LUMBER LEGAL OPINIONS

PUBLISHED BY
NATIONAL WHOLESALE LUMBER
DEALERS ASSOCIATION
66 BROADWAY
NEW YORK

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1910
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NATIONAL WHOLESALE LUMBER DEALERS ASSOCIATION
66 BROADWAY, - NEW YORK

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PREFACE

In presenting “Lumber Legal Opinions” to our members and to some of our friends whom we particularly desire to become members of our Association, not only for the good their co-operation will do us, but for their own benefit as well, we desire to say that this compilation is based upon the practical working out of specific cases for our members during the past few years. An examination will, we think, prove the work to be practical and dependable, and generally to express good common sense, and consequently good law. You will, we hope, find it worth your careful study and guidance. In some instances the opinions may be affected by court decisions of the respective States; some of these decisions are specifically referred to, but, as a rule, it has been our aim to secure opinions covering a general situation.

This gives us an opportunity to remind you of the special work which this Association is constantly undertaking for its members and especially that it is worthy of your earnest co-operation and special effort to bring in new members, so that the influence of the organization may be enlarged and made in every way worthy of its name.

Purpose of the Association

The Charter defines the Purpose of the Association to be “to protect the members against unbusinesslike methods in the wholesale and retail trade; to foster such trade and commerce; to reform abuses in such trade or business; to secure freedom from unjust or unlawful exactions; to diffuse accurate information among its members as to the standing of merchants and others by and with whom said trade or business is conducted, and as to other matters to produce uniformity and certainty in the customs and usages of said trade and of those engaged therein; to settle differences between its members, and to promote a more large and friendly intercourse between them.”

Bureau of Information or Credit Department

The Charter and By-Laws of the Association defines the duty of this Bureau to be as follows: “To diffuse accurate information as to the standing of merchants.” There are in the records of this Bureau at the present time 28,000 reports showing the financial condition of an equal number of buyers of lumber. In

showing the financial condition of an equal number of buyers of lumber. In addition to these financial statements all of these buyers of lumber are rated by the Bureau as to their credit standing as well. It is the unanimous opinion of our members who use this Bureau that the reports are superior to those of any other mercantile agency or other source of information. The Bureau makes a specialty of securing reports only on lumber buyers or users, and it therefore furnishes more complete and reliable reports as to moral and financial standing and business methods than any other agency. A system is also a part of the Bureau whereby important information is sent to each subscriber without the subscriber making special request therefor; in other words, it is the aim of the Bureau to keep its subscribers fully and promptly advised of all important business changes.

Legal and Collection Department

In connection with and as a part of the Bureau of Information there has been established a legal and collection department. This department handles commercial claims, past due accounts, etc., sent to it with promptness and at a minimum cost when compared with the usual methods employed by attorneys and the courts; also has on file much information, including legal opinions and court decisions which are furnished upon request without charge.

Railroad and Transportation Bureau

The Railroad and Transportation Committee through its Bureau is in a position to be of the greatest service to our members, because of the intimate knowledge which our Traffic Manager has of all matters that have to do with our relations with the railroads.

Information and assistance covering a wide range of transportation subjects is being constantly rendered. There are also on file complete lumber tariffs which are kept up to date, and this enables our members to obtain correct information as to rates, routing, etc. Upon request, shipments are traced and prompt deliveries effected. The above services are furnished to our members entirely free of charge.

This Bureau also investigates and collects claims for loss or damage in transit, overcharges in rates, weight, mis-routing, etc. For these services a nominal charge is made based on the actual amount collected. The manager of this Bureau has had years of experience and possesses intimate knowledge of the methods pursued by the various claim departments of the railroads and he is

methods pursued by the various claim departments of the railroads and he is therefore in a position promptly to collect any just claims and frequently has been able to collect claims which our members have been unable to collect themselves. In this connection it may be well to state that all shippers of lumber are entitled to free allowances in weight of five hundred pounds for car stakes used on flat and gondola cars, and this Bureau has secured many refunds on past shipments for members who have not been allowed this free weight. The Bureau is also in a position to compel the railroads not now making the allowances, to do so.

Arbitration

The By-Laws define the duties of the Arbitration Committee to be "to settle differences between our members." The services of this committee are at the disposal of our members at the actual cost of the expenses of three selected men from among the members of this committee who thoroughly understand the customs of the lumber trade. Any member who avails himself of the services of this committee consequently obtains at an actual cost the services of a jury of experts, with the result that differences are settled fairly, equitably and promptly and without any annoyances and undue expenses.

Legislation Committee

"To reform abuses" and "to secure freedom from unjust or unlawful exactions" is jointly the work of several Committees. For freedom from unjust and burdensome laws and for laws granting us security and reasonable opportunity in the conduct of our business, we look to the Legislation Committee, whose duty it is to scrutinize acts affecting the trade, to oppose those which oppress, and to favor and forward those which assist.

Forestry and Conservation

"To foster such trade and commerce" by perpetuating the raw material which forms the basis of all lumber business, we have our Forestry Committee. The people of this country, with its tremendous sources of timber supply, must be educated to grasp the possibility of a future famine, and needful legislation must be enacted to reduce the problem of reforestation to a practical business proposition before the scarcity of timber shall enhance the values of stumpage to the point of placing trees as a crop in the same class with grain and cotton. The Advisory Forestry Committee links our Association with the country at large in this movement.

this movement.

Fire and Marine Insurance

The services performed by the members of these committees in past years have most fully justified their existence in the reduction which has been obtained not only for our members, but for all lumbermen both in fire insuring companies as well as in marine insuring companies. These savings amount annually to a sum which is estimated at more than one million dollars in premiums.

Hardwood Inspection

Our Association stands for not only a national but an international set of rules to govern the grading and inspection of hardwood lumber. In all lines of business nothing is more desirable and necessary than uniformity. It is the aim of the Hardwood Inspection Committee to secure the adoption of a reasonable and universal set of rules for the inspection of hardwood lumber.

Management

The Active Management of the Association is in the hands of a board of twenty-one trustees, operating with the Officers and the Executive Committee, through the Secretary and his assistants.

Headquarters

The offices of the Association are at 66 Broadway, New York, centrally located in the business section of the city. Members have the unrestricted privilege of using these offices as the headquarters for receiving mail and telegrams, and for business conferences.

Membership

The four hundred Lumbermen who are members are ready and willing to testify to the advantages to be derived from connection with this Association. Coming from 28 States and Canada, they are qualified by numbers and ability to cope with all questions affecting the manufacture and wholesale distribution of lumber.

Membership in our Association is restricted to legitimate manufacturers of lumber and wholesale dealers in lumber who are in good standing in the trade.

There is no initiation fee. The annual dues are $50.00, with a charge of $50.00 additional to those who desire the benefits of the Bureau of Information. The Collection Department and Transportation Bureau are open to all members without charge other than the very moderate fees scheduled for actual work performed.

These opinions and abstracts were compiled, and arranged under the supervision of the LEGAL DEPARTMENT, BUREAU OF INFORMATION, W. W. Schupner, Department Manager.

INDEX

The cross index is arranged so as to bring out the several points in each opinion or extract. The number at the left, following each opinion or extract, indicates the number of such opinion or extract referred to in the index. The first number after the subject gives the number of the opinion and the second the page number, for example: after “acceptance of checks sent in full settlement” appear 18–21, denoting that the information can be obtained from opinion 18 on page 21. The other figures after the same subject indicate the other opinions and pages where similar information is given.

First number gives number of opinion; second number gives page number.

CHOICE OF REMEDIES WHEN LUMBER IS REFUSED ON ARRIVAL.

Recently a member took an order from a dealer in Pennsylvania for a car of lumber, and after order had been forwarded to the mill, the buyer requested that a change be made in a certain size included in the order, which our member advised would be made if shipment had not already gone forward from the mill. It developed, however, that shipment had been made and that it was too late to alter any part of the original order. Upon arrival the buyer refused to accept the lumber on the ground that it was not as ordered.

In connection with this case we have the following opinion from an experienced attorney:

Seller has the choice of one of three things, viz.: First, he may store or retain the property for the vendee and sue him for the entire price. Second, he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale. Third, he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price. Usually, the best course to pursue would be to elect the second remedy, to wit: that of acting as agent for buyer and dispose of the carload of lumber and recover the difference between the contract price and the price of resale. By proceeding in this manner, they may have the use of the price realized from the sale, and they have done all that good faith required to the end that any loss sustained be reduced to a minimum. Of course, the seller on the resale must dispose of the goods in good faith and the best mode calculated to produce their value, whether it be public auction or by broker, or any other mode that can or could be easily adopted.

Opinion No. 1.

A metropolitan dealer writes:

We took an order in writing from a party for 25,000 feet of lumber, 5,000 feet to be delivered the latter part of May, June, July, August, and until all should be taken. Buyer accepted the delivery of the shipments until June, when he refused the shipment, writing us a letter, as trade was dull, to please not ship any more

goods on account of order until he notified us. We immediately wrote him that we should insist on his living up to the terms of the contract. We had our truckman make note of the fact that he tendered the goods at their factory and that they refused to receive them. Now, can we sue and collect for these goods, and in the future if they refuse to receive them after tendering them can we sue? If we should instruct our truckman to leave these goods on the sidewalk in front of their place of business, could we sue, claiming this was a proper delivery and collect for same?

Reply: When goods are to be delivered in a number of instalments, as in this case, the buyer's refusal to accept delivery of any one instalment is a breach of the whole contract; the seller may declare the contract at an end, from that moment, and may sue and recover any damage that the breach of contract may have caused him. The seller has the choice of three remedies. He may keep the goods as his own and sue for the damages; he may hold the goods as agent of the buyer, informing the buyer that they will be delivered to him upon his demand, and sue for the contract price of the goods; or he may sell the goods, for account of the buyer, giving the latter prior notice of the time and place of sale and then hold the buyer for any deficiency. A delivery of the goods upon the sidewalk in front of the buyer's place of business would be of no advantage to the seller and it might make him liable for that part of the goods if the buyer neglected to take charge of them. The seller cannot sue for the price of each instalment, when it has been tendered and refused. This would be to put the buyer to the expense of defending a number of suits, all arising out of one contract, and this the law does not sanction. Though it calls for delivery at different times, the contract is one and not several, and it may be made the basis of only one action. Suit may be brought as soon as there is a breach of it, it is true, but that suit must be for all the loss arising by reason of the buyer's unjustifiable act, not simply for the value of the single instalment tendered and refused. When any suit is brought the court will assume that it is for all the loss arising out of the contract and further suits upon the same cause of action will be barred.

Opinion No. 5.

INTERPRETATION OF “F. O. B.” SHIPPING POINT OR DESTINATION.

As there seem to be many opinions on the question of “ownership in transit,” or delivery of lumber F. O. B., and as the association has received numerous inquiries from members covering various phases of the subject, the question has been submitted by the association to Mr. Walter W. Ross, General Counsel to the Car Stake and Equipment Complaint Executive Committee, and an experienced railroad attorney, for opinion. While it must be conceded that such an opinion can cover only a specific case, it will probably be of value to many of our members when the question of ownership in transit arises, and if followed, if adopted as a practical solution, will help to bring about a better understanding between shipper and buyer, always keeping in mind however, that the laws differ in various States.

His opinion is as follows:

If A sells lumber to B and the contract of sale provides that A shall deliver the lumber free on board (F. O. B.) cars at a certain point, the title to the lumber remains vested in A, the seller, until he has delivered the lumber at the point agreed upon to the buyer or his agent the carrier.

If the lumber is damaged while in the possession of the carrier in transit to the point of agreed delivery, the question of the loss is between the seller A and the carrier. If the lumber is damaged after delivery at the point agreed upon, but while in possession of the carrier the question of loss is between the buyer and the carrier.

The question arises what constitutes delivery f. o. b. In the case of shipment of lumber by rail it is customary for the shipper to load the lumber properly on the car. It has been held by some of the courts that it is not necessary for the shipper having completed the loading to give formal notice of delivery to the carrier in order to place the consignment in the possession of the carrier—(but it is safer to notify the carrier of such fact thereby eliminating a possible controversy). If the sale is f. o. b. point of shipment the delivery by the seller to the carrier is delivery to the buyer and from that time the carrier until it has performed its contract of transportation is the agent of the buyer. This principle of law is subject to the exceptions arising under the law of stoppage in transit, as for

subject to the exceptions arising under the law of stoppage in transit, as for instance if the buyer becomes insolvent after the shipment has been made—but before arrival at destination.

It has been held that the liability of the carrier begins as soon as the consignment has been placed in its possession, even though the bill of lading has not been issued.

The question also arises when does the liability of carrier as such terminate by delivery to the consignee.

The general rule is that when the carrier has placed the car of lumber on the track which is the usual and customary place for the consignee to unload and consignee has had reasonable opportunity to unload, then its liability as carrier terminates and it is liable only as a warehouseman while the consignment remains on such track, which means that the carrier is required to exercise only the degree of care which an ordinarily prudent person would exercise to protect his property from loss or destruction. In some states the statutes provide, or the courts hold, that the carrier having placed the car in such position for unloading by the consignee, it is then the duty of the carrier to send due notice of that fact to the consignee; and until such notice and reasonable opportunity has been given, the carrier's liability as such continues. In other states the carriers are not required either by statute or rule of the courts to give such notice of arrival of consignments, it being held to be the duty of the consignee to keep himself informed as to the time of arrival of his freight. This rule is gradually being superseded in most states by the more reasonable rule that it is the duty of the carrier to send due notice to consignee of arrival of freight.

Opinion No. 8.

BUYING AND SELLING AGENT NEEDS NO LICENSE IN NEW YORK CITY.

Very often out of town members who contemplate opening an office in New York City, inquire as to whether it is necessary to obtain a license in order that their agent may legally represent them. The following appears to cover the ground:

Question from Baltimore, Md.—I am acting here as a buying and selling agent for a lumber company outside of the State, they supplying me with the money with which to buy the lumber to ship to them on their orders, and I crediting them with the proceeds of the sales of lumber shipped to me to sell for their account, my compensation being a commission on the sales and purchases. Under these conditions I do not pay a license here in Baltimore, but as I expect shortly to move the office to New York, I will thank you to let me know if I would require a license to conduct this business in that city, and if so, where should I apply for same?

Reply: No license is required in New York City in order to carry on such a business as our correspondent describes. One who simply buys and sells here, as agent, need not make a report or pay a fee to any public officer. But if at any time he carries on a general mercantile business, as agent, he must register and pay a fee. The statute is as follows: “Any person now carrying on or conducting a general mercantile or manufacturing business within this State, or hereafter commencing such business at or in a fixed location as agent or manager for another or others, shall—at the commencement of such business, file a sworn statement, verified by such agent and principal or principals, in the county clerk’s office of the county within which said business is carried on, stating the nature of the business and the full name and residence of such principal or principals.” The fee is $1.00, and failure to file the statement is a misdemeanor.

Opinion No. 3.

RETAINING LUMBER SHIPPED CONSTITUTES ACCEPTANCE.

The acceptance of lumber, where the grade is disputed, is the subject of the following correspondence:

Question.—We recently shipped a car of lumber to a dealer, who claims that same is not up to the grade bought. We have asked him to return shipment and guaranteed to replace same with material that was absolutely right. He refuses to do so, and states that he will not return it until he receives lumber to replace the lot he refused to accept. We have sold this car to another party, who asks for delivery. We believe that the original purchaser is making an unjust claim. Can we demand that the lumber be shipped back to us, as the party has refused to accept same and has not paid for it? In case he refuses to return it are we under any obligation to make a second delivery?

Reply: The purchaser in a case of this kind has no right to any material that previously belonged to the seller except under the contract which he has with the seller. When the seller sends the purchaser any lumber and the purchaser keeps it, he keeps it either wrongfully or else as being in compliance with his contract. But the courts will not allow any man to claim, for his own advantage, that he is a wrong-doer when there is a possible and reasonable explanation of his act which makes it lawful. For this reason, among others, a buyer of lumber when there has been no warranty of quality, who retains the lumber sent to him, and refuses to return it, is always held to retain it as being perfectly satisfactory and in compliance with the contract. Any complaint he may make about the delivery is of no importance; it is his act that counts. The courts will insist upon taking the most charitable view of his conduct, whatever he may say, and the most charitable view is that he is doing right, and not wrong, and is keeping the lumber because it is a good delivery under the contract. Our correspondents can demand that the lumber be returned if they choose to do so, but they cannot enforce the demand. If the buyer does return the lumber, in answer to such a demand, he will have a claim against the sellers for another delivery, and a valid one under the contract, or for a breach of the contract in failing to make a good delivery in the first place. If no such demand is made, or if it is made and not complied with, the buyer can be compelled to pay the contract price of the goods on the theory that his holding them is an acceptance under the contract. It is idle

for him to say that he does not accept them; keeping them is acceptance. No second delivery need be made unless the first delivery is promptly and properly refused and returned.

Opinion No. 6.

OBTAINING CERTIFICATES PERMITTING FOREIGN CORPORATIONS TO DO BUSINESS AND MAINTAIN AN ACTION IN NEW YORK OR NEW JERSEY.

Almost every State in the Union, and especially the States of New York, New Jersey, Pennsylvania, Massachusetts, Connecticut, etc., require foreign corporations, that is, corporations formed under the laws of other States, to procure a license or certificate to do business within such State, and in default thereof penalties or fines are imposed.

In considering the necessity of such license the first question is to ascertain whether the corporation is transacting its business in a manner which could be interpreted as "doing business" in its legal sense, and this means generally filling all orders obtained in that State when more than two or three incidental orders have been obtained or the maintaining of a place of business in such State. The difficulties in obtaining the certificates are not great but the details are technical and the expense ranges from $10 upwards, depending upon the laws under which the company is incorporated, there being retaliatory laws in some States. The average expense is about $25, and the certificates are generally good for an indefinite period; the only annual requirements being a formal report which does not involve the giving of the details of the corporation's business and there is no annual taxation unless the corporation has both property and is doing business within such State.

