anchorage, and it is impossible to reach a place where the repairs can be made.

2. When the cost of the repairs would be more than three-fourths of the value of the ship.

The value mentioned above is the value the ship had when it started on its voyage, if the ship has been damaged during the voyage; and in any other case, it is the value the ship had before its damage.

Article 572. The captain may make use of the cargo for the purpose of the voyage, if such use is necessary for the continuance of it.

In such case the provisions of Art. 568, par. 2, are applicable.

Article 573. The captain must without delay make a report to the shipowner on all important facts in regard to the voyage.

The captain must without delay at the end of a voyage render an account of the voyage and submit it to the shipowner for his approval. If the shipowner requires such account, he must submit it at any time.

Art. 534 of the German Commercial Code provides as follows:—

"The captain is obliged to keep the owner constantly informed of the condition of the ship, of the events of the voyage, the contracts entered into and actions in suspense, and to ask instructions from him in all important cases, so far as circumstances permit, especially in the cases of Arts. 528 and 530, or when he finds himself obliged to change the course of or interrupt the voyage, or on the occasion of unusual repairs or purchases.

"As for extraordinary repairs and purchases, even if he can provide for them with the means of the owner at his disposal he must only have recourse to them in case of necessity.

"If to provide for some necessity he cannot get the necessary money otherwise than giving a bottomry bond or selling apparatus and supplies which can be dispensed with, he must take such measures as are least prejudicial to the owner.

"He must render an account to the owner on his return to port as often as the latter requires one."

Article 574. The shipowner may dismiss the captain at any time; but if he is dismissed without reasonable cause, he may claim damages from the shipowner if he suffers from such dismissal.[1]

In case the captain is a shipowner, if he is dismissed against his will he may require the other owners to buy his interest at a reasonable price.

When the captain intends to exercise such right, he must without delay give notice to the other owners or to the ship's husband.[2]

[1] Arts. 545 and 548 of the German Commercial Code are substantially the same.

[2] The second and third paragraphs of this article are derived from Art. 552 of the German Commercial Code.

Article 575. Any claim of the captain against the shipowners is barred by prescription after one year has elapsed.

Sub-Section 2.—Mariners.

The provisions relating to mariners are not found in the German Commercial Code.

Article 576. A mariner, after the procedure of hiring has been completed, must embark on board the ship at the time appointed by the captain.

A mariner cannot leave the ship on board which he has embarked without the permission of the captain.

The hiring or dismissal of a mariner or the renewal or alteration of such contract of hiring must be acknowledged before the marine authorities. If the shipowner or the captain fails to apply for an acknowledgment, he shall be fined. When the marine authorities take such acknowledgment, certain facts must be entered in the book of mariners, and after they are read to both the hirer and the hired, the parties must insert their signatures and affix their seals. See Arts. 26, 27 and 58 of the Law of the Crew.

Article 577. The food of a mariner during his service must be provided for by the shipowner.

Article 578. If a mariner during his service becomes ill or receives hurt without his own misconduct or any other gross fault, the shipowner is liable for the expenses of medical treatment and nursing for a period not more than three months.

In such case, the mariner may claim wages for the service he has rendered; but if he becomes ill or receives hurt through the performance of his duties, he may claim the whole wages.

Article 579. If wages are to be paid in a lump for each voyage, and the time of the voyage is prolonged, or, except in case of absolute necessity, the distance of the voyage is lengthened, a mariner may claim a proportionate increase of wages. But if the time or distance is shortened, the right of a mariner to claim the whole wages is not affected.

Article 580. If a mariner dies after rendering his service, the shipowner shall pay his wages up to the day of his death.

If a mariner dies for the sake of the performance of his duties, the expenses of his burial must be borne by the shipowner.

Article 581. In the following cases, a mariner may be dismissed by the captain:—

1. When before the voyage a mariner seems to be unfit for his service.

2. When a mariner excessively neglects his duties or commits a gross fault in regard to his duties.

3. When a mariner is sentenced to imprisonment or any other punishment which is severer than imprisonment.

4. When a mariner becomes ill or receives hurt and he can no longer render his service.

5. When, under an unavoidable circumstance, the voyage cannot be started or continued.

In the cases of Nos. 1–3, the mariner may claim his wages for the service he has rendered.

In the cases of Nos. 4 and 5, the mariner may claim his wages up to the day of his dismissal and he is also entitled to a free passage to the port where he was hired. But in the case of No. 4, if he is in fault, he is only entitled to his wages for the service he has rendered.

Article 582. If a mariner is dismissed without any one of the causes mentioned in Art. 581, par. 1, he may claim his wages, not only for the period of time during which he has rendered his service, but also for an additional month. If he is dismissed outside of the port where he was hired, he may claim his wages for the time which is spent in his return to such port and he is also entitled to a free passage to the same port.

Article 583. In the following cases, a mariner may claim his dismissal:—

1. When the ship loses its Japanese nationality.

2. When a mariner, without his own fault, becomes ill or receives hurt and can no longer render his service.

3. When a mariner is ill treated by the captain.

In these cases, the mariner may claim his wages up to the day of his dismissal and he is also entitled to a free passage to the port where he was hired.

Article 584. If the ownership of the ship is transferred during the voyage, each mariner has the same rights against the new owner and the same obligations to him as under the original contract of hiring between the mariner and the former owner.

Article 585. The term of the hiring of a mariner shall not exceed one year. If a mariner is hired for a longer term than one year, such term shall be reduced to the legal term.

The hiring of a mariner may be renewed, but not for a term longer than one year from the time of such renewal.

Article 586. In the absence of a special agreement between the parties, if the term of hiring has not been fixed, a mariner cannot claim his dismissal before the ship is safely anchored and the disembarkment of the goods and passengers is completed.

Article 587. The contract of the hiring of a mariner is terminated in the following cases:—

1. When the ship sinks.
2. When the ship becomes unrepairable.
3. When the ship is captured.

In such cases, the mariner may claim his wages up to the day on which the contract is terminated, and he is also entitled to a free passage to the port where he was hired.

Article 588. When a mariner is entitled to a free passage, he may claim its expenses instead of such passage.

Article 589. Any claim of a mariner against the shipowner is barred by prescription after one year has elapsed.

SECTION 3.—CARRIAGE.

Sub-Section 1.—Carriage of Goods.

A.—General Provisions.

Article 590. When the whole or part of a ship is chartered, each party, on the application of the other party, must furnish him with a charter-party.

Identical with Art. 557 of the German Commercial Code.

Article 591. The shipowner must warrant to the charterer or shipper that the ship is seaworthy at the commencement of the voyage.

Art. 559 of the German Commercial Code provides that the owner is bound to furnish a ship in a seaworthy condition unless the defect could not be discovered by the application of the care of an ordinary shipowner.

Article 592. Even though there is an agreement between the parties to the contrary, the shipowner cannot be exempted from liability for damages caused by the shipowner himself, or by the willful act or gross negligence of the crew or any other employee or by the fact that the ship is unseaworthy.

This provision is based on a resolution passed by the International Commercial Law Conference held in Brussels in 1888.

Article 593. Any goods which have been embarked in violation of the law or ordinances or the

contract of carriage may be disembarked at any time by the captain, and if they threaten to damage the ship or the rest of the cargo, they may be jettisoned. But if the captain carries such goods, he may charge the highest freight for that kind of goods at the place and time of embarkment.

These provisions do not affect the rights of the shipowner or any party interested to claim damages.

This article is derived from Arts. 563 and 564 of the German Commercial Code.

Article 594. In case the whole ship is chartered, the shipowner must without delay give notice to the charterer when the necessary preparations for the embarkment of goods have been completed.[1]

If a period of time has been fixed for the embarkment of the goods, the period begins to run from the next day after such notice. If the goods are embarked after the expiration of the period, the shipowner may claim a reasonable compensation as demurrage, even though there has been no special agreement between the parties.[2]

The days during which embarkment is prevented by circumstances beyond the control of the party may be deducted from such period.[3]

[1] Corresponds to Art. 567, par. 1, of the German Commercial Code.