In many cases where valid claims exist in favor of a corporation of another State against a New York debtor, a serious obstacle arises where the foreign corporation has not obtained a certificate to do business in this State, and, therefore, cannot maintain the action. By the statutes as last amended this prohibition covers also any one to whom such foreign corporation has assigned the claim for collection. The provisions of the New York corporation law in this matter are easily complied with. There has to be a sworn copy of the charter of such foreign corporation and the designation of some person on whom process can be served.

The objection to complying with the statute in this respect is the possible

liability to taxation after the corporation gets its name on the State Register. All that is taxable in New York State is the amount of capital used in the State, and this would be so small as to be unimportant provided, of course, that the proper returns to the tax departments at Albany and New York are made out each year. This, we understand can be done in ordinary cases, at a charge of $10, for the two reports, one to Albany and one to New York, and this sum is a very small tax to pay for what must be the advantages of selling lumber and maintaining the legal rights connected with such sales in New York State.

Opinion No. 17.

A CARRIER IS BOUND TO DELIVER LUMBER AS DIRECTED.

Question.—My shipper consigns me a car of lumber and marks the bill of lading "via P. R. R. delivery." If this car arrives by the C. R. R. of N. J., can I be compelled to accept same from them, or does my original contract entitle me to insist on P. R. R. delivery?

Reply: One of the important and imperative duties of a carrier is to deliver the lumber as he is directed to deliver it. A direction to deliver it to a specified connecting carrier or delivery concern cannot be fulfilled by delivering it to another, any more than a direction to deliver it to a certain consignee can be carried out by delivery to another individual. If the carrier makes a wrong delivery, as here described, he is guilty of conversion. The consignee is not bound to accept the lumber from the connecting carrier to whom it has been wrongly delivered. He may sue the original carrier for the value of the lumber as soon as he learns that a different delivery from that directed by the bill of lading has been made.

Opinion No. 11.

IF A BUYER REFUSES TO TAKE LUMBER ORDERED THE SELLER HAS A CHOICE OF REMEDIES.

Question.—Some time in March last we received an order for two cars of 32–inch lath. A few days after the order came to hand we received a letter from our customer requesting us to defer shipment on account of the threatened strike in the coal regions, which request was complied with. The difficulties between the miners and operators have of course been adjusted and operations were resumed some time ago, but our customer has so far failed to furnish shipping directions for the lath, which we had cut especially for his order and piled on our docks ready for shipment at the time his request was received to hold the order. Would we not be justified in loading this stock up and putting cars in transit in accordance with the original order and insisting upon acceptance of same upon arrival?

Reply: This buyer has not, in our opinion, lost his right to select the route by which the goods shall be shipped to him. There is no question that his delay in giving such instructions has been unusually great, but the sellers on their part have given no indication of an objection to such delay. It is clearly their right now to demand that he send shipping instructions immediately and to inform him that they will send the goods by a route of their own selection if he does not name a route by return mail; then, if the buyer does not reply, or if he refuses to issue shipping instructions, or undertakes to repudiate the contract, the sellers will have a choice of three remedies: They may ship the goods to him by any suitable carrier and compel him to pay for them; they may inform him that the goods are held subject to his order, to be shipped in whatever manner and at whatever time he may select, and then compel him to pay for them, or they may name a time and place at which the goods will be sold at auction for his account, giving him sufficient opportunity to be present at the sale, and may then sell them at such time and place, holding him liable for the necessary expenses of advertisement and sale and for any amount, by which the selling price may be less than the contract price.

Opinion No. 12.

UNDER CERTAIN CONDITIONS THE ACCEPTANCE OF PART OF A DEBT DOES NOT RELEASE THE REMAINDER.

Question.—One of our customers recently sent us a check for less than the amount of his bill, saying in his letter that he was remitting the full amount due us. If he had taken advantage of the regular discount on his last purchase (which he did not do) the amount now due us would have been within a few dollars of the size of the check, but even then the check would not represent the exact amount due to us. He does not say in so many words that he is claiming a discount, just sends the check and writes, “enclosed please find amount of my bill to date.” Something of this kind happens rather frequently, and we would like you to advise us whether we must forego using that check until we can write and straighten out the matter with him. More is due to us than he has paid us, and it seems a hardship that we should be kept out of even this part of our claim during the week or month which it may take to have a full understanding with our customer.

Reply: The creditor, in a case of this kind, is justified in cashing the check and still demanding the amount yet due; this amount he can recover by suit if it is not paid voluntarily. The buyer, it seems, was not entitled to a discount, and he has not made a specific claim to any. Being indebted to a certain amount he simply sends a check for part of that amount. He does not say that he claims a discount. If this check for less than the full amount due had been accompanied by a demand that it be either accepted as payment in full, or else returned, a different question might have arisen; but even then the check might safely have been cashed under the facts of this case. This case is simply that of a man who owes $100 and who sends his creditor a smaller amount. The proper course for the creditor is to accept what is sent as a payment upon account and still maintain his claim for what is yet due.

Opinion No. 18.

BANKRUPTCY AVOIDS AN ASSIGNMENT FOR CREDITORS.

Question.—We made a sale to a firm who became embarrassed and offered a compromise to their creditors. We accepted the settlement offered, 25 per cent. cash and 25 per cent. by note at one year. The note given us was not paid and after some delay the concern now goes into bankruptcy. Please inform us whether our claim in the bankruptcy proceedings would be the note only or the full amount due under the original sale?

Reply: The compromise in this case, in so far as it has not been carried out, will probably be set aside and all the bankrupt's estate be held liable to his creditors under the bankruptcy proceedings. It has been held that "an adjudication of bankruptcy at the instance of the bankrupt's creditors on the ground of a general assignment, avoids such assignment and subjects the property assigned to the jurisdiction of the bankruptcy court to be administered under the Bankruptcy Act which the creditors have invoked."

Opinion No 14.

AN INDIVIDUAL MAY TRANSACT BUSINESS UNDER A CORPORATE TITLE IN NEW JERSEY.

Frequently the question arises regarding a person's legal right to start business under a corporate title; for instance, as "Can John Smith conduct business as the Pine Lumber Company," etc.

Question from New Jersey.—A person wishes to start a lumber business in New Jersey. Can he adopt a style such as "The Crescent Lumber Company" without being incorporated, the manager being the sole proprietor? Is there anything necessary to be done in such a case beyond hanging out his sign at his place of business?

Reply: In New York no person is now allowed to establish a business under any name, corporate or individual, except his own name, until he has first placed on record in the county clerk's office, in the county in which the business is to be carried on, a statement of the facts. So far as we can find, however, there is no similar statute in New Jersey. It is a comparatively recent law in this State and there are not many other States that have adopted it. The public cannot be misled to its detriment by such a method of doing business as our correspondent proposes, and there is no common law rule against it. If any creditor supposes that the business is being carried on by a corporation he will not be harmed by the mistake, because the liability of an individual owner, or of a firm, is greater than that of the stockholders of a corporation. A creditor who learns that his business belongs to an individual, instead of a corporation, will be benefited by the knowledge, not damaged. If there should be a statute just enacted requiring registration, the county clerk will know of it.

Opinion No. 10.

WHETHER FREIGHT IS PREPAID OR ALLOWED DOES NOT AFFECT TITLE TO LUMBER.

Question.—A dealer in Buffalo sells a car of lumber to a dealer in Baltimore with the understanding that freight is to be allowed from Buffalo to Baltimore. Please state whether there is any distinction as to the ownership of the lumber in transit, whether the Buffalo dealer prepays the freight in Buffalo or allows the Baltimore dealer to deduct the amount of freight in settlement. If the freight is prepaid in Buffalo at the time of shipment, and the lumber be lost in transit prior to delivery, is the ownership of the lumber vested with the Buffalo or the Baltimore dealer?

Reply: If lumber is sold with an understanding that the seller is to pay the freight, it makes no difference at all, as to ownership during transit, whether freight is prepaid and included in the price, or whether it is deducted from the price and left for the buyer to pay. A seller is not bound to carry the lumber to its destination and deliver it there unless he has expressly agreed to do so. This is true whether the seller pays the freight or not; in either case a valid delivery, transferring risk and title, may be made, if the seller so chooses, at the beginning of the transportation unless the seller has agreed to deliver the goods elsewhere.

Opinion No. 9.

OBTAINING CERTIFICATES PERMITTING FOREIGN CORPORATIONS TO DO BUSINESS IN PENNSYLVANIA.

A recent attorney's opinion contained some valuable information regarding the filing of certificates in New York State, permitting foreign corporations to transact business in that State and maintain an action. We have been asked for information regarding the requirements of the Commonwealth of Pennsylvania in this matter and our attorney at Philadelphia, William S. Furst, Stephen Girard Building, has forwarded the following opinion.

Herewith follows an opinion embodying the essential points in re foreign corporations doing business in the State of Pennsylvania.

The Act of Assembly approved April 22, 1874, provides that no foreign corporation (this includes corporations created by other States) shall do any business in this Commonwealth until such corporation shall have established an office and appointed an agent for the transaction of its business therein, and it shall not be lawful for any such corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under seal of such corporation, and signed by the President or Secretary thereof, showing the title and object of said corporation and the name of its authorized agent, with a penalty attached thereto for violation, that a person shall be guilty of a misdemeanor, etc.

The words "doing business" do not include a sale in a foreign State, although the goods are delivered in this State, or taking orders, or making sales by salesmen through agents going into Pennsylvania from another for that purpose.

In short, a foreign corporation engaged in strictly interstate commerce, may advertise its goods, send agents to solicit orders, take orders, make contracts of sale respecting the same, and ship them to customers in Pennsylvania, without violating the act, and may sue to recover the price of any merchandise without filing the statement required by the act, although the foreign corporation in question has no office or place of business in Pennsylvania and no part of its capital invested here.

A foreign corporation, which has not complied with the Act above stated, but has an office or place of business in Pennsylvania, or any of its capital invested within the State, cannot enforce contract rights in the courts of Pennsylvania.

It has been recently decided by the Supreme Court of the State of Pennsylvania (the court of last resort) that a foreign corporation which invests most of its capital in the State of Pennsylvania for a period of six months while constructing a railway, employs large numbers of men, but does not file a statement in the office of the Secretary of the Commonwealth, as required by the provisions of the Act until two months after completion of the work, cannot recover for labor and materials furnished in doing such work.

With respect to the taxes imposed upon foreign corporations doing business in the State of Pennsylvania, the Act of May 8th, 1901, provides that all foreign corporations shall pay to the State Treasurer for the use of the Commonwealth a bonus of one-third of one per centum upon the amount of their capital actually employed or to be employed wholly within the State, and a like bonus upon each subsequent increase of capital so employed. This is not an annual tax. It has been defined to be the price paid the Commonwealth for the privilege conferred on such corporation by its charter. It is therefore in no sense a tax, and the payment thereof does not relieve any corporation from any tax to which it is otherwise subject.

Respecting the taxation of foreign corporations, they are taxable like domestic corporations on so much of their capital stock as is invested within the Commonwealth under the provisions of the Act of Assembly approved June 8th, 1898. The tax is imposed annually at the rate of five mills upon each dollar of the actual value of the whole capital stock of all kinds invested or represented by capital invested within the State.

The tax is settled by the accounting officers upon the basis of a report required to be made by all companies subject to the tax, and particularly upon the appraisement of the value of the stock contained in such report. The report is filed between the first and fifteenth of November in each year.

Foreign corporations are also obliged to file a bonus report annually, from which should appear whether there has been any increase in the amount of the capital actually invested within the State, so that the proper bonus charges may be made upon any such increase as above stated.

Opinion No. 19.

PAYMENT OF CLAIMS BY AN EXECUTOR—TIME FOR FINAL ACCOUNTING.

Occasionally the question arises as to what length of time an executor has to close an estate, and the following, particularly the second section, may be helpful:

Question—Can an executor pay a bill of $10 or less, or what is the largest amount he can pay, without having the claim verified before a notary, according to law?

2.—Within what time do the laws require that an executor's accounts shall be made up and ready for final settlement?

Reply: 1. The law makes no distinction as to the amount of the claim against the estate for which an executor should require vouchers and an affidavit. The statutory provision is as follows: "The executor or administrator may require satisfactory vouchers in support of any claim presented, and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant," see Code of Civil Procedure, Section 2718. If an executor should pay a claim of any considerable size, without this precaution, and the claim should afterwards turn out to be unjust, he could be, or probably would be, required to repay the amount to the estate.

2. The laws of this State do not fix any definite time as the limit within which an executor must make his final accounting. Whenever a year has expired since the grant of his letters, the surrogate may compel the executor to make an accounting of all that has been done up to that time. If the estate is then in a condition to be definitely settled this may be done. If there has been any remissness on the part of the executor this may properly be dealt with by the surrogate. If the executor has used due diligence, and still is not ready to make a final accounting, he may have further time, always, of course, under the supervision of the court.

Opinion No. 23.

A SELLER MAY CONTRACT AGAINST LIABILITY FOR DELAY IN SHIPPING.

Question—A company in Boston sells to A in New York 800,000 feet of lumber and on the sales slip are the words, “for delivery, one cargo in June, and one in July.” The lumber was shipped in four cargoes, about 200,000 feet in each. The first two were shipped in July; the third cargo on the 18th of August, and the fourth on the 21st of August. The first two cargoes were accepted at the contract price, $27, but the customer refuses the third and fourth cargoes, claiming that we were late on the deliveries. It is a well known fact that all through this year vessels have been very hard to obtain. Has the New York dealer a right to refuse to accept the third and fourth cargoes at the contract price? The price has dropped from the spring to the present time from $27 to say $24. The customer claims the last two cargoes at the going market price prevailing at the time they arrived. Inasmuch as the cargoes cannot be sold over again, except at a less price than the New York customer offered, we were obliged to let him unload the last two cargoes. We claim that the customer has no right to deduct anything, owing to the lateness of delivery, because our orders read, “subject to delays caused by fires, strikes or other causes beyond our control.”

Reply: We suppose the clause quoted by our correspondent, “subject to delays,” etc., is incorporated in the contract or is so prominently printed on the order blank that the buyer cannot fail to understand that the sale is made subject to it. If that is true, and if it is also true that the delay in this case actually arose from a cause beyond the control of the sellers, then the buyer’s position was not tenable at the beginning. It is possible, however, that the buyer can maintain his position now by reason of the acquiescence of the sellers. The buyer had a right to ask that a deduction in the price be made by reason of the delay. If the sellers had refused this request and demanded expressly that the cargo be accepted at the contract price, or not accepted at all, they could have enforced their demand. It does not appear very clearly what answer the sellers made to the buyer’s request for a lower price. Our correspondent says: “Inasmuch as the cargoes cannot be sold over again, except at a less price than the New York customer offered, we were obliged to let him unload the last two cargoes.” There was plainly a dispute as to whether the delay was one which was excusable under the terms of the contract, and, if the act of the sellers, or their answer to the request of the buyer for a lower price, can be construed into an acquiescence in that request, the

sellers are now bound by such acquiescence. If the sellers have always insisted that the contract price must be paid, that the goods must be accepted in strict accordance with the contract, or rejected, then they are in position to collect the full contract price for all the lumber.

Opinion No. 24.

WHEN LUMBER IS SOLD FOR DELIVERY THERE IS A BREACH OF CONTRACT IF NOT DELIVERED.

Question from Buffalo, N. Y.—A sells B a carload of lumber at a given price delivered, Boston rate of freight for shipment from the West. B gives directions which are accepted by A for shipment of car to a point taking a Boston rate of freight. The lumber is shipped as per contract, and the consignee pays a sight draft with bill of lading attached according to terms. While in transit the lumber is destroyed. Is the shipper not responsible to the consignee for the lumber, as it was not delivered, as the contract called for; and after the lumber is destroyed does the consignee have an option of insisting on having the shipment replaced or canceling the order?

Reply: Our correspondent calls attention to the fact that the contract in this case called for a delivery of the lumber at the end of transportation. This being so, the seller was bound to carry and deliver the lumber, as well as to furnish it. The carrier was an agent of the seller and if the lumber is not delivered the seller is to look to the carrier for damages, while the buyer looks to the seller. What the seller undertook to do in this case was to supply the lumber, to carry it, and then to deliver it. If he fails in either point he is guilty of a breach of contract. He has failed to deliver the lumber; the buyer may regard this as a breach of contract, which it is, and sue for such damages as may have come upon him as a result of the breach. The buyer cannot compel the seller to replace this lumber with other; but if the seller would rather do that than pay damages, and if the buyer is willing to have it done, then, of course, it may be done.

Opinion No. 22.

A LIQUIDATED DEMAND CANNOT BE SETTLED EXCEPT BY PAYMENT OF THE WHOLE AMOUNT.

Question—An individual in Providence, R. I., who was indebted to me, forwarded a check for less than the amount of his entire indebtedness. He stated on the face of it "settlement in full." This in nowise discharged his obligation to me and I wrote him that I would credit his check on account and requested a remittance of the balance. He takes the position that under the Rhode Island law he has discharged his indebtedness. Please advise what rights I hold in the premises.

Reply: We do not find any statute or decision in Rhode Island to the effect that a payment of this kind constitutes payment in full. All the reported decisions by the courts of that State we have been able to find lay down practically the same rules upon the subject that are enforced by the courts of New York. This payment was made in New York, and the laws of this State govern it in any event. The law upon the subject here (and, so far as we can learn, in Rhode Island, too), is briefly this: If there is no doubt, and no dispute, as to the amount due, then payment of less than that amount will not discharge the debt, even though the creditor agree to accept it as a discharge, if there is no release under seal and no new consideration given. If the debt is unliquidated, if there is a doubt or dispute as to the amount of it, then the debtor's offer of so much as payment in full constitutes his estimate of the amount really due. The creditor cannot accept the money without accepting the estimate. The debtor has a right to go into court to have the dispute settled, and if the creditor is unwilling to accept the condition under which the money is sent he is bound to return the remittance and allow the whole matter to be determined in some authoritative way. For decisions to the effect that part payment of a debt that is liquidated and certain is not payment in full, even when the creditor accepts the money and uses it, see 23 N. Y., 684; 108 N. Y., 470; 1 R. I., 496; and 8 R. I., 381.

Opinion No. 20.

PRIVILEGE OF STOPPING LUMBER IN TRANSIT WHEN BUYERS BECOME INSOLVENT.

Question—When lumber has been sold and shipped, and the seller afterwards directs the carrier not to deliver it to the buyer but to return it to him, is the carrier under any obligation to return it, or must he go ahead and deliver it to the buyer, or may he exercise his own will in matter? What are the legal rights of all parties in such a case?

Reply: If one who has sold lumber on credit learns, after it has been delivered to the carrier, that the buyer is insolvent it is his right to demand that the lumber be not delivered to the buyer, but be returned to him. This is known as the right of stoppage in transit, and it is founded upon the theory that one who buys on credit is bound by an implied contract to keep his credit good until the date of payment arrives. In order that the seller may be entitled to exercise this right the buyer must be actually insolvent, that is, unable to meet his just obligations as they fall due; the lumber must be still in the hands of the carrier, and not yet delivered into the actual or constructive possession of the buyer. If the lumber is represented by a bill of lading making it deliverable to the buyer or his order that must be still under the buyer's control; if he has transferred it to a third person, who has taken it for value and in good faith, the seller's right of stoppage is gone. If a seller who has a right to stop the lumber attempts to exercise the right by directing the carrier not to deliver it the carrier is bound to obey the direction. The carrier, however, acts at his peril in any case. If he obeys the instruction and refuses to deliver the lumber to the buyer, and the buyer is solvent, he may bring an action of trover against the carrier immediately. On the other hand, if the carrier disobeys the instruction, and delivers up the lumber, he makes himself liable to the seller, at least to the extent of the buyer's indebtedness for the lumber, if it is a case in which the seller is justified in exercising his right of stoppage in transit. Because of these difficulties of his situation, the carrier is entitled to a reasonable time in which to investigate the financial condition of the buyer; but if he finally delivers the lumber to the buyer in any case in which the seller had a right to countermand the order for their delivery, and had done so, the carrier must answer for it.

Opinion No. 27.

SALES FOR FUTURE DELIVERY.

Frequently the question of credit arises after a contract for future delivery has been made, and the following may be helpful:

Question—Will you kindly give us your opinion in the following matter: A makes a sale to B of a certain quantity of lumber for future delivery, payments to be made on a credit of sixty days' time. Before the delivery of lumber begins, A has reason to believe that the responsibility of B is not satisfactory to him and refuses to ship the lumber except for cash with discount for the difference in time. What redress has B in this matter, if he is not in a position to pay cash?

Reply: The refusal of A to ship the lumber to B under these circumstances constitutes a breach of contract, for B has an action against A for damages. Something more than dissatisfaction with B's financial responsibility is necessary to furnish A with a valid excuse for his refusal to ship except for cash.

Opinion No. 30.

IN MOST STATES A CONSIGNEE MUST BE NOTIFIED OF THE ARRIVAL OF HIS LUMBER.

Question—Is a railroad company obliged to notify the consignee of the arrival of lumber when it is billed and the bill of lading reads: “Order of shipper, notify consignee,” and if the carriers fail to notify the consignee, have they the right to charge demurrage or storage for the lumber so held? Would it make any difference if the lumber were billed direct to the consignee and were not an “Order notify shipment?” Have the courts made any rulings of this matter, and where can we find them?

Reply: A railroad company is, of course, bound to comply with the undertaking set forth in its own bill of lading. If it accepts goods to be carried and delivered under a bill which expressly directs it to “notify the consignee” there is no ground upon which it can escape its obligation actually to notify the consignee except the impossibility of finding him by the ordinary means. If the consignee can readily be found the carrier has not fulfilled the task which it has expressly and in definite terms undertaken to fulfill until it has found him and notified him. It has no right to charge demurrage or storage until such notification has been duly given. If the consignee cannot be found by the exercise of reasonable diligence then the attempt to find him will serve the carrier as well as an actual notification. If the bill of lading does not, in express terms, direct the carrier to notify the consignee this duty still rests upon the carrier by common law as it is interpreted in this State. In some States (Massachusetts, for example) the carrier is not bound to notify the consignee of the arrival of his goods unless the contract of carriage expressly so directs. But in New York the courts hold that this is one of the carrier’s duties, as carrier, without any special stipulation regarding it. This is the rule, as the courts of New York have announced it. “The rules as to the delivery of goods at their place of destination by a carrier that prevail in this State are as follows: If the consignee be present upon the arrival of the goods, he must take them without unreasonable delay. If he be not present, but live at or in the vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to remove them. If he be absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and if the consignee does not call for them in a reasonable

time, its liability as a common carrier ceases."

Opinion No. 25.

OBTAINING CERTIFICATES PERMITTING FOREIGN CORPORATIONS TO DO BUSINESS IN NEW YORK.

A previous opinion contained some information regarding foreign corporations obtaining certificates to do business in New York. The following additional information, from our attorney in New York, Mr. Eustace Conway, 15 William Street, regarding amendments effective November 1st, will be interesting:

There went into effect on November 1st, 1906, various important amendments to the corporation Tax Law. The annual franchise tax is placed on a different basis from what it has been heretofore for foreign corporations, and the license tax which foreign corporations have to pay for doing business in this State is also changed as to its method of determination. Under the new law the measure of amount of capital stock employed in this State (on which the tax of ⅛ of 1 per cent. is to be paid for this corporation license to do business here) is to be such a proportion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. As no action shall be maintained in any of the courts of this State by such foreign corporation without obtaining a receipt for this license fee, it is important to foreign corporations expecting to do business here to comply with the statute and take out the certificate. This tax, of course, is only to be paid once for the license, unless later an increased amount of capital stock is employed in the State, but this is not likely to occur. The annual franchise tax is, of course, a different tax, but it is based on the same proportion, except that the amount of dividends is also to be considered.

Opinion No. 26.

THE NEW JERSEY LIEN LAW PROTECTS MATERIAL MEN.

Question—Please state whether or not, under the laws of the State of New Jersey, a seller of building materials comes in under the mechanics' lien law the same as the man selling his labor.

Reply: Persons furnishing materials for the erection of a building are called "material men" in the Mechanics' Lien Law of New Jersey, and they have a lien which is protected like that of a laborer. The first section of the law provides that "every building hereafter erected or built within this State shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands." It is further provided, in a later section, that "whenever any master-workman or contractor shall, upon demand, refuse to pay any person who may have furnished materials used in the erection of any such house or other building—it shall be the duty of such—material man to give notice in writing," etc. As a result of this notice his lien attaches and his claim is protected.

Opinion No. 21.

OBLIGATION OF CARRIERS AS TO NOTICE OF ARRIVAL TO CONSIGNEE.

Question—Is a railroad company, which has accepted lumber for transportation to a certain point, legally obligated to notify the consignee at the respective point of the arrival of lumber?

Reply: The law relating to the obligation of a railroad company to notify the consignee of the arrival of the lumber at the point of destination is not uniform in all the States. The rule adopted in New York and in most of the States is that the carrier must give notice of arrival to the consignee, and that until notice is given, or a reasonable effort to give notice is made, the carrier's liability as carrier continues in force.

Opinion No. 28.

BUYERS' POSITION WHERE, ON ARRIVAL, LUMBER IS NOT IN ACCORDANCE WITH CONTRACT.

Question—A has sold to B a carload of lumber to be delivered on or before November 24, payment cash promptly after arrival and examination. The lumber arrives on the 24th, and A gives on that day to B an examination order for the lumber, which examination order B accepts. B uses proper diligence in trying to examine, but, owing to congestion of cars at the depot the lumber is not unloaded for several days, and he can only examine it on the 28th. He finds it to be of a quality inferior to the grade contracted for and rejects it, and his rejection is sustained by arbitration. B claims the right to go into the market on the 28th, buy a carload of lumber of the grade contracted for and demand from A the difference between the contract price and the price paid by him on the 28th. A maintains that he can only be held responsible for the difference between the contract price and the ruling market value on November 24, the last date stipulated in the contract. Who is right?

Reply: This lumber was sold for delivery at the buyer's end of the route, the purchase price was to be paid only after arrival and examination. The carrier was an agent of the seller, and he did not give the buyer an opportunity to make examination until November 28. No valid delivery was made, or could have been made, before November 28, inasmuch as an examination by the buyer was to precede such delivery. When delivery was tendered on November 28 the lumber was found to be such as the buyer was at liberty to reject. He was, accordingly, authorized to go into the market on that day and buy at the price then prevailing in order to place himself in as good a position as he would have been in if the seller had done his duty and had not been guilty of a breach of contract. The buyer has a right to demand that the seller shall place him in this position.

Opinion No. 37.

LIABILITY OF TRANSPORTATION COMPANY IN DELIVERING WITHOUT SURRENDER OF BILL OF LADING.

Question—Can a transportation company be held responsible for delivering a shipment of lumber to a consignee without surrender on the part of the consignee of signed bill of lading, originally issued when shipment was made?

Reply: Until lumber shipped has been completely delivered to the person entitled to receive it, the bill of lading represents the lumber, but no longer. The transfer of a bill of lading passes the title of the transferor to the transferee. If, therefore, a transportation company delivers the shipment to consignee without a surrender of the bill of lading it is liable to a person who has obtained a valid title to the shipment by transfer of the bill of lading from the consignee.

Opinion No. 29.

IF NO SPECIFIC TIME OF SHIPMENT IS NAMED A REASONABLE TIME IS UNDERSTOOD.

Question—On October 25th we bought of a manufacturer a carload of lumber through their agent. On the 30th we received confirmation of the order. Nothing was said about the time of shipment, except that in sending the sizes on October 26th, we told them to “ship at once.” On November 1st they wrote that they would ship it “the coming week.” No part of it has been shipped yet. We could have disposed of the carload during this time at a very good profit. During all this time we have been completely out of this kind of lumber. Have we a just claim for damages?

Reply: It does not appear whether the confirmation received by the buyers on October 30 was sent by the sellers before or after their receipt of the instruction to “ship at once.” The only importance of this point is this: If the sellers confirmed the order after receiving the instruction to “ship at once,” they were bound to ship at once. If they confirmed the order before receiving this instruction, then the instruction formed no part of the contract, and is not to be taken into account; in that case the sellers were bound simply to ship the lumber within a reasonable time—within the time within which these sizes commonly are shipped. If they have not done so, they are guilty of a breach of contract and the buyers may recover any damages the breach has caused them. They are entitled to be placed by the sellers in as good a position as they would be in if the sellers had carried out their contract according to its terms. The letter of the sellers of November 1, saying they would ship the goods “the coming week,” forms no part of the contract. The agreement was made before that letter was written, and it is binding as originally made. The letter is of importance, however, as showing an estimate of the sellers themselves as to what was a reasonable date of shipment. The letter is not binding upon the buyers, if they can prove that an earlier date would have been reasonable; but it is binding upon the sellers, who wrote it.

Opinion No. 36.

ONE WHO BUYS LUMBER IS LIABLE THOUGH HE TRANSFERS IT BEFORE DELIVERY.

Question—An individual buys a carload of lumber for future delivery and before it is delivered he forms a partnership with two other persons and turns the order over to the firm. Delivery of the lumber is made to this firm. Please say whether the individual is liable, or only the partnership. It is a limited partnership and the buyer has only a certain definite amount at stake with it.

Reply: This is simply the case of an individual who has purchased goods and then has sold or transferred them before they have come into his actual possession. Such cases, that is, of a second sale before delivery to the first purchaser, are very common, and the original purchaser remains liable precisely as if delivery has been made to him and he had afterward disposed of the goods as he saw fit. In the case our correspondent puts the seller may look to the first buyer unless he has agreed to release him and look to the firm.

Opinion No. 38.

A LUMBER SALESMAN GENERALLY HAS NO POWER TO BIND HIS PRINCIPAL.

Question—One of our traveling salesmen has just sent in a larger order than we feel safe in filling for that particular customer on the liberal terms of credit allowed him in the same contract. Are we compelled to fill the order, or may we reject it without incurring any legal liability?

Reply: Ordinarily a traveling salesman is authorized merely to take orders and submit them to his principal for acceptance or rejection. He has no power to bind his employer irrevocably by a contract of sale. Our correspondents are justified in refusing to fill an order sent in by their salesman unless the latter was expressly authorized to make a valid and binding sale upon his employers' behalf, or unless traveling salesmen are usually clothed with this power. In the latter case each salesman will be presumed to have the powers usually possessed by men of this class, unless the buyer had notice of a limitation upon this general and usual power in the case of the salesman with whom he was dealing.

Opinion No. 35.

USING LUMBER WITHOUT CONSENT OF SHIPPER WHERE QUALITY IS DISPUTED.

Question—We shipped a carload of lumber to a party and they complained of the quality and refused to settle in full. We insisted upon a settlement in accordance with invoice, or re-inspection of the entire carload by an inspector that would be satisfactory to both parties. We sent a man to look at the lumber and found that it was put in a dry kiln without our consent, and this, of course, prevented an inspection of the lumber in its original condition. Are we correct now in insisting upon a settlement in full as invoiced, and can we maintain our action in a lawsuit?

Reply: If your lumber was received by the company and, without authorization from you they put it in the dry kiln, so as to prevent your examining it or taking it back, they would be liable to you for the invoice price. They cannot accept the lumber, use it and then refuse to pay. By their acceptance they waive any defects in quality or quantity, which can be ascertained upon an inspection of the lumber upon arrival. They do not waive any defects that are what we call “latent,” that is, that are not readily ascertainable upon an examination of the lumber on arrival, but only show after the lumber may be put in use. As we take it, such complaints as have been made relate to alleged defects which they ascertained as soon as they received the lumber. In that case they had no legal right to use it, and if they used it, they are liable for the invoice price.

Opinion No. 34.

IN AN F. O. B. SALE, SHIPPING POINT, THE CARRIER IS THE BUYER'S AGENT.

Question—If I buy goods f. o. b. point of shipment and part of the goods invoiced are lost in transit can the consignor enforce payment for the goods not received?

Reply: When goods are bought f. o. b. place of shipment they are delivered to the buyer at the place of shipment. Title to the goods passes to the buyer as soon as delivery is made to the carrier and the carrier is an agent of the buyer to bring his goods to him. If the goods are lost on the way the buyer must pay for them, just as if they had reached him; they have reached his agent and have been delivered to him, and that is all the buyer can ask. When goods are sold the presumption always is that the buyer is to take charge of them in the place in which they are at the time of the sale. There is no presumption that the seller is to carry the goods to any place the buyer may select and deliver them to the buyer there. The seller may do this, of course, and he frequently does do it; but he is never bound to do it unless he has expressly so agreed. If the buyer, in any case, declared that the goods were to be brought to him by the seller he must show some clause in the contract that has this meaning; in the absence of such a clause the buyer, either in person or through an agent, is to take possession of the goods in the place they occupy at the time of the sale. The words, "free on board," are sufficient to prevent the seller from making a good delivery while the goods are in his own warehouse, as he otherwise might do. These words place upon him the duty of taking the goods to the boat or cars and meeting the expenses necessary actually to start them on their way; but when this much is done the seller's whole duty is done. The goods then belong to the buyer and have been delivered to him; that is all that is necessary to raise an obligation on his part to pay for them.

Opinion No. 33.

BUYERS CAN INSIST THAT LUMBER, PURCHASED ON CREDIT, BE DELIVERED.

A retailer says: “Lumber was sold to us by a special written contract on a six months’ credit, the lumber to be ordered out as fast as we saw fit. We have taken a little more than half and only about two of the six months have expired. We order another small shipment to be made. The seller replies that he will send this car, but that he can make no more deliveries unless we are ready to discount part, at least, of our bill. He says that he has already extended credit to us as far as he feels justified in doing. He seems to pay no attention to the contract, under which we were entitled to order out all of the lumber at once, or in such shipments as suited us, and were to have a credit upon the whole bill of six months. Will he be sustained in the stand he has taken? If we have a remedy please say what it is?”

Reply: When lumber has been sold and part of it delivered, it is too late for either the buyer or the seller to alter the contract without the consent of the other. If the sale is upon credit, as in this case, the terms of credit are such as have been agreed upon in the beginning. Either the buyer or the seller may ask, of course, to have the terms changed before all of the deliveries have been made, but if the other does not agree to the change the contract must be performed as it was made. It would be as reasonable for the buyer to refuse to accept the remainder of the lumber unless the terms of credit were made more favorable to him, as for the seller to refuse to continue his deliveries as agreed unless his new proposal as to credits were accepted. If the seller, in the case our correspondents put, refuses to go on with the contract in its original form, the buyers will have the same remedy they would have had if no deliveries at all had been made. They may go into the open market, when the time for delivery arrives, buy lumber enough to finish out the contract, and then hold the seller for such amount as they are compelled to pay over and above that named in the contract. Or, if they do not choose to do that, they may establish the amount of the loss arising from the seller’s breach of contract in any way in which it can be shown to the satisfaction of a jury and collect the damages so established. Or the buyers may cancel the remainder of the contract if they prefer that course. There is only one exception to this rule. Any one who has bought goods on credit is bound by an implied agreement to keep his credit good, and if he fails to do so he cannot require the seller to deliver the goods. Accordingly, if a buyer, before all of the

lumber is delivered, shows an inability to pay any just claim in the ordinary course of business, when it falls due, those who have sold him on credit may lawfully refuse to go on with the deliveries and the buyer will have no remedy.

Opinion No. 39.

ONE CUSTOMER CANNOT DEMAND THAT CREDIT BE EXTENDED TO ANOTHER.