[2] Corresponds to Art. 567, pars. 2 and 5, of the German Commercial Code.

[3] Art. 573 of the German Commercial Code reads as follows:—

"When time of loading and demurrage days are being calculated, the days will be counted as following without

interruption; especially will be reckoned Sundays and holidays, as well as days on which the charterer has been prevented by accident from delivering the cargo.

"Nevertheless, the days are not reckoned on which through wind and weather, or through any other accident, either,—

"(1) The delivery, not only of the cargo agreed upon, but any other kind of cargo on the ship, or,

"(2) The receipt of the cargo is prevented."

Article 595. If the captain is to receive goods from a third person and such person cannot be ascertained or he does not embark the goods, the captain shall instantly give notice to the charterer. In such case, the charterer may embark the goods only within the period of time fixed for embarkment.

Corresponds to Art. 577, par. 1, of the German Commercial Code.

Article 596. Even though the charterer has not embarked all of the goods, he may require the captain to start on the voyage.

But such charterer must pay, in addition to the whole amount of freight, all expenses arising from the fact that he has not embarked all of the goods,[1] and on the demand of the shipowner, must furnish him with an adequate security.[2]

[1] *I.e.* The expenses for the loading of ballast and for the disposition of the goods.

[2] Because the goods are security for the freight or other debts; since the goods have been lessened, the creditor may demand another security.

This article corresponds to Art. 578 of the German Commercial Code.

Article 597. After the expiration of the period of time fixed for embarkment, the captain may instantly start on the voyage, even though the charterer has not embarked all of the goods.

In such case the provisions of Art. 596, par. 2, are applicable.

This article corresponds to Art. 579 of the German Commercial Code.

Article 598. Before the commencement of the voyage, the charterer may terminate the contract on payment of one-half of the freight.[1]

If the ship is chartered for a return voyage and the charterer terminates the contract before the commencement of the return voyage, he shall pay two thirds of the freight. This provision is applicable where the ship is to move from another port to the port of embarkment and the charterer terminates the contract before the commencement of the voyage from the latter port.[2]

If the contract is terminated after the whole or part of the goods has been embarked, the charterer must bear the expenses of their embarkment and disembarkment.[3]

If the charterer does not embark the goods within the period of time fixed for embarkment, the contract is deemed to have been terminated.

[1] Corresponds to Art. 580, par. 1, of the German Commercial Code.

[2] Corresponds to Art. 583 of the German Commercial Code.

[3] Corresponds to Art. 581, par. 1, of the German Commercial Code.

Article 599. Even though the charterer terminates the contract according to the provisions of Art. 598, he cannot be exempted from liability for all incidental expenses and advances.

In a case falling under Art. 598, par. 2, the charterer, in addition to the expenses mentioned above, is liable for contribution to general average, assistance and *sauvetage* in proportion to the value of his goods.

Article 600. After the commencement of the voyage, the charterer cannot terminate the contract unless he pays the whole amount of freight and the debt mentioned in Art. 606, par. 1, and either makes compensation for the damage arising from the disembarkment of the goods or gives adequate security.

Art. 582, par. 1, of the German Commercial Code is substantially the same.

Article 601. In case part of the ship is chartered, if the charterer terminates the contract before the commencement of the voyage without joining the other charterers and shippers, he must pay the whole amount of freight. But if the shipowner receives any other freight by making use of the vacancy, such freight must be deducted.

If the charterer has embarked the whole or part of the goods, he cannot even before the commencement of the voyage terminate the contract without the consent of the other charterers and shippers.

The provisions of Arts. 594–600 are applicable where part of the ship is chartered.

This article is derived from Art. 587 of the German Commercial Code.

Article 602. If, instead of chartering the whole or part of the ship, the goods are to be loaded in a general ship, the shipper must according to the order of the captain embark the goods without delay.

If the shipper neglects to embark the goods, the captain may at once start on the voyage. In such case, the shipper must pay the whole amount of freight. But if the shipowner receives any other freight by making use of the vacancy, such freight must be deducted.

This article corresponds to Art. 588, pars. 1 and 2, of the German Commercial Code.

Article 603. The provisions of Art. 601 are applicable where the shipper terminates the contract.

Article 604. A charterer or shipper must within the period of time fixed for embarkment furnish the captain with all documents necessary for the carriage.

I.e. The charter party, the inventory of the goods, the exportation permit, the receipt of the custom house, etc.

Identical with Art. 591 of the German Commercial Code.

Article 605. In case the whole or part of the ship is chartered, if all preparations necessary for the disembarkment of the goods have been completed, the captain must without delay give notice to the consignee.

If a period of time has been fixed for the disembarkment of the goods, the period begins to run from the next day after such notice. If the goods are

disembarked after the expiration of the period, the shipowner may claim a reasonable compensation as demurrage, even though there has been no special agreement between the parties.[1]

The days during which disembarkment is prevented by circumstances beyond the control of the party may be deducted from such period.[2]

If, instead of chartering the whole or part of the ship, the goods are to be loaded in a general ship, the shipper must according to the order of the captain disembark the goods without delay.

[1] The first two paragraphs correspond to Art. 594, pars. 1, 3 and 6, of the German Commercial Code.

[2] Art. 597 of the German Commercial Code reads as follows:—

"When calculation is being made of the time for discharge and the days of demurrage, the days will be counted as following each other without interruption; Sundays and holidays will be also counted, as well as the days during which the consignee has been prevented, by unforeseen circumstances, from taking delivery of the cargo.

"However, days will not be counted on which through wind or weather, or any other accident,—

"(1) The transport not only of the cargo actually on the ship, but every kind of cargo from the ship on to land; or

"(2) Its unloading from the ship is prevented."

Article 606. When the consignee receives the goods, he is liable according to the contract of carriage or the bill of lading for the payment of the freight, all incidental expenses and advances, and for contribution to general average, assistance or *sauvetage* in proportion to the value of the goods.

The captain shall not deliver the goods unless on payment of the sums mentioned above.

This article corresponds to Art. 614 of the German Commercial Code.

Article 607. If the consignee neglects to receive the goods, the captain may deposit them. In such case, a notice thereof must be given to the consignee without delay.

If the consignee cannot be ascertained, or he refuses to receive the goods, the captain may deposit them. In such case, a notice thereof must be given to the charterer or shipper without delay.

This article corresponds to Art. 601 of the German Commercial Code.

Article 608. If the freight has been fixed in proportion to the weight or bulk of the goods, the amount of the freight is determined by their weight or bulk at the time of delivery.

Corresponds to Art. 620 of the German Commercial Code.

Article 609. If the payment of the freight has been fixed by a period of time, the amount of the freight is determined by the time from the day when the embarkment of the goods commences to the day when their disembarkment ends. But if the ship, in case of absolute necessity, has been compelled to lie at anchor at the port of departure or in the course of the voyage, or to undergo repairs in the course of the voyage, the time spent in such case is not counted.[1] The same provision is applicable in the case of Art. 594, par. 2, or Art. 605, par. 2, to the time spent in the embarkment or dis-

embarkment of the goods after the expiration of the period of time fixed for such embarkment or disembarkment.[2]

[1] Art. 622 of the German Commercial Code reads as follows:—

"If freight has been calculated according to time, it begins to run, apart from agreement to the contrary, with the day following that on which the captain has given notice that he is ready to take the cargo, or if it is a question of a voyage 'on ballast,' that he is ready to start; but if, in the case of a voyage 'on ballast,' notice has not yet been given the day before that on which the voyage has begun, freight begins to run from the day of starting.

"If compensation has been agreed upon for lay and demurrage days, time freight is only calculated in all cases from the day the voyage has begun.