Question—Lumber corporation No. 1 bought from lumber corporation No. 2 several carloads of lumber for future delivery. Corporation No. 1, before the agreed time of delivery, commenced proceedings of dissolution. Out of corporation No. 1, however, a new corporation, No. 3, was formed. Corporation No. 3 now demands of corporation No. 2 that they deliver this lumber. No. 2 declines on the ground that the personal, as well as the financial, standing of the new corporation is entirely changed. Do you think that corporation No. 2 has a legal right to do this? Where the word corporation is used we mean that one company is incorporated under the laws of one State, while the other two companies are existing under charters from different States.

Reply: If any person or corporation has been willing to extend credit to corporation No. 1 that same person or corporation cannot for this reason be compelled to extend credit to corporation No. 3, or to any other person or corporation. If a corporation has bought goods and paid for them it may assign its right under that contract, which is simply a right to demand delivery of the goods to another corporation; but if it has bought goods on credit, and has then gone into dissolution, it cannot demand that the credit of any other corporation be substituted for its own.

Opinion No. 40.

GIVING A BAD CHECK DOES NOT PREVENT DISCHARGE IN BANKRUPTCY.

Giving a worthless check for goods and disposing of them immediately is not a ground for refusing a discharge from bankruptcy. Judge Hough of the United States District Court has recently granted a discharge to a party who filed a petition in bankruptcy on October 24, 1906, with liabilities of $11,577 and no assets. His discharge was opposed by a creditor, who said that on June 6, 1892, the debtor bought $1,964 worth of goods, giving a check in payment, which was deposited in bank and came back marked “no funds.” The creditor went at once to debtor’s place of business and found that he had sold out and left the city. When debtor’s application for a discharge came up for a hearing he excepted to the specifications of objections, and Judge Hough sustained the exception on the ground that the objections are not within the statutory list.

Opinion No. 41.

WHAT IS CONVEYANCE ON F. O. B. SHIPMENT?

Question—What is the meaning of f. o. b. Philadelphia, Pa.? What is the meaning of f. o. b. cars Philadelphia, Pa.? Is there any difference between the two above? If so, what is it?

2.—In selling goods f. o. b. New Orleans, and same are delivered alongside of steamer, does the shipper or consignee have to pay cost of handling charges in transferring from cars to steamer; that is, on goods shipped from New York to New Orleans.

Reply: (1) When goods are sold f. o. b. place of shipment the meaning is that the seller, for the amount named in the contract, will supply the goods and will bear the expense of delivering them on board that conveyance which is to carry them to their destination. The only difference between the two phrases set down above is that the latter binds the seller to deliver the goods on the cars at Philadelphia without any expense to the buyer; while the former binds him to deliver them at his own expense on some conveyance not yet specified, which will carry them to the buyer.

(2) If goods are sold f. o. b. New Orleans, and they are to be carried to the buyer at some other place in a steamer, all expenses necessary to deliver them aboard the steamer are to be borne by the seller. The conveyance on board which the goods are to be delivered is that which is to take them to their destination. If goods are to be carried to a buyer on a steamer there is no reason why he should bind the seller to load them on freight cars and make a tender of them there.

Opinion No. 42.

FAILURE TO DELIVER ONE INSTALLMENT CAUSE FOR CANCELLING ORDER.

Question—We purchased a quantity of lumber to be shipped in February, March and April in equal monthly shipments. The first shipment has not been made in February and we would like to know whether this entitles us legally to cancel the entire contract or only the February lot. In other words, does the breaking of a contract in one instance cancel the entire contract?

Reply: When goods are to be delivered in instalments the courts of this State hold that the seller's failure to deliver one instalment justified the buyer in refusing to accept that tender and also in rescinding so much of the contract as is yet unfulfilled. It is one contract, not several, and the seller cannot insist on a right to deliver only such instalments as he finds it convenient to deliver and to have them accepted. The buyer has not agreed to pay anything at all for part of the goods. His contract is that he will pay a certain amount for all of them. If he is not to have all of them, it is quite conceivable, and is often a fact that any part less than all is of very much less than proportionate value to him; it may have practically no value to him at all. In any event, the seller has agreed to do a certain service and the buyer has agreed to pay a certain sum of money. The court will not infer from that an obligation to pay half the money for half the service or to accept half the service on any condition, if the other half is to be, or has been, withheld.

Opinion No. 43.

Question—A customer places an order with the mill for November, December, January and February, proportionate shipments. The mills are unavoidably delayed in executing the order, but are finally able to make shipment of practically the whole order in February. The customer refuses to pay invoices for all the goods shipped in February, but claims dating on proportionate amounts in April, May and June. Is he justly or legally entitled to the dating and could he hold the goods subject to sellers' order?

Reply: There seems to have been no clause in this contract releasing the mill in case of such a delay as has occurred. In the absence of such a clause the buyer was justified in refusing to accept the goods when all of them were shipped in

February. He is entitled to hold the goods subject to the seller's order, or to return them. He cannot, however, force another contract upon the seller than that which was actually made. The mill may take back its goods or allow the buyer to accept them upon such new terms as may be agreed upon. The buyer is justified in receiving the original contract. This is upon the supposition that the buyer has not during the past four months said or done anything to lead the seller to suppose that he was satisfied with the delay, that he would accept all of the goods as readily in February as if shipment had been made in strict accordance with the terms of sale. If he has done that he is estopped now from making any objection to the tender.

Opinion No. 44.

AMOUNT OF CLAIM FOR DAMAGE AGAINST CARRIER.

Question—We made a shipment via two connecting railroads. When it reached a junction prior to delivery at destination, i. e., a point on the second road, was badly or entirely damaged in a wreck, and our customer asked that we immediately replace the shipment, which we did, and made another shipment of the same kind of lumber four days later, but in the interim between the time of the first shipment and the time we received the replacing order from the customer, the price advanced, and in our second invoice we naturally charged the customer for the advance. The claim department of the railroad now offers to settle with us at the original invoice price of the first shipment and declines to entertain a settlement at the advanced price. We claim that our position is entirely legal in the matter, and that we are entitled to the advanced price for the shipment that was lost, the same representing the value of the goods at the time the goods were destroyed.

Reply: Usually the measure of damages in a case of this kind is based upon the value of the goods at the time and place and in the condition in which they ought to have been delivered; the freight is to be deducted from this, if it has not been prepaid, and then interest is to be added from the day on which delivery ought to have been made to the day of payment; there is to be added also any expense to which the owner of the goods has been put as a necessary and natural result of the loss. What the carrier is bound to do is to put the owner of the goods as nearly as possible in the same position he would have occupied if the carrier had done his full duty in the first place. If the carrier had done his duty the owner could have sold the goods at the market price on the day of delivery at the place of delivery, he would have had the interest on the money thereafter, he would have escaped all incidental expenses arising out of the loss, and he would have been called upon to pay freight to the carrier, if it had not been paid in advance. There is only one exception to the rule that is at all common. If the goods have already been sold for delivery at destination, at a price less than that which chances to prevail when the day of delivery arrives, and if the carrier, at the time of shipment, had actual or constructive knowledge of this fact, then the owner can demand only the selling price with interest. In that case, if the carrier had done his duty, the owner would have obtained for his goods, not the market price, but only the contract price. Whether the carrier had or had not notice of

the sale makes a difference in this respect; that a carrier is not to be held for a larger loss than he had in contemplation when the freight rate was fixed and the degree of care demanded of him was settled. If he had no knowledge of the sale, actual or constructive, he is bound for damages based upon the market price, as in the other case. The fact that other goods at a different price were sent to replace the lost shipment does not enter into the matter.

Opinion No. 46.

RISK IN SENDING CHECK TO DRAWER'S BANK FOR CERTIFICATION.

Question—We received a check from one of our customers and sent it to the customer's bank for certification. The bank failed before the end of the next day and our check was not paid. Can we not return it to the maker and demand the face of it from him?

Reply: If the drawer of the check in this case had sufficient money on deposit to meet it our correspondents have no other recourse except against the assets of the insolvent bank; the depositor is discharged. The usual rule is that when a check is delivered that is drawn upon a bank in the same place in which the payee resides the drawer guarantees the solvency of the bank during the remainder of the day on which the check was delivered and the whole of the next day. The holder has this much time in which to present the check and draw the money; if the bank fails meanwhile the loss is upon the drawer of the check and the holder takes the risk of failure after the second day. But this rule does not apply when the holder of the check takes it to the bank and has it certified before the end of the next day after he receives it. Certification binds the bank and releases the drawer. So far as the drawer and holder are concerned, the effect is precisely the same as if the holder had drawn the money and had then deposited it to his own credit in the same bank.

Opinion No. 45.

A CONTRACT MAY BE CANCELLED WHEN ONE PARTY IS GUILTY OF BREACH.

Question—Lumber has been sold for delivery in installments running through a considerable period. Payments are to be made in installments also. The buyer has been very lax in this regard, however; he has not made a single payment strictly on time, and in some cases has delayed until the seller has been compelled to threaten suit. Is the seller bound to go on making deliveries to the end of the time named in the contract, getting his money whenever and however the tardy buyer sees fit to pay it?

Reply: If a seller agrees to deliver the goods at certain times, and the buyer agrees to pay for them in installments at given dates, each promise is a consideration for the other. If either the buyer or the seller fails to do his full duty under the contract he is in no position to demand that the other shall do what he has agreed to do. In other words, as soon as either is guilty of any breach of the contract the other may declare the whole agreement at an end; he may refuse to do anything further under the contract himself, and may demand damages of the person who was guilty of the breach. If a buyer fails to meet any payment promptly when it is due, the seller, if he chooses to do so, may immediately rescind the contract and bring suit for the unpaid installments and for damages. If he had not this privilege he might be compelled to go on for months delivering his goods to one who had already shown his unwillingness or inability to make good his promise of payment.

Opinion No. 47.

LUMBER ON A CONSIGNEE'S SIDE-TRACK IS IN CUSTODY AND AT THE RISK OF THE CONSIGNEE.

Question—When does the railway's liability end and the consignee's begin on lumber delivered in cars on the consignee's side-tracks; i. e., if a carload was burned in forty-eight hours after being placed for the consignee, would the loss fall on the transportation company or the consignee?

Reply: When a carload of merchandise is delivered upon the consignee's own side-track and the consignee has notice, express or implied, of that fact, then all liability of the railroad company for the safety of the merchandise ceases at once. The goods are still in the company's cars, but that is not sufficient to make the company liable, for the cars themselves are in the custody of the consignee and upon his premises. The goods have been delivered to the consignee, and that is the last of the duties the carrier undertook to perform. A railroad company cannot be expected, and in some cases would not be allowed, to place its watchmen in private freight yards and to extend over and through those yards its system of protection against fire. When cars containing goods have been delivered upon the consignee's premises the goods themselves have been delivered there. The carrier is no longer liable, either as carrier or as warehouseman and the courts have so decided.

Opinion No. 48.

WHERE A SELLER REFUSES TO MAKE DELIVERIES, BUYER CAN PROTECT HIMSELF.

Question—A places a contract with B for future delivery of lumber beginning in October; B, for certain reasons, does not care to deliver this contract. A has the opportunity to buy the identical goods for the same delivery from competitors at the same price, after being notified by B that he does not care to deliver this contract. Does the fact that A has the opportunity to cover himself on the same conditions release B of damages arising from non-delivery of the contract, or can A wait until the time of delivery before buying goods in the open market against the contract of B which the latter refuses to deliver?

Reply: If B is under contract to deliver goods to A in October, and if, before October, he notifies A that he does not intend to fulfill his contract obligation, A may accept that statement as final and protect himself at once. He may make other arrangements for an October delivery and compel B to pay the loss, if any, or he may sue at once for breach of contract. The buyer is not bound to pursue this course, however. He may act upon the supposition that, upon further consideration of the matter, the seller will conclude to do his duty after all; and so the buyer, A in this case, may wait till the time arrives for the October delivery, and may then buy goods to replace those that the seller ought to have delivered, holding the seller liable for the loss, if any, or he may then sue for breach of the contract. If this costs the seller more than the other plan might have cost him, the fault is his own. He will not be heard to complain because the buyer has taken it for granted that he really would perform his contract obligation when the time arrived, in spite of his previous statement that he did not intend to do so.

Opinion No. 49.

ALL CONDITIONS OF A CONTRACT MUST ACTUALLY BE EMBODIED IN THE CONTRACT.

Question.—The following is a general form that is frequently printed across the top of the letter heads of manufacturers: “All agreements are contingent upon fires, strikes, delays of carriers, accident and other contingencies beyond our control.” What effect does this have on a contract when such letter heads are used when quoting prices and when accepting the order?

Reply: Any provision that is intending to form part of a contract ought to be introduced into it in express terms or else referred to so that there can be no mistake regarding it. In the particular case under consideration the clause should be incorporated in the contract or acceptance, or the contract should state that the sale is made subject to the terms and conditions printed across the top of the paper. Either one of these would be a simple, easy procedure and would remove all doubt. A contract usually begins with the name of the place and a date, or with the names of the parties; and it ends with one or more signatures. Both parties are bound by all that lies within these limits and by everything beyond that is referred to as forming part of the agreement; but neither party is, as a rule, expected to look anywhere else—even around the margins of the same paper—to ascertain his rights and liabilities. It may be possible, in some cases, to make a provision printed on the margin of the paper containing the contract part of the contract itself, but there is always more or less doubt upon this point, and no doubt should be left where it is so easy to make the meaning plain. If the marginal printing is to be useful at all it will be mainly in connection with a statement that the contract was made subject to a certain usage of the business, or a certain custom of that particular house, and that this custom was well known to the buyer; as proof of this fact the words across the top of the paper would be useful.

Opinion No. 50.

A CARRIER IS LIABLE FOR ANY LOSS CAUSED BY HIS DELAY IN DELIVERING GOODS.

Question.—Inform us what recourse we would have against a railroad for a shipment of lumber from Buffalo to New York, which has already been on the road eighteen days, as shown by the shipping documents, and has not arrived yet. In the meantime the market dropped some 10 per cent. in price. This lumber was bought f. o. b. Buffalo.

Reply: A carrier is bound, not only to deliver the lumber entrusted to him for carriage, but to deliver it with reasonable promptness. The courts recognize the fact that promptness of delivery has an importance second only to the fact of delivery itself. What is to be held as constituting reasonably prompt delivery is to be decided in accordance with nature of the goods and all the circumstances of the particular case; it is such delivery as carriers of the kind in question, carriers by rail or vessel, as the case may be, ordinarily make in handling goods of the same kind as those in question. When the time arrives for delivery to be made, under this rule, and the goods are not delivered the consignee is entitled to sue for their value at destination on the day on which delivery ought to have been made. If the carrier is able to deliver the goods, and offers to do so, at any time before he has been required to pay for them as goods lost, the consignee cannot refuse to accept them and still recover their full value. He is bound to accept the goods whenever they are tendered, no matter how great the delay may have been; but in such a case he still has a valid claim for any loss he may have sustained as a result of the delay. His damages are at least as great as that amount by which the market value of the goods on the day of delivery is below their market value on the day on which delivery ought to have been made; to this is to be added any other loss or expense brought upon him as a direct result of the carrier’s delay.

Opinion No. 13.

THERE IS NO REMEDY AFTER ACCEPTING LUMBER.

Question.—I purchased some lumber from a party in New York State at a given figure f. o. b. shipping point, and had it forwarded by the railroad company according to my instructions. Upon arrival my customer reported to me a shortage of several hundred feet, of which I in turn notified the party from whom I bought. He stated that he hardly thought such a shortage was possible and asked me to retally the lumber. I communicated with my customer, who told me that the shortage reported was correct, and that he had used up the lumber as he was in need of the lumber, although I requested him to hold it intact. My customer in settling with me deducted for the full amount of the shortage, whereas the party who sold to me refuses to accept settlement on this basis, offering me an affidavit from his shipper that the quantity alleged to have been shipped by him was correct. Am I compelled according to the New York court rulings to remunerate the party who sold to me as per his invoice? He claims that the lumber ceased to belong to him when he placed it at the railway company's depot subject to my instructions. For this reason he demands full payment. I am in a position to furnish an affidavit from the party to whom I sold the lumber to the effect that the shortage actually occurred at destination, although the lumber was received in good condition.

Reply: This lumber was sold f. o. b. shipping point and it is true, as the seller says, that title passed to the buyer at that point. This fact, however, does not excuse the seller for delivering short count or tally, if he made such delivery. He undertook to deliver a certain quantity of goods at the shipping point, and his contract obligation was not fulfilled unless he delivered that quantity. It does not appear, however, that the contract was such as to allow the buyer to accept less than the quantity sold at a pro rata price. As the contract is described to us, it was a sale of a definite quantity for a stipulated price, with no other provision. That being the case, the buyer, when tender was made to him had no choice other than to accept the tender as satisfactory, or else to reject it and claim damages for breach of contract. He did accept the goods and he used them. It is too late now for him to say that the tender was in any respect unsatisfactory. The buyer might have rejected the goods on account of short tally, and then he could either have claimed damages for breach of contract, as we have suggested, or he could have communicated with the seller, offering to take the shipment at less than the

contract price—could have made a new contract, in short. He did neither. He accepted the goods. He will not be heard now to say that they were, in any respect, not such goods as the contract called for. Our correspondent can be compelled to pay for these goods the full contract price, and the person to whom he sold them can be compelled to do the same.

Opinion No. 31.

PROPOSED FREIGHT RATE ADVANCE.

In view of the agitation regarding the proposed advance in freight rates it is suggested that our members protect themselves as fully as possible in making quotations. It is believed advisable to use a clause either printed or stamped on the letter-head or quotation stating substantially the following:

“All quotations made and orders accepted are based on present freight rates.”

Where this clause is used it should be printed or stamped in such a way that it becomes a part of the quotation or correspondence. Stamping the clause on the margin of a letter-head is considered inadvisable.

Opinion No. 110.

ACCEPTANCE OF AN AMOUNT OFFERED AS "PAYMENT IN FULL" MAY OR MAY NOT CANCEL THE DEBT.

Question—A customer sends me a check for a certain amount and inserts the following on the face of his check: "In full to June 1." Does my indorsement give my receipt in full to this date or not? Can I indorse his check and write him a letter advising him that I am using the check only to apply on the account?