"Time freight ceases to run on the day on which the discharge is finished.

"If the voyage is delayed or interrupted without fault on the part of the owner, time freight must be paid for the interval of time, without prejudice to the provisions of Arts. 637 and 638."

[2] Because in such case the shipowner is already entitled to demurrage.

Article 610. The shipowner, in order to obtain payment of the sums mentioned in Art. 606, par. 1, may sell the goods by auction with the permission of the court.

Even after the captain delivers the goods to the consignee, the shipowner may still exercise his right of lien on the goods. But, after two weeks have elapsed from the day of delivery or if a third person has acquired the possession of the goods, the shipowner can no longer exercise such right.

Art. 623, pars. 1 and 2, of the German Commercial Code reads as follows:—

"The owner has a right of lien on goods for debts referred to in Art. 614 (freight and other incidental expenses, etc.).

"The lien continues so long as the goods are held or deposited and after their delivery, if within thirty days after such delivery they are claimed before the court, and the goods are still in possession of the consignee."

Article 611. If the shipowner fails to exercise his right mentioned in Art. 610, he loses his right of recourse against the charterer or shipper. But the charterer or shipper must return the profit he has received.

Art. 625 of the German Commercial Code reads as follows:—

"When the owner has delivered the goods, he cannot have recourse to the charterer for sums due to him from the consignee (Art. 614). Such recourse can only be had to the extent that the charterer may have benefited through any damage sustained by the owner."

Article 612. In case the whole or part of the ship is chartered, if the charterer makes another contract of carriage with a third person, only the shipowner is liable to the third person for the performance of the sub-contract, so far as it lies within the scope of the duties of the captain. But this provision does not affect the right mentioned in Art. 541.

Art. 605 of the German Commercial Code provides that when, at the time of chartering the whole of a ship or a portion of, or specified space in it, the charterer has made under-charter parties for a mixed cargo, the rights and duties of the original owner are subject to the enactments of Arts. 594-602.

Article 613. When the whole ship is chartered, the contract is terminated in the following cases:[1]—

1. When any of the accidents mentioned in Art. 587, par. 1, occurs.

2. When the goods are destroyed beyond the control of the party.

If any of the accidents mentioned in Art. 587, par. 1, occurs during the voyage, the charterer must pay freight in proportion to the part of the carriage already performed, so far as the amount of such freight does not exceed the value of the existing goods.[2]

[1] Derived from Art. 628 of the German Commercial Code.

[2] Derived from Art. 630 of the German Commercial Code.

Article 614. If the voyage or the carriage becomes illegal after the making of the contract of carriage, or, under circumstances beyond the control of the party, the performance of the contract becomes impossible, either party may terminate the contract.[1]

If any cause mentioned above occurs after the commencement of the voyage and the contract is terminated, the charterer shall pay freight in proportion to the part of the carriage already performed.[2]

[1] Art. 629 of the German Commercial Code reads as follows:—

'Either party is entitled to withdraw from the contract without being liable in damages,—

"(1) If, before the beginning of the voyage—

"An embargo is put upon the ship, or it is seized for imperial service or that of a foreign power;

"Trade with the port of destination is forbidden;

"The port of loading or the port of destination are in a state of blockade;

"The exportation of goods such as referred to in the charter party from the port of loading, or their importation into the port of destination is forbidden; by an order emanating from supreme authority an obstacle is put to the departure of the ship or voyage, or to the delivery of the goods mentioned in the charter party.

"In all these cases the order emanating from supreme authority only gives a right of withdrawal from the contract if such obstacle is apparently not likely to be of short duration.

"(2) If, before the beginning of the voyage, a war breaks out, by reason of which the ship or the goods to be transported by virtue of the charter party, or both, cannot be considered as free, and run the risk of being captured."

[2] Corresponds to Art. 634, par. 5, of the German Commercial Code.

Article 615. If any cause mentioned in Art. 613, par. 1, No. 2, and Art. 614, par. 1, arises from part of the goods, the charterer may disembark such part of the goods and embark any other goods in their stead, provided that the burden of the shipowner is not increased.

If the charterer desires to exercise such right, he must without delay embark or disembark the goods. If he neglects to do so, he must pay the whole amount of freight even though only part of the goods is carried.

This article is derived from Art. 636, pars. 1, 2 and 3, of the German Commercial Code.

Article 616. The provisions of Arts. 613 and 614 are applicable where part of the ship is chartered, or the goods are to be loaded in a general ship.[1]

Even though any cause mentioned in Art. 613, par. 1, No. 2, and Art. 614, par. 1, arises from part of the goods, the charterer or shipper may terminate the contract. But he must pay the whole amount of freight.[2]

[1] Derived from Art. 641 of the German Commercial Code.

[2] Art. 636, par. 1, of the German Commercial Code reads as follows:—

"When, before the voyage has begun, a part only of the cargo is affected by an accident and in such a way that had it happened to the entire cargo it would have entailed the cancelling of the contract or authorized the parties to withdraw from it, in the terms of Arts. 628 and 629, the charterer has only the right, either to provide other goods, in place of those stipulated in the contract, unless by such transport the position of the owner is prejudiced (Art. 562), or to withdraw from the contract, and be obliged to pay half the freight agreed on and other claims of the owner (Arts. 580 and 581)."

Article 617. The shipowner is entitled to the whole amount of freight in the following cases:—

1. When the captain, according to the provisions of Art. 568, par. 1, has sold or pledged the cargo.

2. When the captain, according to the provisions of Art. 572, has made use of the cargo for the purpose of the voyage.

3. When the captain, according to the provisions of Art. 641, has disposed of the cargo.

Art. 618, par. 2, of the German Commercial Code provides that as to freight payable for goods sacrificed through general average, its amount will be determined by the enactments on the subject of general average.

Article 618. Any claim of the shipowner against the charterer, shipper, or consignee is barred by prescription after one year has elapsed.

Article 619. The provisions of Arts. 328, 336–341 and 348, are applicable to a shipowner.

B.—Bills of Lading.

Article 620. The captain, on the application of the charterer or shipper, must as soon as the goods have been embarked furnish him with a bill of lading in one or more parts.

Corresponds to Art. 642, par. 1, of the German Commercial Code.

Article 621. The shipowner may authorize a person instead of the captain to furnish the charterer or shipper with a bill of lading.

Corresponds to Art. 642, par. 4, of the German Commercial Code.

Article 622. A bill of lading shall contain the following particulars with the signature of the captain, or the person acting instead of the captain:—

1. The name and nationality of the ship.
2. If the captain does not make the bill himself, the name of the captain.
3. The nature, weight or bulk of the goods and the nature of their packing, number and marks.
4. The name or trade name of the charterer or shipper.

5. The name or trade name of the consignee, or the fact that the goods are to be delivered to the holder.

6. The port of embarkment.

7. The port of disembarkment; but if such port is to be appointed by the charterer or shipper after the commencement of the voyage, the port where such appointment is to be made.

8. The freight.

9. If the bill of lading is drawn in several parts, the number of the parts.

10. The place where the bill of lading is made and the date of its making.

Corresponds to Art. 643 of the German Commercial Code.

Article 623. The charterer or shipper, on the application of the captain or the person acting instead of the captain, must sign a copy of the bill and deliver it to him.

Corresponds to Art. 642, par. 3, of the German Commercial Code.

Article 624. At the port of disembarkment, the captain shall not refuse to deliver the goods, even though the delivery of the goods is demanded by the holder of one part of a bill of lading drawn in several parts.

Identical with Art. 645, par. 1, of the German Commercial Code.

Article 625. Outside of the port of disembarkment, the captain shall not deliver the goods unless all the parts of a bill of lading have been surrendered.

Identical with Art. 659, par. 2, of the German Commercial Code.

Article 626. If the delivery of the goods is demanded by two or more holders of a bill of lading, the captain must without delay deposit the goods and give notice thereof to each holder who has demanded such delivery. The same provision is applicable where, after the captain has delivered part of the goods according to the provision of Art. 624, any other holder demands their delivery.

Corresponds to Art. 646, par. 1, of the German Commercial Code.

Article 627. In case there exist two or more holders of a bill of lading, if the captain has delivered the goods to one holder, the bill of lading in the hands of any other holder loses its effect.

Article 628. In case there exist two or more holders of a bill of lading, if the captain has not delivered the goods, the person who holds the bill which was first sent or delivered by the original holder[1] has a superior right to any other holder.[2]

[1] "The original holder" means the holder who wrongfully delivered the different parts of the bill of lading to different persons.

[2] Derived from Art. 649 of the German Commercial Code.

Article 629. The provisions of Arts. 334, 335, 455 and 483 are applicable to a bill of lading.

Sub-Section 2.—Carriage of Passengers.

Article 630. A passage ticket with a name on it is not transferable.

Corresponds to Art. 664 of the German Commercial Code.

Article 631. The food of the passengers is provided by the shipowner.

Article 632. The shipowner cannot demand freight for the baggage which a passenger is entitled to bring on board in accordance with his contract, unless there is a special agreement between the parties.

Identical with Art. 672 of the German Commercial Code.

Article 633. If a passenger does not embark within the time for embarkment, the captain may start on, or continue the voyage. In such case, the passenger must pay the whole amount of the passage money.

Identical with Art. 666 of the German Commercial Code.

Article 634. Before the commencement of the voyage, a passenger may terminate the contract on payment of one half of the passage money.

After the commencement of the voyage, the passenger cannot terminate the contract unless he pays the whole amount of the passage money.

Art. 667 of the German Commercial Code reads as follows:—

"If a passenger withdraws from the contract before the beginning of the voyage, or dies, or it becomes necessary for him to remain behind through illness or some accident happening to him personally, only half the passage money is owing.

"If it is after the beginning of the journey that he withdraws from the contract, or that an accident such as mentioned above happens, the whole of the passage money must be paid."

Article 635. If, before the commencement of the voyage, the passenger cannot make the voyage on account of his death, illness, or any cause relating to his person beyond his control, the shipowner is entitled to one fourth of the passage money.

If any cause mentioned above occurs after the commencement of the voyage, the shipowner may claim either one fourth of the passage money or an amount in proportion to the part of the voyage already performed.

See notes to Art. 634, *supra*.

Article 636. If the ship is repaired in the course of the voyage, the shipowner, during the time of such repairs, must provide the passenger with proper lodging and food. But this provision is not applicable where the shipowner has offered to carry the passenger in another ship without prejudice to the rights of the passenger.

Derived from Art. 671 of the German Commercial Code.

Article 637. The contract of the carriage of passengers terminates on the happening of any cause mentioned in Art. 587, par. 1. But if the cause occurs during the voyage, the passenger must pay passage money in proportion to the part of the voyage already performed.

Corresponds to Arts. 668 and 670, par. 2, of the German Commercial Code.

Article 638. When the passenger dies during the voyage, the captain shall treat his baggage on board in such a manner as is most beneficial to his heirs.

Identical with Art. 675 of the German Commercial Code.

Article 639. The provisions of Arts. 350, 351, par. 1, 352, 591, 592, 614 and 618 are applicable to the carriage of passengers at sea.

The provisions of Art. 593 and 617 are applicable to the baggage of a passenger.

Article 640. When the whole or part of the ship is chartered for the purpose of carrying passengers the provisions of Arts. 590–619 are applicable as to the relation between the shipowner and the charterer.

Derived from Art. 676 of the German Commercial Code.

SECTION 4.—GENERAL AVERAGE.

Article 641. When the captain disposes of the ship or cargo[1] with the object of saving both from a common danger, any loss as well as expense arising therefrom is general average.[2]

If the danger is caused by negligence, the right of recourse against the wrongdoer by the party interested is not affected by this provision.[3]

[1] Such disposition includes jettison, voluntary stranding, cutting away sails or spars, carrying press of sail, burning cargo, ship's materials and stores for fuel, etc. See York-Antwerp Rules, 1890.

[2] Corresponds to Art. 700, par. 1, of the German Commercial Code.

[3] In such case, the party whose property has been sacrificed may at his option either claim damage from the wrongdoer or claim a contribution from the shipowner or owner of the goods. After a contribution, the contributors have a right of recourse against the wrongdoer.

Art. 702 of the German Commercial Code reads as follows:

"The application of the enactments concerning general average will not be prevented by the fact that the danger was brought about through the fault of a third person or even a person interested.

"An interested person who has commited such fault can nevertheless not only demand no compensation for damages which he has sustained, but is besides answerable to those obliged with him to contribute to general average, for the damage sustained by them through the fact that compensation is to be paid as general average.

"If the danger is incurred through a member of the ship's crew, the owner is answerable for the consequences in accordance with Arts. 485 and 486."

Article 642. Each party interested is liable for contribution to general average according to the proportion of the value of the ship or cargo that has been saved, one half of the amount of the freight and passage money,[1] and the amount of general average.[2]

[1] The law presumes that one half of the amount of the freight and passage money is the net profit of the shipowner. Since so much profit is saved by general average, it is reasonable that the very same profit is liable to contribution.

[2] For example: The value of the ship is 5,000,000 *yen*. The value of the cargo is 1,000,000 *yen*. The total amount of freight and passage money is 100,000 *yen*. When the ship was in danger at sea, the captain, in order to lighten the ship, threw overboard a part of the cargo which cost 400,000 *yen*. The average adjustment is as follows:—

5,000,000 *y*.=the value of the ship.
1,000,000 =the value of the cargo.
50,000 =½ of the freight and passage money.
6,050,000 *y*.=total amount liable for the general average.

The amount of general average

$\frac{400{,}000 \times 5{,}000{,}000}{6{,}050{,}000}$ = the amount for which the ship is liable.

$\frac{400{,}000 \times 1{,}000{,}000}{6{,}050{,}000}$ = the amount for which the cargo is liable.

$\frac{400{,}000 \times 50{,}000}{6{,}050{,}000}$ = the amount for which the profit of the owner is liable.

$\frac{400{,}000}{\cancel{1{,}000{,}000}} \times \frac{400{,}000 \times \cancel{1{,}000{,}000}}{6{,}050{,}000}$ = the amount for which the sacrificed cargo itself is liable.

$\frac{600{,}000}{\cancel{1{,}000{,}000}} \times \frac{400{,}000 \times \cancel{1{,}000{,}000}}{6{,}050{,}000}$ = the amount for which the saved cargo is liable.

Arts. 716 and 721 of the German Commercial Code read as follows:—

"Art. 716. The total damage which comes under general average must be distributed over the ship, cargo, and freight in proportion to the value of ship and cargo and the amount of the freight.

"Art. 721. Freight contributes to the extent of two thirds,—

"1. Of the gross amount earned;

"2. Of the amount which in accordance with Art. 715 (compensation for lost freight) is brought into account as general average.

"Passage money contributes to the amount of the reduction which would result in case of loss of the ship (Art. 670), after deduction of expenses, which would in such event be spared."

Article 643. On the calculation of the amount of contribution to general average for which the saved ship or cargo is liable, the value of the ship is deter-

mined by its value at the place and time of arrival and the value of the cargo is determined by its value at the place and time of disembarkment; but as to the cargo, the freight and other expenses which need not be paid in case of loss[1] must be deducted from such value.[2]

[1] The loss spoken of is the loss of the cargo through any other accident after the cargo is once saved. It is a loss falling under Art. 336 on account of which the carrier is not entitled to freight.

[2] Derived from Arts. 717–719 of the German Commercial Code.