Reply: Suppose A owes B a certain sum of money and there is no doubt or dispute as to the amount actually due. Then if A pays to B less than the amount, in cash or by check, saying at the time, "this I tender as payment in full," B may keep the money or cash the check without losing the right he previously had to demand what was still due and unpaid. No man, without the consent of his creditor, can discharge the whole of his debt by paying part of it, if the amount is liquidated and certain. Suppose, however, that there has been no agreement as to the amount due or that there is an honest and well-founded dispute concerning the matter. Then when the debtor sends any reasonable amount, with a statement that it is tendered and is to be accepted, if at all, as payment in full, that is his estimate of the sum due. The creditor cannot accept the tender without accepting the estimate; if he does accept the tender the amount due is thereby agreed upon and fully paid. If the creditor is not willing to accept the tender as payment in full he must return it. Then an agreement may be reached as to the amount actually due, or if the two cannot agree the matter may be left to the courts. The debtor has this privilege, in a case of this kind, because it would be unfair to him to allow the creditor to keep what the debtor honestly believed to be the whole sum due, and still allow him to sue for more, when, if he had brought his suit in the first place it is possible he might not have been able to recover even as much as the debtor has already paid him.

Opinion No. 51.

PROTEST IS NOT NECESSARY TO HOLD PARTIES PRIMARILY LIABLE.

Question—Is it necessary, or is it in any way helpful to have a note or an accepted draft protested, regard being had only to the maker of the note or the acceptor of the draft?

Reply: The object of a protest is to inform a person who is secondarily liable upon a bill or note that the person primarily liable has been properly called upon and has refused to pay the amount. There could be no object in conveying formal information of this kind to the parties primarily liable, because they know what the facts are, they know, that is, that demand has been duly made of them and that they have failed to comply with it. Accordingly it is held that protest and notice are not necessary to charge the maker of a promissory note or the acceptor of a bill of exchange. We believe this to be the sound rule in all cases.

Opinion No. 52.

F. O. B. SHIPMENTS.

Question.—Please advise us, what the position of a shipper is who takes an order for a full carload of material at a price including freight to destination, but where the shipper takes out a bill of lading in the name of the buyer. The shipper claims he simply guarantees freight to destination, and having the bill of lading issued in the name of the buyer places the risk of loss or damage in transit on the buyer.

Reply: A buyer of goods takes title to them wherever they may be at the time of the sale unless the contract provides otherwise or unless the seller by some act of his own reserves the title to himself during transportation. A mere agreement on the part of the seller to pay the freight is not sufficient to rebut the presumption that title was to pass on delivery to the carrier. When goods are sold f. o. b. destination the seller undertakes to carry them to their destination and there deliver them. They are his goods, and the risk is his, until he has tendered delivery at that place; this is true because the buyer cannot be compelled to accept a tender made at any other place; but a mere agreement that, for a given price, the seller will furnish the goods and pay freight upon to a given place, does not make him liable for their delivery in that place. If he was bound to deliver them at destination the contract would say nothing about freight; an obligation on the seller's part to deliver the goods at destination is, in itself, an obligation to pay freight upon them or to carry them himself, and it is not for the buyer to choose which he shall do. If the agreement to pay freight did place the risk on the seller during transportation he could not escape that obligation by his own act in taking out a bill of lading in a particular form. If he was at liberty, under the contract, to deliver the goods at the shipping point, however, he could increase his obligation by his own act, and taking the bill of lading to his own order would, if not otherwise explained be sufficient for this purpose. In this case the bill of lading was taken in the name of the buyer, and that is consistent with the seller's claim that a valid delivery could be and was made at the shipping point and the carrier was an agent of the buyer.

Opinion No. 53.

PAYMENT OF FREIGHT NOT ALWAYS TRANSFER OF TITLE.

Question.—Please advise us if in selling lumber freight paid to destination we are liable for damage in transit. As we understand it, when we sell lumber delivered at destination we are liable, but when we sell it freight paid the buyer is liable.

Reply: The person who owns goods while they are in transit must bear the expense of damage or loss if they are not insured. If the goods have been sold the title during transit may be either in the seller or the buyer. It is sometimes perfectly clear that title is in one or the other, while in some cases it is a very difficult question. Payment of freight is one item to be taken into consideration, but it is generally not alone absolutely conclusive of the question one way or the other. Our correspondent is correct in saying: “When we sell goods delivered at destination we are liable.” It is equally correct to say: “When we sell them, otherwise than for delivery at destination the buyer is liable.” It is not always true, however, that the buyer is liable when the seller pays the freight. Goods that had not been ordered, for example, or goods slightly different from those ordered might be sent in the expectation that the buyer would accept them. In such a case the seller would probably prepay the freight but title would remain in him, and the risk would be his, until the buyer had received the goods and accepted them. If the contract requires the seller to pay freight that is good evidence, if there is nothing on the other side to offset it, that title and risk are to be in the buyer during transit; this is so because if the seller was bound to deliver the goods at the buyer’s end of the route he would be bound to pay the freight, as a part of this obligation, and would not separately agree to pay the freight. If the contract is silent on that subject the mere fact that the seller pays the freight is not sufficient to show that he reserves title. All the facts of the case are to be taken into consideration, the presumption being that title passes when the goods are delivered, properly directed, to the carrier. If the buyer claims that title did not pass to him at that instant the burden of proof is on him, and the mere fact that the seller paid the freight is not alone sufficient to overcome the presumption.

Opinion No. 54.

FILING CERTIFICATES IN MARYLAND.

Some of our members have recently received communications from the Secretary of State of Maryland calling their attention to a law which went into effect in Maryland June 1st, 1908, regarding filing certificates permitting foreign corporations to transact business. The Secretary of State's letter reads in part as follows:

"The name of your company appears on the records of this office as a Foreign Corporation doing business in Maryland. As the recently enacted Act of the Legislature repeals the law under which you are authorized to transact business in this State, it will be necessary for you to comply with the provisions of the new law, a copy of which I enclose herewith, together with a blank form, convenient for use in connection therewith."

Our attorney at Baltimore writes as follows regarding the necessity of complying with the provisions of the law above referred to:

"It is not necessary for a foreign corporation who maintains no office or agency, or has no assets in this State, to file a certified copy of its charter, the required certificate under the act and the franchise tax. A foreign corporation under the facts above stated may send any number of salesmen for the purpose of making sales in this jurisdiction without having to comply with the foreign corporation law."

Opinion No. 55.

RAILROADS CAN INSIST ON ACCEPTANCE OF DELAYED SHIPMENTS.

Question.—I shipped a carload of lumber to a customer consigned to myself and it was apparently lost in transit. The delay caused my customer to cancel this order with me, whereupon I notified the railroad that I would not accept delivery and would hold it responsible for not only the value of the car, but any damages resulting to me. The car has just turned up and the railroad insists that I must take it and put in claim for loss. Am I compelled to accept the car?

Reply: If the road offers to deliver the lumber now the consignee should accept it. A carrier is not a dealer, and goods tendered by it cannot be refused, however late the tender may be, or however seriously the goods may be damaged, provided they are recognizable as the goods actually shipped and have any value at all. The consignee cannot leave them in the hands of the carrier and demand full value for them. He must accept them and do the best he can with them. His acceptance of them does not relieve the carrier of its liability, and the consignee is entitled to recover all loss caused by delay, or by damage to the goods, as soon as the loss has been ascertained. If the market price has declined since the day on which delivery should have been made that difference in value is to be included in the damages; usually that is the principal part of the loss, and frequently it is the whole of it.

Opinion No. 56.

QUESTION OF DISCOUNT.

Question.—I take an order from my customer, the terms of payment being stated 2 per cent. 10 days. The buyer makes settlement in 20 days and claims that he is entitled to the discount by paying interest for the extra time which he has taken over and above the ten days. On the other hand, I claim that the bill not having been paid within the discount period becomes net, and that face amount of the bill therefore becomes due on the eleventh day Which is right?

Reply: If a contract of sale gives the buyer no right to a discount he has no such right. If the contract does give him a right to a discount, upon certain terms, he must comply absolutely with those terms in order to entitle himself to the discount. The situation is just this: A seller who is entitled to demand the full face of his bill, says to the buyer, “I will deduct part of the amount if you will do a certain thing at a certain time in a certain way.” The buyer cannot fail to do the thing so specified at the time and in the manner named, and still claim a discount as if he had done it. The buyer is entitled to no discount at all in the case here put.

Opinion No. 57.

LUMBER MAY BE RETURNED TO THE CONSIGNOR IF THE CONSIGNEE WILL NOT ACCEPT IT.

Question.—We ordered a carload of lumber from a shipper in the South and advanced $200 on account before the shipment arrived at its destination. This shipper received from the railroad company a bill of lading in his name marked "non-negotiable," which he indorses to us and mails to us and notifies the railroad by letter that the shipment is for us. On arrival we find that the lumber is not in accordance with our order and we refuse to accept it, whereupon the railroad stores it for account of the owner. We notified the railroad that we would release the car to the shipper upon the latter paying to us the $200 advanced. The railroad has since delivered the car back to the shipper on the latter's instructions by their giving the railroad the usual bond, which the railroad insisted upon having, and we still retain the original bill of lading indorsed to our order. We put in a claim against the railroad company for the $200 advanced, taking the position that they had no right to deliver the car to the shipper without the bill of lading or an order from us. The railroad refuses to pay our claim, saying that the bill of lading was a non-negotiable one, and inasmuch as the shipper took it out in his own name he had a right to regain possession of the car, and that we waived our rights, although retaining the bill of lading, by refusing to accept the lumber on arrival. We did not pay the freight. What course can we pursue to recover the $200 advanced?

Reply: If a consignee refuses to accept goods shipped under a non-negotiable bill of lading they may be returned to the consignor. The carrier is not bound to act as agent or intermediary for the settlement of any differences between the two. Here our correspondents have simply extended a credit of $200 to the shipper. If he does not voluntarily meet the obligation the amount may be recovered by suit.

Opinion No. 58.

RAILROADS MUST PAY VALUE AT DESTINATION FOR DAMAGES ON LOST LUMBER.

Question.—Should the railroad in settling claims for shortage of lumber pay for it at our cost price or at the current market price?

Reply: Unless the contract between the shipper and carrier provides for some other measure of damages, the principal amount to be paid by the carrier when the lumber is lost or destroyed is the market value at destination. If the freight has not been paid in advance it is to be deducted from market value. There is to be added, on the other hand, interest at the legal rate from the day on which delivery should have been made to the day of settlement; and there is to be added also any incidental expense to which the consignee may have been put as a direct result of the carrier's failure to do his duty. This is the only way in which the consignee can be placed in as favorable a position as he would have occupied if the carrier had done his duty, the only way in which the whole of the loss can be placed upon the carrier, who has caused it; and this is what the law aims to do in every case.

Opinion No. 59.

SUIT CAN BE INSTITUTED IN NEW JERSEY ON JUDGMENT OBTAINED IN ANOTHER STATE.

Question.—Some time ago I secured a judgment in Pennsylvania against a party who now lives in New Jersey, and has some property there. Can I make collection in New Jersey?

Reply: A judgment of a Pennsylvania court can be enforced by a levy on property in New Jersey, without regard to the place of residence of either the plaintiff or defendant. If this judgment was secured in Pennsylvania it is without force in New Jersey. In that case, however, another suit can be started in New Jersey, and the proceedings will be brief and inexpensive; he will have to prove merely that suit was previously brought in Pennsylvania, in a court of competent jurisdiction, and judgment rendered in his favor. Judgment in New Jersey will follow immediately and as a matter of course; under that judgment he can levy on property in New Jersey.

Opinion No. 60.

NOT ALWAYS NECESSARY FOR CARRIER TO NOTIFY CONSIGNOR THAT SHIPMENT IS REJECTED BY CONSIGNEE.

Question.—Have we a claim on the transportation company for the invoice value of the shipment under the following conditions: We made a shipment of a car of lumber, and when it arrived at destination the railroad offered it to consignee and he refused it. Some time later the railroad sold the lumber for what it would bring, which, it appears, was only about 50 per cent. of our invoice. Is the transportation company under obligation, in a case of this kind, to notify the shipper that the lumber is at destination refused and thereby give the shipper an opportunity to dispose of the lumber without loss?

Reply: If a carrier has no notice to the contrary, he is entitled to assume that the consignee is owner of the lumber and that any delivery or disposition of it of which the consignee cannot complain will be satisfactory to all persons. If the goods are sent C. O. D. or if the carrier is instructed not to deliver them to the consignee until they are paid for, or if he receives any instructions from which he may infer that the consignor retains title to the goods, in any such case, it becomes the carrier's duty to inform the consignor of the consignee's refusal to accept the goods. The same result follows if the carrier is expressly directed to give such notice and if he accepts the goods under these directions. In any other case the carrier is not bound to assume that the goods have been sold and that the consignor is retaining title to them to secure payment of the purchase price, or that the consignor has any interest in them at all. He may assume that the consignee has already paid for them, or that they were the property of the consignee before shipment. The consignor has put it in the power of the consignee to take the goods and do as he pleases with them, and the carrier is bound merely to act in such manner that the consignee may have no valid ground of complaint. In the absence of special instructions to the carrier, or of knowledge on his part that the goods belong to the consignor, the rule is simply this: That the carrier is not to be expected to deal with two different persons with reference to a single shipment or the disposition to be made of it; that he may safely assume such an understanding between consignor and consignee that they will keep each other informed, if necessary, and that anything that satisfies the consignee will satisfy the consignor. There is nothing in the question asked to show that it was the carrier's duty to notify the consignor in this case.

show that it was the carrier's duty to notify the consignor in this case.

Opinion No. 61.

LUMBER IS ACCEPTED UNLESS REJECTED PROMPTLY.

Question.—A retailer goes away leaving his son in charge of the business. The son asks us to ship a car of lumber and we sell it to him, acting for his father, invoicing the car and mailing the bill of lading. The car arrives, the son surrenders the bill of lading to the railroad and orders the car placed on his father's siding for unloading. For some reason the son decides not to unload the car before the arrival of the father, which will be in about a week. When the father arrives he claims the lumber is not up to grade and refuses to accept same, unless we make an allowance. Does not the acceptance of the bill of lading and its surrender to the railroad constitute a delivery of the lumber and entitle us to our money without question whether we are right or wrong about the quality of the lumber? It is possible, of course, that a very small proportion of this lumber may be a little off, but the difference is very slight, and would show only the difference that any two inspectors would make in going over the car of lumber.

Reply: A buyer of goods is bound to inspect them with reasonable promptness, after he has an opportunity to do so, and then accept or reject them at once. Reasonable promptness is greater promptness than was shown in this case, unless there were some unusual facts in connection with it of which we are not informed. A buyer is seldom justified in delaying his inspection beyond the next day after arrival of the goods. If he does not reject the goods with reasonable promptness, whether he sees fit to inspect them or not, then he is held to an implied acceptance. They are placed in his hands. He may do as he likes about examining them, but he must reject them promptly, if he is to reject them at all. If he does not reject them promptly any remedy he may have had is gone unless the goods were sold to him under a warranty of quality.

Opinion No. 62.

NEW YORK INCORPORATION LAW.

In view of a recent decision regarding the corporation law of New York State and its probable effect upon foreign corporations doing business in this State, we have asked our attorney in New York for information, and the following is submitted:

“At the end of January last there was handed down a decision in the Court of Appeals, which was later printed in 190 N. Y., settling the disputes which had arisen as to the necessity for obtaining certificates of license to do business in this State as a condition precedent to suing here.

“It holds that in compliance with the General Corporation Law it must be alleged and proved by a foreign corporation in order to establish a cause of action in the courts of this State. The cases holding otherwise, should be regarded as overruled and the conflict of authority ended.

“And it is further held that an objection to a complaint on this ground is not waived by the failure to raise it in the defendant’s pleadings, but can be raised at any time.

“A little later the court also held that this rule applied just as much as to the assignee of a foreign corporation’s claim, except as to negotiable paper taken in good faith from the corporation before maturity.

“It follows that any foreign corporation desiring to do business in New York, whether on a large or small scale, must comply with the statute and take out a license and pay the franchise at the end of the first year, and I suggest that this should be brought to the attention of your foreign lumber corporations.”

(If further information is wanted by any members whose business is incorporated under a State law other than New York, we shall be pleased to hear from them.)

Opinion No. 63.

NEW JERSEY INCORPORATION LAW.

Question.—Under New Jersey laws a New York corporation doing business in New Jersey must register in Trenton. We did a large amount of business before we were aware of this, but ultimately registered. In suing one of our customers we were nonsuited because we were not registered at the time the goods were sold, but this was in an inferior court. Does the fact that we were not registered in Trenton at the time the goods were sold completely shut us off from recovering in the State of New Jersey?

Reply: We believe that our correspondents will not be allowed to maintain this suit; they are prevented from maintaining it as much by the laws of their own State of New York as by those of New Jersey. The law of the case stands thus: The New Jersey statute requires all foreign corporations to file certain documents with the Secretary of State and to take out a certificate authorizing them to do business in New Jersey. It is further provided that "until such corporation so transacting business in this State shall have obtained said certificate of the Secretary of State, it shall not maintain any action in this State, upon any contract made by it in this State." If this were all our correspondents could take out a certificate any time and then sue; this section only forbids them to sue before taking out a certificate. It is further provided, however, that when another State imposes any greater penalties on New Jersey corporations than the laws of New Jersey impose upon corporations of that State, the same penalties shall be imposed on corporations of such other State doing business in New Jersey. Now, it is provided by the General Corporation law of this State (Sec. 16) that foreign corporations must take out certificates as in New Jersey, and that "no foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State unless prior to the making of such contract it shall have procured such certificates"; that is the reason a New York corporation doing business in New Jersey is not allowed to sue in the courts of that State on a contract made therein unless it had taken out its certificate before the contract was made.

Opinion No. 64.

A LARGE CONTRACT SHOULD BE IN WRITING.

Question.—In the summer one of our salesmen sold a car of lumber for September delivery, the salesman handing the buyer copy of the order at the time of purchase. On previous purchases made by this same customer he has been in the habit of sending in a confirmation of the order on which appear the words "No order valid unless signed by one of the members of the firm." No such confirmation was received by us for the last order placed, the same having been overlooked by us, and we shipped the goods to them upon the agreed delivery date. And they write us now that as no confirmation was given they cannot accept the goods and hold them subject to our order. They write further that their former buyer brought up the memorandum order for these goods, but that they declined to confirm; but of this latter act we had no knowledge. Please inform us where we stand in this matter.

Reply: In nearly every State there is a statute declaring that the purchaser of goods to the value of $50 or more shall not be legally liable unless he signs a written contract or part of the price is paid or part of the goods are accepted. The wording of the statute in New York State is as follows: "Every agreement, promise or undertaking is void, unless some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking—is a contract for the sale of any goods, chattels or things in action for the price of $50 or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action, nor at the time pay any part of the purchase money."

Opinion No. 65.

USING CHECKS MARKED “IN FULL SETTLEMENT.”

In connection with several claims recently handled by our Collection Department in Pennsylvania and the question of using checks marked “in full settlement” or “in settlement of all demands to date,” we have the following communication from a prominent attorney in Pennsylvania:

“I desire to state that it is elementary law that if pending the adjustment of a disputed claim, the debtor sends the money to his creditor in full payment of the demand, the latter cannot receive and retain it as a credit upon a larger sum claimed by him, without discharging the debtor as to the whole.

“123 Pa., p. 576. 147 Pa., p. 607. 70 Pa., p. 315.

“These cases have been decided by the Supreme Court of Pennsylvania, the court of the last resort. Therefore it does not lie in the province of your members to cancel the words ‘in full settlement’ without destroying their right in respect to prevailing for the balance.

“I might further state that in the absence of any dispute in respect to any claim, the payment of a smaller amount will not operate to discharge the whole, because there is no accord and satisfaction; the absence of any dispute in respect to the amount being the material circumstances in this regard.”

Opinion No. 66.

A CUSTOMER BUYING ON CREDIT MUST KEEP HIS CREDIT GOOD.

Question.—If a bill of lumber is sold on credit and before delivery to the customer the seller considers he has good reason to question the purchaser's ability to settle when the bill is due, can the seller withhold the delivery and demand either better terms or cash without making him liable for the non-fulfillment of the contract?

Reply: A man who has bought goods on credit is bound, as the courts phrase it, "to keep his credit good." If he does not do that the seller need not ship the goods; if he has shipped them and then finds that the buyer has not kept his credit good, he may stop the goods and take them back into his own possession at any time before they have actually been delivered to the buyer or his agent. In making his decision the seller must, of course, take his own risks. He has entered into a contract and he must fulfill it or pay the resulting damages unless he has a legal excuse for refusing to go on with it. It is not sufficient that, as the question says, "the seller considers he has good reason to question the purchaser's ability to settle"; nor that the seller has good grounds for believing that the buyer's credit is impaired. It is not a question of any man's belief, but a question of fact. The goods must be shipped unless the buyer is actually insolvent. This does not mean that he must have made an assignment or gone into bankruptcy or made any other public acknowledgment of the fact that he is insolvent. It means he has become unable to pay his debts as they fall due. The seller must be able to show that at least one debt has fallen due against the buyer and that he has not paid it promptly. Of course, it must be a debt the validity of which the buyer himself does not dispute upon any tenable ground. If he has paid his debts as they fell due he has "kept his credit good," no matter what any one may suspect as to the future; if he has failed to pay any just debt promptly he has not kept his credit good. If the seller has no right to refuse delivery of the goods altogether he has no right to demand better terms than his contract gives him.

Opinion No. 67.

DISCOUNT MUST BE IN ACCORDANCE WITH THE CONTRACT.

Question.—We sold to a concern and the terms of sale were “2 per cent. discount for cash in ten days or sixty days net.” The buyer in his settlements has taken fifteen to twenty days’ time and has deducted 2 per cent. discount and has added 6 per cent. per annum for the extra days beyond ten. We claim that this settlement is entirely wrong, and if he wishes the discount in full he must send a check within ten days after the date of the bill.

Reply: No debtor is to be excused from paying the full amount of his debt except in strict accordance with some provision to that effect in his contract. Here is a debtor who would have been bound to pay the full amount immediately if there had been no special provision to the contrary. Any such provision as there may be is a kind of grace to him and it is not to be extended beyond the strict terms in which it is expressed. He may take 2 per cent. off if he pays at any time within ten days. When the ten days are passed the contract stands precisely as if it had said nothing at all about discount for payment within ten days. This debtor had no right to deduct the 2 per cent. He is trying to take an advantage which his contract does not give him. If he were asked to point out a clause in the contract giving him a right to take off the discount later than the tenth day, of course, he could not do it.

Opinion No. 69.

A BILL OF LADING TO ORDER RETAINS TITLE TO THE GOODS.

Question.—If a shipper sells a carload of lumber f. o. b. shipping point with draft attached to bill of lading and bills the car to his own order, notify the purchaser, and if the car should be wrecked in transit or should never reach its proper destination, would the buyer who bought the car f. o. b. be compelled to pay the draft and take up the bill of lading and seek recourse against the carriers? Should the shipper bill a car to the order of a bank, notify the f. o. b. purchaser and sell the draft and bill of lading to the bank outright, would the purchaser be compelled to pay for same?

Reply: When a sale is made f. o. b. shipping point the seller can make a valid delivery at that point. If he delivers the goods to a carrier there, takes a bill of lading making them deliverable to the buyer and forwards it to the latter, his full duty is done and the goods are at that moment, in legal effect, delivered to the buyer; they are actually delivered to the buyer's agent, the carrier, and that is equivalent to a delivery to the buyer himself. This is the kind of delivery the seller is at liberty to make, under the contract, but he may not do so. He might, conceivably, carry the goods in his own arms to the buyer, or he may deliver them to one who is unquestionably his own agent. In either of these cases delivery to the buyer does not occur until the goods reach their destination. If A ships goods to the place in which B resides and takes the bill of lading to his own order the goods are not in any sense delivered to B or to his agent. They are A's goods. He can stop them where he will and take them back into his own possession. When they reach their destination he can take charge of them or have them delivered to anyone he may choose to name. Those goods could be seized by a creditor of the seller and they could not be seized by a creditor of the buyer. If they are lost in transit it is the seller's loss. A seller must either deliver the goods or retain them. He cannot do both. He cannot deliver them so as to make the buyer liable in case of loss and still retain them so that they will be his, to do with as he will if there is no loss. The same result follows if the bill of lading is sold to a bank. A bill of lading represents goods in transit and transfer of the bill transfers the goods. The direction to the carrier to "notify" one person or another is of no importance. Goods may be consigned to B and the carrier, for one reason or another or for no reason at all, may be directed to "notify" X or Y or Z of the fact that they have arrived. Notification is not to be substituted for

delivery.

Opinion No. 70.

ONE WHO BUYS ON CREDIT MUST KEEP HIS CREDIT GOOD.

Question.—A, in New York, has with B, a manufacturer, three separate contracts made in December, February and March, respectively, each contract specifying the grade and price of material, date of delivery and terms of payment. The deliveries called for in the December contract have been completed by A; the date for the first delivery of the February contract is due this month; but B is overdue 30 days on his payment on the first delivery of the December contract and payment on the delivery of balance of the December contract is now due. Because B has failed to comply on his part with the conditions of the first contract, must A deliver the material according to the terms of the second and third contracts, thereby unduly increasing the amount of credit extended to B beyond his general credit limit? From information obtained which would lead A to question the credit of B, such as his taking a contract at a loss (this occurring since the contracts were made) can A demand payment before delivery of the goods, although the contract specifies 30 days from certain dates? Can A cancel the two uncompleted contracts for any of the above reasons, viz., non-fulfillment of the condition of the first contract by B or doubt as to B's credit? If cancelled by A would B have any legal redress such as buying the quantity and grade of material stipulated by the contracts in the open market and compelling A to pay the difference in price should the present market price be higher than the prices stipulated in the contracts?

Reply: When a man buys goods on credit it is always an implied condition of the contract that he shall "keep his credit good," as the courts phrase it, till the time of delivery arrives. If he becomes insolvent before that time he cannot demand that the seller shall ship the goods. If the seller does ship them, and then learns of the insolvency, he may stop the goods before they reach the buyer and take them back into his own possession. A buyer on credit has no right to demand that the goods shall be delivered to him at a time when he is insolvent and when there is reason to believe, accordingly, that the goods may have to be sold to pay his other debts. That is the situation in the case our correspondent puts, and the seller is certainly not bound to deliver the merchandise. By insolvency, in a case of this kind, is not meant an actual assignment for creditors; neither does it mean that the buyer has gone into bankruptcy or made any other public acknowledgment of the fact that he is insolvent. It means that he has become

unable to pay his debts as they fall due. The seller must be able to show that at least one debt has fallen due against the buyer and that he has not paid it promptly. Of course, it must be a debt the validity of which the buyer himself does not dispute upon any tenable or reasonable ground. The buyer in this case has failed to pay such a debt. The seller has ample proof of the fact because the debt was owing to him. The buyer has not "kept his credit good," and he has no right to demand that goods sold to him on credit shall be delivered. If they are not delivered he will have no legal ground of complaint or cause of action against the seller. It is not the seller who is guilty of a breach of contract, but the buyer; he is guilty of a breach of the implied condition which enters into all such contracts—the condition that the buyer shall "keep his credit good."

Opinion No. 71.

A SELLER IS BOUND BY HIS OWN MISTAKE UNLESS IT IS OBVIOUS.

Question.—We sent an inquiry for certain sizes of lumber to a mill asking for quotations. Our inquiry was delayed in the mails, and, as it did not reach the mill in time enough to quote we placed the order with the mill, but did not specify prices. The mill acknowledged our order, saying, “We have entered your order as per enclosed carbon,” and after each item they named a price. The lumber was shipped and an invoice sent us, but on two of the items a larger amount is charged than specified in the communication from the mill, saying our order had been entered. In remitting we deducted the difference between the prices mentioned in reply from the mill and the invoice, but the mill claims they made a clerical error and that we are bound to pay the invoice price. What is our position in the matter?

Reply: When a seller puts a price on his goods and the buyer accepts them at that price it is then too late for the seller to demand more except in the following case: If the buyer knew that a mistake had been made, or if the mistake was so gross and palpable that he ought to have known it to be a mistake, then it may be corrected. If a seller were to quote $1.25 when all buyers knew that $12.50 was about the market price, the buyer would not be allowed to claim the goods at the quotation without making special inquiry as to its accuracy; if the quotation was only slightly under the market, so that no suspicion attached to it, and if there was nothing else to show that a mistake had been made, and if the buyer had no actual knowledge of the fact, the seller is bound. Taking the whole class of sellers together, it would not be a safe rule to allow them to come around and collect more after a sale had been made and concluded upon the plea that they had not asked as much as they intended to ask.

Opinion No. 72.

A CARRIER SHOULD PAY VALUE AT DESTINATION FOR LUMBER LOST.

Question.—On what basis must a railroad company settle a claim by a consignee on lumber damaged or lost? Must the consignee supply the original invoices, or is he entitled to the selling price in his market?

Reply: If the contract does not provide otherwise, a carrier who fails to deliver goods must, as a rule, pay to the consignee the value of the goods at the time and place at which delivery should have been made. The carrier is to retain his freight charges out of this amount, of course, if freight has not been paid in advance. This is the only rule by which the whole of the loss can be placed upon the carrier, where it belongs. If he had done his duty and delivered the goods the consignee could have sold them at the prices there and then prevailing. If the carrier pays the consignee less than this amount the consignee himself must bear part of the burden of the carrier's negligence. Of course, if the contract provides that settlement shall be upon some other basis, original cost, for example, the contract will be enforced. The only other exception to the rule is that which arises when the goods have already been sold for an amount which is not so great as the market price at the place and time at which delivery ought to have been made. If delivery had been duly made, in such a case the owner of the goods could not have taken advantage of ruling market prices; he had already bound himself to deliver the goods at a price which proves to be less than the market on the day fixed for delivery, and this selling price is all that he can claim. The object in every case, except where there has been a special contract of carriage, is to place the owner of the goods as nearly as possible in the same position he would have occupied if the carrier had done his duty and to put upon the carrier, where it belongs, the whole burden of his negligence and breach of contract.

Opinion No. 73.

LIABILITY OF SHIPPER WHERE PART OF SHIPMENT IS ADMITTED BELOW GRADE.

Question.—I received from a customer an order for a carload of lumber of a certain grade. A fair sized car would be 14,000 feet. The car arrives and 2,000 feet of the lumber is admitted by me to be of a grade lower than the order called for. Can I compel my customer to accept the balance of 12,000 feet, which is up to the requirements of the order? He claims that inasmuch as the car I have offered is not all up to grade, I cannot compel him to accept even so large a proportion as 12,000 feet, notwithstanding the fact that 12,000 feet will still be a pretty fair sized car of lumber.

Reply: According to this statement the shipper undertook to carry out an order and deliver a carload of lumber. According to the admission 2,000 feet of the carload were contrary to the terms of the contract. Under the circumstances a carload of lumber has not been delivered and we doubt very much if you can find a way to compel acceptance of a carload of lumber that is admitted on the face of it as not being strictly according to the terms of the contract.

Opinion No. 76.

NECESSITY OF FOREIGN CORPORATIONS FILING CERTIFICATES.

The Association has made some inquiry regarding the necessity of so-called foreign corporations filing certificates in States other than those under whose laws the corporation was organized. If any corporate members are interested and desire information along these lines we shall be pleased to render such assistance as we can.

In some States the requirements are strict, and recently some Western States, particularly Oklahoma, have enacted legislation of much importance to foreign corporations shipping into those States.

Opinion No. 77.

COURSE TO PURSUE WHEN LUMBER IS REFUSED ON ARRIVAL.

Question.—We took an order from a customer for a carload of lumber to be shipped not later than September 15th. The car was shipped within the specified time but did not reach destination as promptly as it should, and our customer claims that he has been damaged to such an extent that he refuses to take in the car, saying it arrived too late for his use. The lumber is exactly in accordance with the order and is a special worked car. We will be put to some expense in disposing of this elsewhere and will probably have to sell it at a lower price. What method should we pursue?

Reply: There are three courses:

First: The shipper may store the lumber for the buyer and sue him for the invoice price.

Second: He may retain the property as his own and recover the difference between the market price at the time and place of delivery and the contract price.

Third: He may sell the lumber, acting as the agent for the purchaser and recover the difference between the contract and the price of resale.

This last course is usually considered best because it gives the seller the use of the money realized on the resale. Of course in reselling the lumber care must be taken to obtain the best possible price, and in the event of the resale the seller is entitled to recovery from the purchaser of all the costs which he was obliged to lay out in bringing to pass a sale of the property in question.

Opinion No. 78.

A CARRIER MUST STOP GOODS IN TRANSIT IF PROPERLY ORDERED TO DO SO.

Question.—A makes a shipment to a customer in another State and several days after he receives information that leads him to believe it prudent to hold up the shipment and have the goods reconsigned to himself. He immediately takes the matter up with the initial carriers with the request that they take immediate steps to stop the shipment in transit and have same reconsigned to himself, all charges to follow. In the event that the initial carrier fails to take prompt action and it develops that the goods are delivered after the initial carrier has been notified not to deliver them, thereby causing A the loss of the value of the shipment, cannot A hold the initial carrier responsible for the value of the shipment?

Reply: When goods are sold on credit and the buyer becomes insolvent or gives proof of insolvency, before the goods are delivered to him, it is the right of the seller to take them back into his own possession and refuse delivery altogether; this is because one who buys on credit is bound by an implied contract that he will keep his credit good and be able to pay for the goods when the due date arrives. When the carrier is called upon to return the goods to the seller he must act at his own peril. If he does return them and the buyer was not insolvent, the carrier must answer to the buyer for his damages. On the other hand, if the carrier fails to return the goods and the seller can show that the buyer was insolvent the carrier must respond to the seller for the value of the goods or for such part of it as the seller finally loses. The seller, in the case under consideration, must first establish the fact that he had a right, within these rules, to stop the goods. Then if he can show also that this might have been done except for negligence or delay on the part of the initial carrier, he can hold that carrier liable for his loss.

Opinion No. 79.

ACCORD AND SATISFACTION.

Frequently inquiries are sent us inquiring as to the advisability of accepting checks marked “In full settlement of account to date,” etc. The situation is not the same in all States but usually the questions are covered in the doctrine of accord and satisfaction explained as follows:

If an account between two parties be actively and openly in dispute and the debtor sends to his creditor a remittance for a specific sum and states that such sum is offered in full settlement, and if such sum be accepted by the creditor he is bound thereby and cannot thereafter recover anything on the account from his debtor. The mere sending of a remittance, however, for an amount less than the amount due, where there is no dispute between the parties, does not affect the right of the creditor to bring suit for the balance due even though it is stated in the letter accompanying the remittance that said remittance is in full settlement.

The question as to whether a dispute is open or active can usually be easily determined. If the seller and buyer have been in correspondence regarding a dispute, that determines its activity, and if after such correspondence a remittance is made marked “In full settlement,” etc., the acceptance is binding.

Opinion No. 80.

ACCEPTANCE IN NEW JERSEY MAY BE AFFECTED BY STATUTE.

Our attention has been called to a law passed by the New Jersey Legislature in 1907, from which the following is quoted:

“Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.”

We are receiving inquiries as to the responsibility of a customer where he had used part of a shipment of lumber of one description, the customer claiming the statute above quoted permitted him to use such of the shipment as was up to grade and reject the balance. Commenting on the law above referred to where a shipment contains lumber under one description it would seem to be the law that if the consignor delivers to the consignee the goods contracted for of the same description included in the contract, the debtor, with his right of inspection must either reject or accept, and if the consignee does any act by which it could be inferred that he is exercising the right of ownership of any part of the merchandise so shipped and delivered, we believe he is liable for the entire amount of lumber shipped and received. He cannot take out what he wants of the order and reject the balance.