Article 644. Any person who is liable for contribution to general average under Arts. 642 and 643 is only responsible to the extent of the existing value of the ship at the time of its arrival or of the cargo at the time of its delivery.

Derived from Art. 726, par. 1, of the German Commercial Code.

Article 645. The arms of the ship, the wages of the crew and the food and clothing of the crew and the passengers are not liable for contribution to general average; but if these things are sacrificed on account of general average, the other parties interested are liable for contribution.

Corresponds to Art. 723, pars. 1 and 2, of the German Commercial Code.

Article 646. If goods embarked without a bill of lading or any other documents for the assessment

of the value of the cargo, or appurtenances of the ship which have not been entered in the ship's inventory, are sacrificed on account of general average, the other parties interested are not liable for contribution.

This provision is applicable where the deck cargo is sacrificed, except in the case of short voyages along the coast.

The parties interested in the cargo mentioned in the last two paragraphs cannnot be exempted from liability for contribution to general average.

This article corresponds to Arts. 708 and 723, par. 5, of the German Commercial Code.

Art. 723, par. 3, of the German Commercial Code provides that no compensation is paid for jewelry, objects of art, money, or valuables, unless specially explained to the captain.

Article 647. On the calculation of the amount of general average, the value of the ship is determined by its value at the place and time of arrival and the value of the cargo is determined by its value at the place and time of disembarkment; but as to the cargo, all expenses which need not be paid on account of loss or damage must be deducted from such value.

Thus, the basis of calculation is the same as the calculation of the amount of contribution to general average for which the saved ship or cargo is liable, except that in this article only expenses, and not freight, must be deducted from the value of the cargo; because, when the goods are lost through general average, the shipowner is still entitled to the freight. See Art. 617, No. 3, *supra*.

Derived from Arts. 711 and 712 of the German Commercial Code.

Article 648. If the value of the cargo designated in bills of lading or any other documents for the assessment of the value of the cargo is lower than its actual value, the amount of loss caused to the cargo is determined by the lower value thus designated.

If the value of the cargo designated is higher than its actual value, the parties interested in the cargo are liable for contribution to general average according to the higher value thus designated.

The provisions of the last two paragraphs are applicable where there is a false statement in regard to matters affecting the value of the cargo.

Article 649. If the owner of the ship, the appurtenances or the cargo recovers what he has lost after a contribution to general average has been made by the parties interested according to the provision of Art. 642, he shall return the amount of contribution he has received after deducting from that amount all expenses for salvage and the amount of damage resulting from a partial loss or damage.

The provision of the German Commercial Code similar to this article is as follows:—

"Art. 720. If goods are thrown away and then salved, they have not to contribute to general average taking place at the same time or later, except when their owner claims compensation."

Article 650. If two ships come into collision through the fault of the crews of both ships and it cannot be ascertained which party is more to blame,

the owners of both ships are equally liable for the damage caused by such collision.

If it can be ascertained that one party is more in fault, the parties will be liable for the total amount of loss in proportion to the degree of their fault in accordance with the decision made by the International Commercial-Law Conference held in Brussels in 1888 and 1895. This decision is adopted by the German Commercial Code as well as the Japanese Code. If the cause of the collision is unknown, each ship will bear its own loss and neither party can claim damages.

Art. 735 of the German Commercial Code reads as follows:—

"If the accident arises through no fault of the members of the crew of either ship, no repair of the damage caused may be demanded from either ship or both of them together.

"When the collision has occurred owing to the fault of both parties, the obligation to make compensation and the amount of damage to be paid must depend upon circumstances, and especially on the fact of knowing up to what point the collision occurred more through the fault of the members of one of the crews than that of the members of the other."

Article 651. Any claim arising from general average or the collision of ships is barred by prescription after one year has elapsed.

In case of general average, the period mentioned above begins to run from the completion of the average adjustment.

Art. 904 of the German Commercial Code reads as follows:—

"Claims for charges upon goods for money lent on bottomry, contributions for general average, expenses of salvage and help, as well as the personal rights to which such sums, contributions, and expenses have given rise, are lost after one year.

"Prescription, for contributions to general average, from the end of the year in which the goods subject to such contribution have been delivered; for other claims, from the end of the year in which they become enforceable."

Article 652. The provisions of Arts. 641–651 are applicable to expenses which are incurred when the ship in case of absolute necessity is compelled to lie at anchor at the port of departure or in the course of the voyage.

Any expense falling under this article is known as *quasi* general average, though its nature is similar to that of particular average or accustomed average, yet all parties interested are liable for contribution thereto.

Derived from Art. 635 of the German Commercial Code.

SECTION 5.—MARINE INSURANCE.

Article 653. A contract of marine insurance is a contract made for the purpose of indemnifying any loss caused by accidents relating to a voyage at sea.

The provisions of Arts. 384–418 are applicable to a contract of marine insurance, unless there are special provisions in the present section.

Article 654. The insurer is responsible for any loss to the subject-matter during the continuance of insurance caused by accidents relating to the voyage, unless there are special provisions in the present section or in the contract of insurance.

Art. 820 of the German Commercial Code reads as follows:—

"The insurer takes all the risks to which the ship or cargo is exposed during the insurance, unless the following enactments or the contract decide otherwise:—

"He especially takes,—

"(1) The risks run from the elements and such-like maritime accidents, even when they are caused by the fault of a third person, such as leakage, stranding, shipwreck, sinking, fire, explosion, lightning, earthquake, damages brought about by ice, etc.;

"(2) The risks of war and orders of the authorities;

"(3) The risks of seizure in execution on the request of a third person without any fault on the part of the assured;

"(4) The risks of theft, as well as danger from piracy, pillage and other deeds of violence;

"(5) The risks of a bottomry bond being given on the insured goods for the continuation of the voyage, or the disposal of the goods by sale or by any employment of them for the same object;

"(6) The risks run through the disloyalty or the fault of a member of the crew, if any damage happens therefrom to the thing insured;

"(7) The risks of collision, it making no difference whether the assured, on account of such collision, has directly suffered damage, or indirectly, by the fact that he is obliged to repair the damage caused to some third person."

Article 655. The insurer is responsible for the amount of contribution to general average to be paid by the insured;[1] but if part of the insurable interest has been insured, the insurer is responsible for the loss according to such proportion as the sum insured bears to the value of the subject-matter.[2]

[1] Corresponds to Art. 834, No. 1, of the German Commercial Code.

[2] See notes to Art. 391, *supra*.

Article 656. When an insurance is effected on a ship, the insurable interest is the value of the ship

at the time when the risk of the insurer begins to run.

The policy contemplated by this article and the next two articles is an open policy; that is, the insurable interest is not fixed therein. In case of a valued policy, the value of the subject-matter fixed therein is binding on the parties except that when the value is greatly exaggerated, the insurer may demand a reduction of the amount of indemnity. See Art. 394, *supra*.

Art. 795 of the German Commercial Code provides that the value which the ship possessed at the time the risk began to run for the insurer, is to be considered the insurance value of the ship, unless the parties have agreed upon another basis for their estimate.

Article 657. When an insurance is effected on the cargo, the insurable interest is the value of the goods at the place and time of embarkment together with the expenses arising from such embarkment and insurance.

Because, the total amount of such value and such expenses is the approximate value of the goods at the place of arrival, and in case of loss such amount is the very interest which the insured loses.

Art. 799, pars. 1 and 2, of the German Commercial Code reads as follows:—

"The insurance value of goods is the value they possessed at the place and time of loading, including all expenses till they are actually on board, unless the parties have agreed upon another basis of valuation.

"Freight, and expenses incurred during the voyage and at the place of destination, are not to be added, unless it has been specially agreed so."

Article 658. When an insurance is effected on any profit or compensation to be received on the arrival

of the goods, the sum insured is presumed to be the insurable interest, if it has not been fixed by contract.

Identical with Art. 802 of the German Commercial Code.