The New Jersey law covers mixed shipments, for instance, in a shipment of barn boards, siding and moulding, the buyer would have the right to accept either of these items without prejudicing his claim, or waiving his privilege of rejection on the other two, but where a straight car of barn boards is ordered the buyer is not privileged to use a portion of them and reject the balance as not being up to contract.

Opinion No. 81.

CONDITIONAL CLAUSES REGARDING TERMS ON LETTERHEADS, INVOICES, ETC.

It seems again necessary to call the attention of our members to the custom of printing a clause on the top of letter-heads used for quotation to the effect that agreements or contracts are contingent upon strikes, accident, other causes, etc. It frequently happens that this clause is so printed on the letter-head or quotation form as not to make it a part of the contract, and the following attorney's opinion is pertinent:

When a man has a proposal to make to another in writing he begins, usually and naturally, with the name of the place from which he writes and the date. Then he makes his proposal and closes by signing his name. The paper upon which he writes may have printed at the top or somewhere in the margin the name and address of the firm; the telephone number and the number of the firm's post office box; the cable address; a list of five or six cable codes used by the concern; names of the various articles in which it deals; facsimiles of some of its trade-marks; pictures of certain gold medals that have been awarded to its goods at fairs of one sort or another. Frequently there is much other matter. There may also be something to the effect that agreements are contingent upon strikes. Of course, the person to whom the proposition is addressed is not concerned with any of these things. What he has to read and consider is the matter found between the address and the signature, and nothing more. That is the reasonable interpretation of the matter, and, is, very naturally, the view that the courts have taken of it. In 153 Ill., 102, to quote only one case, the Supreme Court of Illinois decided that "the words 'all sales subject to strikes and accidents,' printed as part of the letter-head of a reply, do not form any part of the contract." No court could very well reach any other conclusion, so far as we can ascertain, and no court has done so.

In the same manner a postscript on a letter or quotation blank is not an actual part of the contract unless it is signed.

Other members have also attempted to enforce terms printed on their invoices where such terms were not referred to in the original order or contract of sale. The following opinion will be helpful in such matters:

The question of the invoice may be settled with little difficulty. Nothing upon

The question of the invoice may be settled with little difficulty. Nothing upon the invoice is binding upon the buyer, whether it is written or printed and whether it stands in the body of the document or in the margin. A contract is made by two persons, and it is binding only in so far as both have agreed to be bound by it. An invoice is made, after all the terms of the contract have been irrevocably fixed, and it is made by only one person. The seller would have things very much his own way if he could go off alone, after a contract had been made, and alter or amend or limit or explain it by his own act. He has no such power, of course, and he cannot put anything upon his invoice in writing or in print, that will bind the buyer.

Opinion No. 82.

INTERPRETATION OF “REASONABLE TIME,” “DUE NOTICE,” ETC.

Frequently our members ask what constitutes shipment within a reasonable time, or what is the meaning of “due notice,” etc.

The courts are always careful not to give any general definition of such words as “due,” “reasonable” and the like. What is due or reasonable notice in one case might not be so in another; and each case is made to stand on its own facts. “Due notice,” in one case or in any other, is such notice as, all of the circumstances and conditions being duly considered, would permit the person receiving the notice to do that which was required of him. Evidence is to be presented, on the one side, and on the other, to show whether due notice, within this definition, was or was not given. Due notice is sufficient notice, and that which is sufficient in one case may be too much or too little in another.

Opinion No. 83.

IF SHIPMENTS ARE NOT TENDERED IN TIME THE BUYER NEED NOT TAKE THEM.

Question.—In December, 1909, we placed an order for nine cars of lumber to be delivered in March, 1910. Part of the shipment was made in February and March, leaving about a third unshipped on the first of April. We wrote the sellers to cancel the order. They object to this cancellation, saying that the delay was caused by a breakdown of their mill which was unavoidable and say for this reason the order is in force, as they are ready to make delivery of the balance of the goods to-day, April 7th, one week after the contract date expired. Have we a legal right to cancel under these conditions?

Reply: The man who runs a mill is entitled to all the profit he can make from it; but if there is an interruption of the running it is he who must stand the loss. He cannot ask a customer to wait for goods, at his own expense and inconvenience, until it may be found practicable and advisable to start up the works again. The buyers may refuse to accept the belated delivery, in the case our correspondent puts, and may demand damages for the sellers' breach of contract. If a breakdown of the mill is to excuse the seller the contract of the sale must contain an explicit stipulation to that effect.

Opinion No. 84.

WHEN A BUYER ACCEPTS A SHIPMENT, A WRITTEN CONTRACT IS NOT NECESSARY.

Question.—A customer called at our yards and arranged to buy six cars of lumber, asking that one car be shipped at once. He took this car, but refuses to order the balance out as per agreement. He offers to pay for what he has already had, but he says we cannot hold him for any more because the contract was not in writing. Is he right?

Reply: This buyer can be held for the value of the six cars. A written contract or memorandum is not necessary where part of the goods have been delivered and accepted. There are three ways in which a sale of goods for $50 or more may be made valid and binding: (1) By a written contract or memorandum; (2) by delivery and acceptance of part of the goods; (3) by payment of part of the purchase price. Thus a buyer sometimes pays a small part of the price at the time of the agreement, “to bind the bargain,” as he says, and it has that effect.

Opinion No. 86.

IT IS TOO LATE TO CLAIM DAMAGE FOR DELAY IN SHIPMENT WHEN LUMBER IS ACCEPTED.

Question.—We took an order from a customer for ten cars of lumber to be shipped one car every two weeks. The first three cars were shipped on time, but there was a lapse of four weeks before the fourth car got out and weather at the mill delayed our getting the balance out as per agreement, although we finally got off all the cars. When the delayed shipments began to arrive our customer complained of the delay, and said he would charge us back with any cost he had to allow his customer. We objected, but our customer said we agreed to time deliveries, and would hold us to same. He took in all the shipments, but now wants to charge us with a loss he claimed he allowed his customer.

Reply: If the lumber was offered to the buyer at a time later than any date agreed upon at time of sale, the buyer could have refused to accept it, and would have had a claim against the seller for damages occasioned by the delay. On the other hand, the buyer might accept the goods, notwithstanding the delay, if he chose to do so. He had no option except one of these two, accept the goods and pay for them, or reject them as not having been sent in time to constitute a fulfillment of his order. He could not accept the goods at any other than the contract price. This is the situation in which the case would have stood if there had been no correspondence between the ordering of the goods and their shipment. It is barely possible that the correspondence may contain some modification of the original contract, introduced into it by mutual consent, which would give the buyer the right he now claims. If the original contract was allowed to stand as made then the buyer has mistaken his remedy if he had any remedy at all. The goods were offered in fulfillment of the contract. He could accept them as such, or reject them. Having rejected them, it is possible that he would have had a claim against the seller for failure to deliver the goods in time. This much, however, is perfectly well settled. The buyer had no right to the goods at all except in fulfillment of his contract. If he accepts them, the contract is fulfilled and he cannot turn about and demand damages because it is not so. If he thinks the delivery is not a good one, because of delay, let him refuse it and then say that the contract has not been carried out. It has been or it has not been, and his acceptance of the goods shows that it has been.

Opinion No. 87.

NOTICE TO AN AGENT IS NOTICE TO THE PRINCIPAL

Question.—A, a shipper in the South, ships to B, in New York, a carload of lumber at a price based on delivery f. o. b. New York City. The material is offered to B on a lighter at the agreed upon point of destination, and B, on inspecting it, comes to the conclusion that it is not what he ordered, and refuses to accept it, simply telling the railroad that the material is not what he ordered, and refuses to unload. B does not notify the shipper, A, and the latter knows nothing of B's rejection or refusal to accept until about a month later, when he receives a notice from the railroad that B has rejected the material. A claims that B should have notified him immediately by mail or telegram that the material was not what he ordered, but B claims that he was not compelled to do so and that the fact that the railroad did not notify A until a month after was no concern of his. Is he right?

Reply: There is no rule of law known to us which would have required the buyer to notify the seller of his determination not to accept the goods in this case. If the buyer had taken the goods from the carrier he would have been bound to notify the seller of this subsequent rejection. If delivery had been made at the shipping point instead of f. o. b. destination, so that the carrier should have been agent of the buyer and not of the seller, the buyer's duty to give notice would have been the same. As the case actually stands it is this: The seller himself or his agent, which amounts to the same thing, tenders the goods to the buyer and the buyer rejects them without having taken them into his custody. The seller or his agent immediately knows that they are rejected. How could notice add anything to that knowledge? If it is the seller's agent who knows, and if the seller himself does not know, that is because the seller has not given proper instructions to his agent or because the agent has failed to follow them if they were given. In neither case is the buyer to blame. He has notified the seller's agent that the goods are refused; that is all he can be required to do. If the refusal is not justified the seller has his remedy, of course. If it was justified the seller has sufficient notice of it. Our correspondent says the seller complains because the buyer did not notify him "immediately by mail or telegram that the material was not what he ordered." That is absurd in any case. The seller knew as well as the buyer, and knew before the buyer did whether the goods sent were such as the buyer had ordered or not. Why should he be notified of a fact that he knew already.

Opinion No. 88.

ASSESSMENT OF FOREIGN CORPORATIONS.

Inquiries are frequently made at this office as to the amount of tax which a foreign corporation must pay in States where a certificate is issued to such foreign corporations, authorizing them to do business under the State statutes. In computing the assessment or tax the State auditor gets his information from the reports which ought to be filed annually. The amount of tax assessed is predicated upon the amount of capital actually employed within the State, and if no capital is employed, no tax can be legally levied.

Opinion No. 89.

A PRIVATE CUSTOM MAY BE ESTABLISHED TO SUPERSEDE A GENERAL CUSTOM.

It seems to be a generally accepted custom in the lumber trade that using a shipment of lumber, even though there be a dispute regarding the grade, constitutes an acceptance of the shipment as invoiced unless the shipper has authorized the purchaser to use a part or all of the lumber in dispute. Our Legal Department has received some claims for members on disputed shipments where, from an examination of the correspondence, it appeared the member had a valid claim for the full amount of the invoice. After negotiations with the buyers it developed that in past transactions allowances were made on several shipments where the grade was in dispute, after the lumber had been used. We have had occasion to go into such matters with our attorneys and the latter are of the opinion that where a sufficient number of adjustments have been made on such a basis, practically acquiescing in the buyers using a part of the lumber, would prejudice a claim on a subsequent shipment where the shipper attempted to take advantage of his right of recovery. Frequently disputed claims of this character are small and have to be tried before a local jury and our attorneys have stated that the custom of having made allowances in the past after lumber was used would have some bearing with a jury on a subsequent deal, and possibly be construed by the court as a private custom apart from the general trade custom.

Opinion No. 90.

AN ORDER MAY BE CANCELED ONLY WHEN BUYER BECOMES INSOLVENT.

Question.—A buyer places an order with a mill for five cars of lumber, deliveries to be one car a month. At the time of the purchase the buyer is in good financial standing and signed copies of the contract are exchanged between the buyer and seller. After three deliveries have been made information reaches the seller that the financial standing of the buyer has changed for the worse; that is, he has committed no act of bankruptcy, but a commercial agency has reduced his capital and credit rating. The seller requests the buyer to anticipate the payment of some of the previous shipments before he will agree to make further shipments. The buyer refuses to comply with this request and asks for the delivery of the balance. The seller thereupon makes no further deliveries, but when the bills for the goods delivered become due, demands payment. The buyer refuses on the ground that the seller has not carried out his part of the contract. On these facts please tell us what the law in this case would be.

Reply: One who has sold goods on credit is not justified in refusing delivery simply because the buyer's financial standing changes for the worse between the time of sale and the time of delivery. In the case here put, for example, there is nothing to show that the buyer is not now amply able to pay for the goods, or that the contract would have been declined by the seller if the buyer's rating at the time had been what it is now. The seller is entitled to refuse delivery only if the buyer, before delivery is made, commits any act of insolvency. He need not become a bankrupt or make an assignment for creditors. He is insolvent, within the meaning of this rule, if he fails to pay any just and admittedly proper debt promptly upon its due date. As long as he is paying his bills whenever they fall due the seller has no ground upon which to declare that he is not "keeping his credit good," if the buyer in this case is not solvent, as the word is here defined, the seller need not continue the deliveries. If the buyer is solvent the seller is not justified in his position. In that case the buyer need not pay for the goods already delivered until the time named in the contract for payment arrives, and he has a valid claim for damages arising out of the seller's failure to make the other deliveries in strict accordance with the contract.

Opinion No. 91.

A BUYER HAS A CLAIM WHEN HE ACCEPTS A DRAFT ON INFERIOR LUMBER.

Question.—We bought a car of lumber through a broker. Terms were: Sight draft with bill of lading attached for three-fourths of the amount of the invoice, the balance to be paid on arrival and inspection. We accepted the draft on presentation and when the car arrived we instructed our truckmen to draw the lumber in. Upon examination we found that it was all more or less below grade. We wired shippers accordingly and asked for instructions. We also wrote them a letter to the above effect and told them that we could not use the lumber and that we would hold it for their instructions. Do we need to keep the shipment? Can we compel sellers to return us the amount of the draft and freight charges?

Reply: The buyers are not bound to accept any lumber not in accordance with the order. They have a valid claim against the sellers for the amount already paid towards the purchase of the goods, for the amount expended for freight and for any other useless expense to which the buyers were put as a result of the sellers' failure to do their contract duty. The buyers also have a claim for damages, if any, caused by the breach of contract on the part of the sellers. The latter were bound to supply lumber regularly sold and accepted by the trade under the terms covering the grade in question, and their failure so to do was an actionable breach of contract.

Opinion No. 92.

CONTRACT OF SALE.

Delivery by Installments—Successive Recoveries by the Vendee Not Permissible.

When a party contracts to deliver goods by installments, for example—Several carloads of lumber to be shipped at different intervals but fails to deliver one or more of such installments, the vendee may repudiate the contract and sue for damages. If he brings the action prior to the time for the delivery of the last installments, he can only recover for such installments as are past due and such recovery bars him from afterwards bringing an action and recovering thereon for the remaining installments or deliveries.

Opinion No. 93.

DUTY OF VENDOR TO MINIMIZE LOSS WHEN VENDEE REFUSES TO ACCEPT GOODS.

It occasionally happens that a purchaser of a car of lumber refuses to accept same and leaves it at the mercy of the railroad company or common carrier. In this way demurrage piles up and other loss may arise and the shipper hesitating, for fear of compromising himself, refuses to do anything with the lumber on his part. This is generally a mistake because it is the duty of the shipper to make the loss, if any, as small as possible and it is always safe to first notify the vendee, who has refused to receive the goods that he, the shipper, will endeavor to dispose of them in the best possible manner and hold the vendee responsible for any loss or damage thereby. In this case he may have to have the goods sold elsewhere or returned to him, and it is always advisable to endeavor to have them inspected by two or three competent parties in order to establish the market value and to ascertain that the defects, if any, claimed by the vendee, do not exist.

Opinion No. 94.

ACCORD AND SATISFACTION.

If a buyer of lumber, disputing the quantity or quality, sends a check for an amount less than the invoice to the seller, does the seller in accepting the same preclude himself from recovering the balance of the account? This situation occurs, we believe, often in lumber circles and very frequently the remittance is accompanied by a letter or some notice written on the check to the effect that it is sent as a settlement in full and some go so far as to add that if accepted by the creditor it must be at his peril so far as the remainder of the invoice or account is concerned. The law on this point is generally similar to that of the State of New York wherein it is well settled that the acceptance or use of such a remittance does not stop or prevent the creditor from recovering the balance of the debt from its debtor unless there has been an honest dispute as to the amount of indebtedness or the existence of any indebtedness at all. This is what is termed an unliquidated account or claim and in such a case, when one tenders an amount to be accepted in full or rejected and the other accepts the remittance, it is a complete accord and satisfaction. The rule is different when the amount or debt is certain and there is only a dispute between the parties concerning questions of shortage, quality, etc. This is what is termed a liquidated claim and the acceptance of a remittance to be a full settlement does not preclude the creditor from using the remittance, crediting the same to the account of the debtor and suing for the balance.

Opinion No. 95.

CANCELLING AN ORDER BEFORE SHIPMENT—EFFECT OF SAME.

Many lumbermen take orders from their customers through traveling men or other representatives. Usually the orders are written down in a manifold book and often are signed by the buyer. The order is usually taken subject to confirmation by the house or home office. This acceptance or confirmation is customarily made by acknowledgement of the order in writing to the purchaser. The question in point is whether or not, if an agent has taken an order as above, can the purchaser cancel the order and his obligation to accept the lumber? In a case in this State a purchaser of merchandise placed the order with the traveling man and later wrote to the house cancelling the same, as he found he could buy similar goods for less money. The purchaser wrote before the seller had communicated any acceptance or intention to fill the order which had been given to the seller's representative. Some correspondence ensued in which the seller refused to cancel the order and later shipped the goods to the purchaser, who refused to receive them. The action resulted in a judgment in favor of the seller, which was reversed on appeal, in which numerous authorities were cited by the Appellate Court holding substantially as follows—"An order or request in writing, addressed to a dealer or his agent to ship to the writer on or before a date named, goods of a kind specified, for which the writer agreed to pay a price named, does not constitute a contract until accepted or acted upon by the vendor and may be withdrawn at any time before acceptance."

It is obvious that the result would be different were the vendor to have signified his acceptance of the order prior to the cancelling or withdrawal of same by the purchaser, as we would then have a valid contract, which could not be cancelled without mutual agreement.