Article 659. When an insurance is effected on a ship for a voyage, the risk of the insurer begins to run as soon as the embarkment of the cargo or ballast takes place.

When an insurance is effected on a ship after the embarkment of the cargo or ballast, the risk of the insurer begins to run as soon as the contract of insurance is completed.

In the cases mentioned above, the risk of the insurer ends as soon as the disembarkment of the cargo or ballast at the port of destination is completed; but if the disembarkment is delayed, except in case of absolute necessity, the risk ends at the time when such disembarkment should have been completed.

This article is identical with Art. 823, pars. 1 and 2, of the German Commercial Code, except that the latter, instead of providing that when an insurance is effected on a ship after the embarkment of the cargo or ballast the risk of the insurer begins to run as soon as the contract of insurance is completed, provides that if there is no cargo or ballast to load the risk runs for the insurer from the moment when the ship's departure begins.

Article 660. When an insurance is effected on the cargo, or any profit or compensation to be received on the arrival of the cargo, the risk of the insurer begins to run as soon as the cargo leaves the land

and ends as soon as the disembarkment of the cargo at the port of disembarkment is completed.[1]

In such case, if the disembarkment is delayed, except in case of absolute necessity, the risk ends at the time when such disembarkment should have been completed.[2]

[1] If the goods are lost after they have been transferred to a lighter but before they have been moved to the land, the insurer is still responsible for such loss.

[2] This article is identical with Art. 824, pars. 1 and 2, of the German Commercial Code.

Article 661. In addition to the particulars mentioned in Art. 403, par. 2, a policy of marine insurance shall contain the following facts:—

1. When the insurance is effected on the ship, the name, nationality and class of the ship, the name of the captain, and the ports of departure and destination or any port at which the ship is to lie at anchor.

2. When the insurance is effected on the cargo or any profit or recompense to be received on the arrival of the cargo, the name, nationality and class of the ship, and the ports of embarkment and disembarkment.

Article 662. If the voyage is changed before the risk of the insurer begins to run, the contract of insurance loses its effect.

If the voyage is changed after the risk of the insurer begins to run, the insurer is not responsible for any accident happening after such change, except

the said change is not caused by the fault of the *preneur* or the insured.

If the port of destination is changed and such change has actually taken place, the voyage is considered to have been changed even though the ship has not deviated from the original route.

This article corresponds to Art. 813 of the German Commercial Code.

Article 663. If the insured neglects to start on or continue the voyage, or changes the original route, or acts in any other way by which the risk is greatly changed or increased, the insurer is not responsible for any accident happening after such change or increase, unless the said change or increase has no influence on the happening of the accident or arises from an unavoidable circumstance under which the insurer must be liable or from a reasonable cause.

Corresponds to Art. 814 of the German Commercial Code.

Article 664. Even though the name of the captain has been designated in the policy of marine insurance, the change of the captain does not affect the validity of the policy.

Corresponds to Art. 815 of the German Commercial Code.

Article 665. When an insurance is effected on the cargo or any profit or compensation to be received on the arrival of the cargo, if the ship is changed the insurer is not responsible for any accident happening after such change, unless the said change

is not caused by the fault of the *preneur* or the insured.

Corresponds to Art. 816 of the German Commercial Code.

Article 666. If the ship in which the goods are to be loaded is not designated in the contract of insurance, the *preneur* or insured, as soon as he knows that the goods have been embarked on board, must give notice of the name and nationality of the ship to the insured.

If the *preneur* or insured neglects to give such notice, the contract of insurance will lose its effect.

This article corresponds to Art. 817 of the German Commercial Code.

Article 667. The insurer is not responsible for the following losses or expenses:—

1. Any loss caused by the nature or the defects of the subject-matter or by its natural wear and tear or by the malicious intention or gross negligence of the *preneur* or the insured.

2. When an insurance is effected on the ship or freight, any loss caused by the fact that at the commencement of the voyage the necessary preparations for the voyage had not been made or the necessary documents had not been kept.

3. When an insurance is effected on the cargo or any profit or compensation to be received on the arrival of the cargo, any loss caused by the malicious intention or gross negligence of the charterer, shipper, or consignee.

4. Pilotage, port dues, quarantine fees and any other ordinary expenses incurred for the voyage in regard to the ship or cargo.

This article is derived from Art. 821 of the German Commercial Code.

Article 668. The insurer is not responsible for any loss or expense other than general average, if the amount of such loss or expense does not exceed two per cent of the insurable interest exclusive of the costs of adjustment.[1]

If the amount of such loss or expense exceeds two per cent of the insurable interest, the insurer must pay the whole amount without deducting two per cent.

The provisions of the previous paragraphs are applicable where it is fixed in the contract of insurance that the insurer shall not be liable for a certain percentage of the loss or expense.[2]

The percentage fixed by this article must be counted for each voyage separately.[3]

[1] The insurer is not responsible for such small amount, since the amount of the costs for adjustment may be far greater than two per cent of the loss. But in case of general average, he must be liable for an amount of contribution not exceeding two per cent, because in such case an average adjustment always takes place for all the parties interested.

[2] Thus, if it is provided in the contract of insurance that the insurer shall not be liable for an amount of loss not exceeding three per cent of the insurable interest, the insurer is still liable for three per cent in case of general average according to the first paragraph of this article; and if the amount of

loss exceeds three per cent, he is liable for the whole amount of loss without deducting three per cent according to the second paragraph.

[3] This article is identical with Arts. 845, 846 and 847 of the German Commercial Code, except that the percentage fixed by the latter is three per cent instead of two per cent.

Article 669. If the insured cargo arrives at the port of disembarkment in a damaged condition, the insurer is liable for part of the insurable interest bearing such ratio to the sum insured as the amount of loss bears to the value which the cargo would have should it arrive safe and sound.

For instance: The insurable interest of the cargo is $10,000. If it arrive safe and sound, it would be worth $12,000 at the port of destination. But the cargo is greatly damaged and is only worth $4,000. The amount of loss is $8,000. Thus, the insurer must be liable for a sum bearing such ratio to the sum $10,000 insured, as the amount of loss, $8,000, bears to the value, $12,000, which the cargo would have had, had it arrived safe and sound.

Art. 875 of the German Commercial Code reads as follows:—

"So far as goods which have arrived in a damaged condition at their port of destination are concerned, a percentage of the value they have lost must be fixed, taking for basis of comparison the gross value they possess at such port, in their damaged condition, and the gross value they would have if they had not been damaged.

"The amount of damage consists in the same percentage on the insurance value.

"The assessment of the value possessed by the goods in their damaged condition is effected by public sale, or, if the insurer consents to it, by means of a valuation. The value goods would have if not damaged is determined by Art. 611, par. 1, (*i.e.* their current commercial value, or the current

value that goods of the same kind possess at their place of destination at the beginning of the ship's discharging, or at the time of its arrival).

"The insurer has, besides this, to bear the cost of inspection, valuation and sale."

Article 670. If, in case of absolute necessity, the insured cargo is sold in the course of the voyage, the insurer is liable for the difference between the insurable interest and the purchase price after deducting from such price the freight and other expenses. But if the insurance is effected on part of the insurable interest, the application of the provision of Art. 391 is not affected.

In such case, if the vendee fails to pay the purchase price, the insurer is liable for the payment. When the price is paid by the insurer, he acquires the rights of the insured against the vendee.

This article corresponds to Art. 877 of the German Commercial Code.

Article 671. The insured may abandon the subject-matter to the insurer and require him to pay the whole sum insured,[1]—

1. When the ship sinks;
2. When the ship is missing;
3. When the ship becomes unrepairable;[2]
4. When the ship or cargo is captured;
5. When the ship is taken by public authorities and not acquitted for six months.

Derived from Art. 861 of the German Commercial Code, in which it is provided that the insured may abandon,—

"1. When the ship is missing;

"2 When the thing insured is menaced by some danger through the ship and goods being under embargo, captured by a belligerent power, arrested in any other manner by order of the supreme authority, or taken by pirates, and not been released for a space of six, nine, or twelve months, according as the capture, arrest, or taking have taken place:—

"(*a*) In a European port or European sea, including all the ports or inlets of the Mediterranean, Black or Azov seas; or

"(*b*) In other waters, but on this side of the Cape of Good Hope and Cape Horn; or

"(*c*) In other waters beyond one or the other of these capes."

[2] According to Art. 873 of the German Commercial Code, the insured may sell such ship and require the insurer to pay the difference between the net loss and the insurance value. In such case the insurer is also liable for the purchase price upon default of the vendee.

Article 672. If it cannot be ascertained for six months whether the ship is in existence, the ship is considered to be missing.

In case the duration of the insurance contract has been fixed, the insured may abandon the ship, even if the fixed period has expired during the said six months. But if it is proved that the ship was not lost during such fixed period, the abandonment will have no effect.

Art. 862 of the German Commercial Code reads as follows:—

"A ship which has begun a voyage is considered as missing if it has not reached its port of destination before the time after which it is to be considered as missing, and that during such time those interested in it have received no news of it.

"The time after which it is to be considered as missing is,—

"1. If the port of departure and the port of destination

is a European one, six months for sailing ships and four months for steam ships;

"2. If either only the port of departure or only the port of destination is outside Europe, and on this side of the Cape of Good Hope and Cape Horn, nine months for sailing or steamships; if beyond either of such capes, twelve months for either sailing or steam ships;

"3. When both the port of the departure and the port of destination are outside Europe, six, nine, or twelve months for both sailing and steam ships, according to whether the time required for the voyage is not over two or three months or more than three months.

"In case of doubt the longer time must be given."

Again, Art. 863 of the same Code provides that the time at the expiration of which a ship will be considered missing begins to run from the day on which it begins its voyage. If, however, news has arrived of it since its departure, such time begins to run from the day on which news was last received of it, if the ship has left the place where it was after the last authentic news was obtained of it.

Article 673. If the captain uses another ship to carry the cargo as soon as the ship becomes unrepairable, the insured can no longer abandon the cargo.

Article 674. If the insured intends to abandon the subject-matter, he must within three months give notice thereof to the insurer.

In cases falling under Art. 671, Nos. 1, 3 and 4, the period of time mentioned above begins to run from the time when the insured has knowledge of the cause.

In case of re-insurance, the time mentioned above begins to run from the time when the re-insured receives notice of abandonment from his insured.

Art. 864 of the German Commercial Code reads as follows:—

"Notice of abandonment must be given to the insurer within the time prescribed.

"The time for giving such notice of abandonment is six months, when, in the case of a ship considered missing, the port of destination is a European port; and when, in the case of capture and arrest, the accident has happened in a European port or European sea, including all the ports and inlets of the Mediterranean Sea, Black Sea, or Sea of Azov.

"In other cases, notice of abandonment is nine months.

"Notice of abandonment begins with the expiration of the periods of time mentioned in Arts. 861 and 862.

"In case of re-assurance, time for giving notice of abandonment begins to run from the end of the day on which the assured has given notice to the person who has been re-insured."

Article 675. An abandonment must be unconditional.

When an abandonment is made, the subject-matter of insurance must be totally abandoned. But if the cause of abandonment arises from part of the subject-matter, such part alone may be abandoned.[1]

In case part of the insurable interest is insured, an abandonment may be made according to such proportion as the sum insured bears to the value of the subject-matter.[2]

[1] For instance: if part of the goods have been captured, the insured may abandon them without affecting the other part.

[2] For instance: The ship costs $1,000,000. The sum insured is only $600,000. When the ship is lost, the insured may abandon six tenths of the ship without affecting the four tenths.

Art. 866 of the German Commercial Code reads as follows:—

"Notice of abandonment must, to be of any effect, be made without restriction or condition, and refer to the thing insured in its entirety, and to such extent as at the time of the accident it was exposed to sea risks.

"If, however, the insurance was not effected for its full value, the assured is only bound to abandon a proportionate part of the thing insured."

Article 676. When the insurer has accepted the abandonment, he cannot raise an objection afterwards.

Article 677. By the abandonment the insurer acquires all the rights of the insured over the subject-matter of insurance.[1]

When the insured abandons the subject-matter, he must deliver to the insurer all documents relative thereto.[2]

[1] Identical with Art. 868, par. 1, of the German Commercial Code.

[2] Art. 869, par. 1, of the German Commercial Code reads as follows:—

"Payment of the sum insured cannot be demanded till after the documents justifying the abandonment have been sent to the insurer, and a reasonable time has passed for their inspection. If abandonment has taken place on account of the disappearance of the ship, there ought to be joined to such documents credible proofs of the ship's having left the port of departure and the non-arrival of the ship at the port of destination during the time allowed for any delay."

Article 678. On the abandonment the insured shall notify the insurer whether there exists any other contract of insurance on the same subject-

matter and whether the subject-matter has been encumbered with any debt, and if so, what kind of contract or debt.

Until the insurer is so notified, he is not obliged to pay the sum insured.

If a period of time has been fixed for the payment of the sum insured, such period begins to run from the time when the insurer receives the notification mentioned in the first paragraph.

This article corresponds to Art. 869, pars. 2 and 3, of the German Commercial Code.

Article 679. When the insurer does not accept the abandonment, the insured cannot require him to pay the sum insured unless the cause of the abandonment can be proved.

SECTION 6.—THE SHIP'S CREDITORS.

Article 680. A creditor entitled to the payment of any one of the following debts has a maritime lien on the ship, its appurtenances, and the freight which has not been received by the shipowner:—

1. Expenses for the public sale of the ship and its appurtenances, and those for their safekeeping in process of such sale.
2. Expenses for the safekeeping of the ship and its appurtenances at the last port.
3. Taxes imposed on the ship in regard to the voyage.
4. Pilotage and towage.

5. Expenses for assistance and *sauvetage* and the ship's liability to contribution for general average.

6. Debts incurred in case of necessity for the continuance of the voyage.

7. Claims of the captain and any other member of the crew arising from the contract of hire.

8. In case a ship has not entered upon any voyage after its sale or building, claims arising from such sale or building and its equipment, and claims arising from the supplies of equipage, food and fuel for the last voyage.

9. Claims arising from damages done to others by the captain or any other member of the crew in the execution of his duties.

Arts. 754 and 755 of the German Commercial Code read as follows:—

"Art. 754. The following are debts which may be enforced by the creditor of a ship:—

"1. When the ship is sold by virtue of an execution, put in it such watching and guarding of the ship and its rigging and appurtenances since its being brought into the last port, and which are not included in the costs of such forced sale.

"2. Public taxes due from the ship; navigation and port dues, especially sums payable for tonnage, lighthouse, quarantine, and harbour dues.

"3. Claims of members of the crew arising out of contracts of service and hiring.

"4. Sums due for pilotage as well as expenses of salvage, help, re-purchase and re-claim charges.

"5. The contributions of the ship for general average.

"6 The money due to the creditors on a bottomry bond, as well as the claims arising out of other business transactions,

which the captain has concluded in his quality as such in any case of necessity while the ship was outside its own port, even if he is co-proprietor or sole proprietor of the ship; on the same footing as claims arising out of such business transactions are claims for provisioning and money lent to the captain in his quality as such, without having agreed to give any credit, while the ship was outside its own port, which have occurred in cases of necessity for the preservation of the ship or continuation of the voyage.

"7. Claims for non-delivery or deterioration of goods and luggage referred to in Art. 673, par. 2.