In this connection it might be well to add that in business transacted by mail, the general rule is that the time of the mailing or depositing in the mail of a letter is the presumptive time of the communicating of the facts therein to the party to whom the letter is addressed, hence when an order is sent by mail, another letter withdrawing the order, if mailed prior to the mailing of the acceptance by the other party, is a complete cancellation of the order in the first letter. In other words, the law does not take into account the periods elapsing by reason of the means of communication but only the acts of the parties in so far as the time of

such acts is considered to have taken place.

Opinion No. 96.

DISCHARGE IN BANKRUPTCY—WHAT WILL PREVENT.

Under the amendment to the National Bankruptcy Law as amended in February, 1903, the rules relating to discharge of bankrupts, are somewhat changed. Many parties are interested ofttimes in preventing the discharge of a bankrupt for no other reason than that they are creditors who believe that the bankrupt has not been honest in his dealings and irrespective of motives of personal enmity feel that the welfare of the business community is served by preventing the bankrupt from being discharged and re-entering into business. Probably the act that will prevent a discharge that most often appeals to the creditor is that the bankrupt obtained goods on a false statement in writing. This, if shown, will prevent the discharge, the law reading in this respect, as follows: “Obtained property on credit from any person upon materially false statement in writing made to such person for the purpose of obtaining such property on credit.” It is obvious that the party who urges this objection must be the one who has been injured thereby.

Other debts not dischargeable in bankruptcy are taxes levied by the United States, the State, county, district or municipality in which bankrupt resides, and others of no practical interest to merchants. In addition to the above are those debts which have not been duly scheduled by the bankrupt in the proceeding in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity.

Opinion No. 97.

SALES—OF AN INDEFINITE QUANTITY.

A purchaser of a quantity of merchandise ordered by letter two hundred to three hundred tons of a certain article to be delivered within the following six months as wanted. The vendor duly acknowledged receipt of the order and accepted same, stating that they would deliver a certain quantity in the immediate future and balance as ordered within the following six months. Thereafter, the vendor delivered a certain portion of the merchandise for which it was paid with the exception of one installment, which the vendee refused to pay for alleging that the vendor had refused to deliver further installments. The purchaser sued the vendor for damages for breach of contract in failing to deliver the balance of the contract. The Court held that by the terms of the order the vendor could not insist on the purchaser taking more than the two hundred tons but the purchaser on his part could insist within the six months period upon the vendor delivering the remaining hundred tons, it appearing that two hundred tons had been already delivered. In fact, it was an option which the vendee could enforce but not the vendor.

The above is a brief outline of an action decided in the Appellate Court in New York and applies as well to an executory sale of lumber, many similar orders being placed among lumbermen.

Opinion No. 98.

LIABILITY OF BANK FOR FAILURE TO GIVE NOTICE OF PROTEST TO ENDORSER UPON NOTE RECEIVED FOR COLLECTION.

That it is the legal obligation of a bank, which receives a note for collection to use all diligence to give notice of its dishonor to all endorsers is set forth in a decision of the Appellate Division of the New York Supreme Court (Howard vs. Bank of Metropolis, 95 App. Div. 342).

One H., who was the owner of a promissory note made by one S., and indorsed by G., delivered the note to a bank for collection and left with it a card giving G.'s full name and address, stating that he wished the note carefully protested as he expected to hold the endorser, the maker not being responsible, and that he would not be in the city when the note fell due. The maker of the note having failed to pay it when due, the bank sent it to its Notary for protest, but failed to deliver to the Notary the card bearing the name and address of the endorser, and informed the Notary that the endorser's address was unknown. The Notary made out two notices of protest, one directed to H. and the other to G. Both notices were placed in an envelope and sent to H., who did not receive them, being out of town.

The Court held the bank responsible and in rendering its opinion referred to a prior New York case entitled First National Bank vs. Fourth National Bank (77 N. Y. 320) and quoted "it is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal, and if he fails in this duty and thereby causes loss to his principal, he becomes liable for such loss."

Opinion No. 99.

ACCOUNTS STATED.

The Settlement of Accounts and Striking of a Balance Between Parties—What It Consists Of.

Upon merchandise accounts which embrace many items or cover transactions running through a long period it is often wise to strike a balance or to bring about an agreement between the creditor and debtor as to the exact amount owing thereon. The value of such arrangement becomes of great moment when at a later date attempt is made to enforce collection of the account. It obviates the necessity proving various material matters such as the delivery of the various items charged to the debtor; that they were accepted by the debtor; that they were of the kind called for by the contract of sale; that there was a full number or count; that the agreed prices were as charged. The fixing of a balance upon a running account is legally known as the *stating of an account* and an account so fixed is an "account stated."

A running account becomes an "account stated" by agreement either express, or implied by acquiesence, between the parties, that a definite amount or sum is owing from one to the other. No particular form of words is essential and neither must it be in writing, although a written expression is of more ready proof and, therefore, preferable. An express admission, either verbally or by letter, of the correctness of an account constitutes an account stated.—(Vernon v. Simmons, 7 N. Y. Supp. 649.)

In the above case the debtor retained accounts received from his creditor without objection or replying and subsequently acknowledged orally the receipt of the letter containing them and promising to pay later on, and it was held that the creditor could sue upon an account stated. It is not necessary that the account should be signed by the parties to make it an account stated. It is enough that it has been examined and accepted by the party and this acceptance need not be expressed; it may be implied from circumstances such as keeping it without objection beyond a reasonable time. As to what is an unreasonable time depends on circumstances largely and it has been held that two months was sufficient, although generally a longer time would be more conclusive. This acquiesence, however, may be explained by the debtor, which would nullify the apparent acceptance, but without such satisfactory explanation the situation is prima facie against him. Where the indebtedness has been expressly denied, the retention of

the account does not bind the debtor.—(Austin v. Wilson, 11 N. Y. Supp. 565.)

In bringing an action on an account stated if the plaintiff is defeated through failure to prove the agreement as to the amount or the fact that an "account was stated;" he would not be debarred from bringing another action to recover for the various items comprising the account.

Opinion No. 101.

ACCEPTANCE OF GOODS—WHEN SUFFICIENT TO BIND PURCHASER.

It is a daily occurrence in the lumber trade that a purchaser finds some objection to the quality or quantity of lumber shipped to him on order. Frequently in such case, without any communication with the shipper a purchaser feels warranted in using such portion of the lumber as suits him, relying on an assumed right to lay aside the balance for the account of the shipper, with the idea that he may reject it entirely or obtain some reduction in the price. The general rule laid down by the courts in cases of this sort is as follows: Where the vendee of goods, purchased without warranty, after full opportunity for an inspection, accepts them without objection when delivered, he cannot, in an action against him to recover the price defend upon the ground that they did not conform to the contract of sale.—(Smith vs. Coe, 170 N. Y. 162.)

If the purchaser, upon the receipt of the goods, makes objection to the quality, but, without the express permission of the seller, uses a portion, it is held that by so doing he tacitly waives his objection and his acts amount to an acceptance of the entire lot.—(Coplay Iron Co. vs. Pope, 108 N. Y. Appeals, 232.)

In the above case, which involved a transaction in pig iron, the purchaser complained of the shipment and upon being sued for the purchase price set up a claim for damages by reason of the alleged defective quality and it was held "where after discovery or opportunity to discover any defect in goods delivered under an executory contract of sale, the vendee neither returns or offers to return the property nor gives the vendor notice or opportunity to take it back, in the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced and may not thereafter complain of the inferior quality."

When a car constitutes but a portion of the order, which was in the nature of one contract for a number of cars, the purchaser cannot object to the quality and retain the initial car and decline to receive the balance of the shipment. The contract of sale being an indivisible one in law, the purchaser by his acceptance of the initial shipment and failure to return it, is conclusively presumed to have acquiesced in the quality of the lumber offered him and waived any objection to the remainder of the shipment order provided it is the same as the first car.

In the case of Weil vs. The Unique Electric Device Co., Reported in 39 Misc. (New York 1902), page 527, a vendor sought to recover the stipulated purchase price of certain merchandise sold to the defendant, consisting of some 3,000 electric batteries, of which 1,000 were delivered and paid for, but the purchaser refused to accept the balance on the ground that the quality was not according to the agreement. The court held that the contract of sale was an entire one and it was the duty of the purchaser to receive balance of the order, provided they were of similar quality to the lot already delivered. That when the purchaser received the first lot and found them unsatisfactory, it was its duty to rescind the sale and return, or offer to return the goods; and its failure so to do was an acquiesence on its part of the quality of the goods in question.

The above discussion leaves for further consideration the question when a purchaser though bound to take goods and chargeable with their full price, may hold the seller liable for damages for breach of express or implicit warranty.

Opinion No. 102.

CONTRACT OF SALE—STATING ESTIMATES OF MAXIMUM AND MINIMUM AMOUNT.

It is the custom of many merchants, with a view doubtless of securing the best possible terms and yet to leave a loophole, whereby they can take only such an amount as they desire, to give the vendor a general idea of their requirements.

In Heisel vs. Volkman, reported in Volume 55, New York Appellate Division, page 607, a dealer wrote to a manufacturer of certain kinds of merchandise asking for "prices for supplying our requirements," stating "we estimate our yearly requirements at from five to ten million pieces. Are confident that they will not be less than the smaller amount and reasonably certain that they will come up to or exceed the larger one," to which the manufacturer replied, "I would be willing to make a yearly contract with you from five to ten million pieces, etc." The purchaser did not take the minimum amount of five million pieces during the period in question and the manufacturer sued to recover the purchase price of the difference, having, of course, done what was necessary in respect to making a tender of delivery. The court held that the purchaser was obligated to take and pay for at least five million pieces, even if his requirements for the year fell substantially short of that amount and that the seller in making his price had a right to rely upon the minimum amount stated by the buyer.

Attention is called to this for the reason that the same rule would apply to a transaction in lumber and because many of the trade are in the habit of making contracts upon similar conditions and referring in elastic terms to their probable requirements.

Opinion No. 103.

CERTIFICATION OF CHECK—RELEASES THE MAKER.

Attention is called to the fact that under the law of New York State the procuring of the certification of a check by the holder from the bank or banker upon which it is drawn is equivalent to the acceptance of a bill of exchange and releases the drawer.—(Meurer vs. Phœnix National Bank, 94 App. Div. (N. Y.) 331.)

Opinion No. 104.

SALES—STOPPAGE IN TRANSIT.

The right to stop a shipment in transit is based on the existence of a lien in favor of the seller, which continues until the goods have reached the actual physical possession of the buyer. So long as the goods are in the hands of a carrier the seller may, given the proper conditions, reclaim the goods. This is so even if the carrier is one designated or selected by the purchaser. A fraudulent sale of the goods by the purchaser to third parties will not defeat the right of stoppage, nor will seizure under attachment or execution issued against the purchaser provided the right is exercised before the transit is at an end.

Opinion No. 105.

FOREIGN CORPORATION LAWS.

Necessity of Filing Certificates, Etc., in West Virginia, Indiana, Tennessee, Mississippi, Kentucky, Ohio, Michigan, New York.

One of our members recently had an attorney examine the corporation laws of several States and give an opinion concerning the advisability of filing corporate certificates, securing so-called licenses, etc., in the various States wherever the member was making sales. The States referred to are West Virginia, Indiana, Tennessee, Mississippi, Kentucky, Ohio, Michigan and New York. This information may be helpful to other members, and a copy of the opinion follows:

West Virginia.—Every corporation whose principal place of business is located out of the State must pay an annual license tax as follows: If the authorized capital is not more than $25,000, $20; not more than $100,000, $50; not more than $1,000,000, $50; an additional forty cents on each $1,000 in excess of $100,000. No other taxes are assessed unless it has personal or real estate in West Virginia. Such foreign corporations may be authorized to hold property and do business in the State by certificate of the Secretary of the State that they have filed with him a copy of their articles of association, which certificate with a copy of the charter must be filed with and the certificate recorded by, the Clerk of the County Court of such county in which their business is conducted. A foreign corporation obtaining the above mentioned certificate authorizing to hold property and do business in West Virginia has the powers, rights and privileges and is subject to the same regulations, restrictions and liabilities that are conferred by statutes of West Virginia on domestic corporations.

Every foreign corporation which shall do business in the State without having obtained such certificate and having it filed and recorded according to law shall be guilty of misdemeanor, and upon conviction shall be fined not less than $50, nor more than $1,000 for each month its failure so to comply shall continue.

Indiana.—Every foreign corporation, except railroad and telegraph companies, built before March 15, 1901, and insurance companies must maintain a public business office in Indiana and must designate a representative in Indiana on whom service of process may be had. Such foreign corporations are subject to the liabilities, restrictions and duties imposed upon domestic corporations. They

must before being permitted to do business in Indiana file in the office of the Secretary of State certified copy of its articles of incorporation, and a statement sworn to by the principal or agent in Indiana of the proportion of the capital stock of such corporation represented by its property located and business transacted in Indiana, and must pay in the office of the Secretary of State upon such proportion incorporation fees equal to those required of domestic corporations. The Secretary of State shall then issue a certificate authorizing such corporation to do business. Until this law is complied with, demands of a foreign corporation, whether arising out of contract or tort, cannot be enforced in the courts of Indiana, and such corporation is subject to a fine of not less than $1,000. Fee for filing articles of incorporation of a corporation with capital stock of $10,000 or under is $10, over $10,000, one-tenth of one per cent. upon authorized capital. No annual State tax on corporation as such.

Tennessee.—Foreign corporations must file in the office of the Secretary of State a copy of its charter and cause an abstract of same to be recorded in the office of the Register of each county in which such corporation purposes to carry on its business or to acquire and own property. Penalty for failure to do so shall subject the offender to a fine of not less than $100 nor more than $500. They must pay in the office of the Secretary of State a tax or license of $100 to exercise such privilege.

Mississippi.—Foreign corporations may sue and be sued and are liable to be proceeded against by attachment or otherwise, as individual non-residents are liable. The acts of their agents shall have the same force as the acts of agents of private persons within the scope of their power. They cannot recover on any contract made in the State or cause action originating therein which is in violation of laws or policies of States. No general statutes about taxation of foreign corporations. Subject governed in main by common rule as to taxes, but they are required to file with the Secretary of State certified copy of their charter for record, for which a graduated fee is fixed.

Kentucky.—If the corporation be organized under the laws of another State a board shall fix the value of the capital stock determined from the amount of the gross receipts of the corporation in Kentucky and elsewhere the proportion which the gross receipts in Kentucky bear to the entire gross receipts. The same proportion of the value of the entire capital stock, less the assessed value of tangible property in the State, shall be the correct value of the corporation franchise for taxation. Reports must be made and failure is a misdemeanor

punishable by a fine of $1,000 and $50 for each day.

Ohio.—Foreign corporations are forbidden to do business until they have procured from the Secretary of State certificate that they have complied with the requirements of law which authorize them to do business in the State, and until said companies shall have caused the proportion of their capital stock employed within the State to be determined by the Secretary of the State, and shall have paid to him a fee of one-tenth of one per cent. upon such amount and obtained his certificate of such payment. No foreign corporation doing business in the State can maintain any action upon any contract made by it in the State until it has procured such certificate. The corporation must file with the Secretary of State due copy of its charter and statement under seal of the amount of its stock, the nature of its business and state which is to be its principal place of business, designating a person upon whom process against such corporation may be served. The person so designated must have an office where the corporation is to have its principal place of business within the State. Corporations complying with these requirements are exempt from attachment on the ground that they are foreign corporations.

Michigan.—Foreign corporations filing in the office of the Secretary of State certified copy of articles of incorporation and an appointment of an agent in this State for service of processes may carry on their business in Michigan. Foreign corporations may bring suits on furnishing security for costs.

New York.—No foreign corporation shall do business without first procuring from the Secretary of State certificate that it has complied with requirements of law. License fee shall be paid. No foreign corporation can do business in New York or sue on contract made there unless it has procured such certificate prior to the making of the contract. Selling goods through a factor within the State is not covered by this prohibitive clause. Before granting such certificate foreign corporation must file with Secretary of State copy of its charter and a statement setting forth its business, its principal place of business within the State and designating the person upon whom processes may be served. Such person must have an office within the State, where the principal place of business of such corporation is located. Foreign corporations must pay to State Treasurer a license fee of one-eighth of one per cent. for privilege of exercising its corporate franchise in New York, to be computed upon the amount of capital stock employed within the State during its first year of business.

Opinion No. 106.

CONTRACTS FOR CARLOADS SEPARABLE.

Where a contract was made for three carloads of a company's No. 1 white cedar shingles and the purchaser accepted and paid for two carloads, but refused to accept the third because of alleged inferior grade and quality, and because the shingles were not made by said company, the Supreme Court of Minnesota holds that the contract as to the three carloads was separable, so that the purchaser's payment and the seller's acceptance of payment for two carloads did not prevent the seller from beginning an action to recover the purchase price of the third carload nor the purchaser from defending therein. The court also holds that a buyer, seeking to reject an article as not in accordance with the contract of sale, must do nothing after he discovers the true condition inconsistent with the seller's ownership of the property.—Duluth Log. Co. vs. John C. Hill Co., 124 N. W., 967.

Opinion No. 107.

WARRANTY SURVIVES ACCEPTANCE.

Where one attempting to sell shingles stated in a letter that “They are mighty good shingles, they are as good as you could get anywhere,” it was a warranty of their quality. Where a buyer of shingles accepts shingles which he knows are of a grade inferior to what the seller warranted, the buyer does not waive the warranty, and he can defend against an action for the price on that ground. (Texas Court of Civil Appeals.) Harroll vs. McDuffie, 128 S. W. Rep., 1149.

Opinion No. 108.

ACCEPTANCE OF LESS THAN INVOICE PRICE.

On arrival of a carload of shingles, the buyer complained of their quality, and for the purpose of securing an immediate settlement and avoiding further negotiations the seller agreed to accept a less amount for them than the full price if payment was made before a specified time. The buyer failed to make payment within such specified time and in a suit to recover for the full amount of the invoice it was held by the court that the seller could require payment under the circumstances of the full price. (Texas Court of Civil Appeals.) Harroll vs. McDuffie, 128 S. W. Rep., 1149.

Opinion No. 109.

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