"8. Claims not coming under the head of any of those above enumerated, resulting from legal acts that the captain has entered into in his quality as such, by virtue of the powers conferred on him by law, and not by some special mandate, as well as any claim not coming under the head of any of those above enumerated, and resulting from the non-execution or incomplete or defective execution of a contract entered into by the owner, in so far as the execution of such contract is part of the captain's duty.

"9. Claims arising through some fault of a member of the crew, even if such member is at the time co-proprietor or sole proprietor of the ship.

"10. Claims against the owner which any association has in accordance with the enactments concerning insurance against accidents, and any insurance office in accordance with the enactments concerning insurance against sickness."

"Art. 755. Ship's creditors to whom the ship is not already pledged by bottomry bond have a legal right of lien upon the ship and its appurtenances.

"This right of lien is maintainable against any third person in possession of the ship."

Article 681. The maritime lien of the creditor of the ship on the freight can be enforced only against such freight as is to be paid for the voyage from which such lien arises.

Corresponds to Art. 756 of the German Commercial Code.

Article 682. If the maritime lien of one creditor of the ship conflicts with that of another creditor of the same ship, the superiority of the lien is decided according to the order mentioned in Art. 680.[1]

But, as between the claims mentioned in Nos. 4–6, the subsequent lien is superior to the antecedent lien.[2]

If several creditors of the ship are entitled to a maritime lien of the same rank, each creditor shall be paid in proportion to the amount of his claim, but as between the claims mentioned in Art. 680, Nos. 4–6, not arising at the same time, the subsequent lien is superior to the antecedent lien.[3]

A maritime lien arising from a subsequent voyage is always superior to a maritime lien arising from an antecedent voyage.[4]

[1] Art. 768 of the German Commercial Code reads as follows:—

"Debts arising during the same voyage, as well as those which are considered as arising during the same voyage, will be paid in the following order:—

"1. Public taxes payable by the ship; navigation and harbour dues.

"2. Claims of the crew upon hiring and service contracts.

"3 Sums due for pilotage, as well as connected with salvage, services rendered, re-purchase and reclaim charges, contributions of the ship to general average, debts arising out of bottomry bonds, and other credit transactions concluded by the captain in case of urgency, as well as such debts as are on the same footing as these latter ones.

"4. Claims arising out of non-delivery or deterioration of cargo and luggage.

"5. Debts mentioned in Art. 754, sub-secs. (8) and (9)." (See notes to Art. 680, *supra*.)

[2] According to the order mentioned in Art. 680, the debts designated in the antecedent numbers are generally incurred after the debts designated in the subsequent numbers. Thus, the expenses for the public sale of the ship designated in No. 1 are incurred after the expenses for the safekeeping of the ship designated in No. 2; and, again, such expenses for the safekeeping are incurred after the taxes designated in No. 3, and so forth. In a word, the debts in No. 1 are the latest debts incurred by the ship, and the debts in No. 9 are the earliest debts. As a rule, the law favours the later debts. This is the principle of Art. 680 and of the first sentence of the present article. But, as between the debts in Nos. 4–6, the pilotage is not necessarily incurred after the expenses for salvage, and the expenses for salvage are not necessarily incurred after the debts for the continuance of the voyage. For this reason, the law does not presume that the debts in No. 4 are incurred after those in No. 5, or that the debts in No. 5 are incurred after those in No. 6, as it does in regard to the other numbers, but leaves the priority in law to be determined by the facts of the case. In consequence of this, if the expenses for salvage in No. 5 are incurred after the pilotage in No. 4, the pilot shall not be paid until the persons who saved the ship have been satisfied, irrespective of the order mentioned in Art. 680.

[3] Art. 769 of the German Commercial Code reads as follows:—

"Debts referred to in Art. 768, sub-sects. (1), (2), (4), (5), are of equal rank when they are under the same number.

"Referring to debts enumerated in Art. 768 (3), one that is incurred later takes precedence over one incurred before; those incurred simultaneously rank equally.

"When the captain has concluded several transactions arising out of the same case of urgency, debts arising therefrom rank equally.

"Claims arising out of transactions, especially out of giving bottomry bonds, which the captain has concluded, to pay anterior debts, come under those enumerated in Art. 768 (3), as well as debts arising out of contracts which he has concluded to obtain a prolongation of time of payment, or to recognize or renew such anterior debts, have only the right of preference which the anterior debt enjoyed, even if such transaction or contract was necessary for the continuation of the voyage."

[4] Art. 767 of the German Commercial Code reads as follows:—

"In the number of claims enumerated in Art. 754, Nos. 3–9 [see notes to Art. 680], those referring to the last voyage, among which must be included those arising since the termination of the last voyage, have a right of precedence over the claims arising out of former voyages.

"Among claims which do not arise out of the last voyage, those having reference to a later are preferred to those referring to a former one.

"Nevertheless, the ship's creditors referred to in Art. 754, sub-sect. 3 [see notes to Art. 680] have, for claims arising out of a former voyage, the same right of precedence as that which belonged to them for claims arising out of a later one, in so far as these different voyages are a part of the same contract of service and hiring.

"If the voyage for which the bottomry bond is given comprises several voyages within the meaning of Art. 757 (*i.e.* the ship has been equipped anew or has been undertaken by virtue of a new charter party or after a complete discharge of cargo), the lender on such bond takes rank after the ship's creditors whose claims arise out of voyages commenced later, and after the end of the first of these voyages."

Article 683. If the maritime lien of the creditor of the ship conflicts with any other mechanic's lien, the former is superior to the latter.

Corresponds to Art. 776 of the German Commercial Code.

Article 684. When the shipowner has transferred the ship, the transferee, after the registration of such transfer, must give a public notice to maritime lienors requiring them to set up their claims within a certain period. But such period shall not be less than one month.

If maritime lienors do not set up their claims within such period, their maritime lien is extinguished.

Arts. 764 and 765 of the German Commercial Code read as follows:—

"Art. 764. The creditor's right of lien upon a ship is lost, except in the case of a forced appropriation of the ship, in its own country, by a sale of the ship effected by the captain in case of urgent necessity and by virtue of his legal qualifications; the price of the sale is substituted for the ship from the point of view of the ship's creditor, so long as the purchaser owes such price or so long as such price is still in the captain's possession.

"These enactments are applicable to other rights of lien over the ship."

"Art. 765. If a ship is transferred otherwise than in the cases provided for by Art. 764, the transferee of it is entitled to demand the exclusion of unknown creditors and their rights of lien by means of a public summons."

Article 685. The maritime lien of a creditor of a ship is extinguished after one year has elapsed from the time when the creditor acquired such lien.

The maritime lien mentioned in Art. 680, No. 8, is extinguished as soon as the ship has entered upon a voyage.

This period of time is not prescription and therefore the rules for prescription are not applicable to such case.

Art. 901 of the German Commercial Code provides that

claims mentioned in Art. 754, Nos. 1–9 (see notes to Art. 680) cannot be brought after one year, but it provides that time for prescription runs for two years:—

"1. For claims of the crew arising out of contracts for services or hire, if they were discharged beyond the Cape of Good Hope or Cape Horn.

"2. For claims for compensation to be made on account of collision."

Article 686. A registered ship may become the subject-matter of a mortgage.

A mortgage of the ship includes all its appurtenances.

All provisions in regard to the mortgage of real property are applicable to a mortgage of the ship.

According to the Japanese Civil Code, a mortgage is a *jus in re* over the real property which is furnished as security for debts. The mortgagor must retain possession.

Article 687. A maritime lien on the ship is superior to the right of the mortgagee.

Article 688. A registered ship cannot become the subject-matter of a pledge.

According to the Japanese Civil Code, a pledge is a *jus in re* over the real or personal property which is furnished as security for debts. Possession of the property must be taken by the creditor.

Article 689. The provisions of Arts. 680–688 are applicable to ships in process of building.

FINIS.

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[The references are to the Articles of the Code and the notes thereto.]