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German Commercial code.
THE

GERMAN COMMERCIAL CODE

TRANSLATED AND BRIEFLY ANNOTATED BY

A. F. SCHUSTER,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

WITH AN INTRODUCTION

BY

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1911.
At the outset I would wish to warn the possible reader that if he opens this volume hoping to find in it a model of English prose, he is in danger of disappointment. I would frankly recommend the better works of Milton or of Burke as more suited for the purpose. The difficulty of translating an enactment of this kind must be so obvious from the most cursory perusal of the German that I will refrain from further apologizing for the awkward phrases and cumbrous sentences with which, as I well know, this volume abounds.

There are two distinct methods of translating from the German. The first is the word-for-word method, by which the translator merely seeks to render the German into English piecemeal and as literally as possible. Where this method can be successfully employed it is undoubtedly the most satisfactory, but if followed slavishly it will frequently result in a form of language which, besides being grotesque in the extreme, conveys absolutely no meaning to the ordinary English reader. I believe that all who have had much experience of
German official translations will agree with me in this. By the second method the translator looks at his original as a whole, and attempts to give its general effect in intelligible English. While seeking as far as possible to combine both methods and to give in English the equivalent of the German both in its separate parts and its entirety, I have allowed myself a certain amount of latitude in cases where it appeared to me that a verbatim translation would have been wholly inadequate.

A translation of the fourth and last book of the Commercial Code has not been included in this volume. This deals solely with the law of Maritime Commerce, and is not usually included in the German annotated editions of the Commercial Code, which have been published. An excellent translation of it has already appeared from the pen of Mr. Wendt.

Appendices have been added containing translations of the Custody of Negotiable Instruments Act (Gesetz betreffend die Pflichten der Kaufleute bei der Aufbewahrung fremder Werthpapiere, 1896), and the Private Limited Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, 1898).

In spite of its inconveniences, I have retained the German system of sub-dividing the sections into paragraphs and sentences, instead of into
numbered sub-sections, in order to keep as close as possible to the original and facilitate reference from the German to the English, and vice versa.

With regard to terminology, I have in almost all cases adopted that used in Dr. E. J. Schuster's "Principles of German Civil Law," not out of any motives of filial piety, but because after prolonged consideration I have come to the conclusion that it cannot be improved upon.

While I have endeavoured always to translate the same German phrase in the same manner wherever it occurs, I have occasionally departed from this rule where, owing to the dissimilarity of the two languages, to observe it would have been impossible or very inconvenient.

Most of the technical terms that appear to require elucidation are sufficiently explained by statutory definitions occurring in the text of the Code itself. With regard to others, short explanatory notes have been inserted. References both to the statutory definitions and to the notes will be found by consulting the Index. To furnish a sufficiently full explanation as to all matters which seem to require it would have been far beyond the scope of a work like the present, and I have therefore in my notes frequently referred the reader to Dr. E. J. Schuster's "Principles of German Civil Law," of which mention has already been made in this Preface.
To the never-failing kindness of the author of that work this little book, such as it is, owes not only the Introduction which he has written for it, but its very existence: without his encouragement it would never have been begun, and without his help it could never have been completed.

A. F. S.

The Temple,

August, 1911.
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**APPENDIX A.**

**The Custody of Negotiable Instruments Act, 1896.**

(Gesetz betreffend die Pflichten der Kauflute bei der Aufbewahrung fremder Werthpapiere).

**APPENDIX B.**

**The Private Limited Companies Act, 1898.**

(Gesetz betreffend die Gesellschaften mit beschränkter Haftung.)
INTRODUCTION.

The German Commercial Code (together with a number of statutes dealing with specific matters) supplements the Civil Code, and in some respects modifies its provisions in so far as they apply to certain classes of transactions.

A separate system of law for the transactions of merchants known as "Law Merchant" (Lex Mercatoria) was known in all European countries during the Middle Ages; but while in England the "Law Merchant" became merged in the Common Law, on the Continent it retained a separate existence.

The German General Commercial Code which in the year 1866 became the law of all German States (including Austria, which then still formed part of the German Confederation), was the embodiment of the German Law Merchant. When in 1897 the German Civil Code was enacted, many rules which had up to that date been applicable exclusively to mercantile transactions, were embodied in the General Law, and it then became necessary to recast the German General Commercial Code, which had already been considerably modified by enactments on specific matters, more particularly
by the statute of 1884 relating to share companies. The remodelled Code was given the shorter title of "Commercial Code" ("Handelsgesetzbuch"—usually quoted by the initials H. G. B.), and like the Civil Code ("Burgerliches Gesetzbuch"—usually quoted by the initials B. G. B.) came into force on the 1st January, 1900.

One of the distinguishing characteristics of German commercial law is to be found in the fact that a special class of traders is set apart under the designation of "Kaufleute" (mercantile traders) as having peculiar privileges and being subject to peculiar duties. In some cases the question whether or not a particular trader comes within the description of a mercantile trader is dependent upon whether he is registered in the Mercantile Register (see sects. 2, 3). The rules applying to mercantile traders also apply to the various classes of mercantile associations; i.e., unlimited mercantile partnerships (Offene Handelsgesellschaften); limited partnerships (Kommanditgesellschaften); share companies (Aktiengesellschaften); share companies en commandite (Kommanditgesellschaften auf Aktien), and private limited companies (Gesellschaften mit beschränkter Haftung). The last-named class of companies is left untouched by the Commercial Code and is dealt with by a separate statute (translated in Appendix B.), sect. 13 of which provides that such a company has the character of a mercantile association. An incorporated co-operative association has also the character of a mercantile trader (except in so far as
the statute relating to these associations contains no provisions to the contrary (see sect. 17 of that statute).

Among the privileges of a mercantile trader the following are of importance: he may trade under a firm name; he may appoint a procuration holder (see sects. 48—50); he is entitled to claim commission for services rendered, and to charge interest on loans even in the absence of any express agreement to that effect; he may in the case of an account which is balanced at regular intervals, charge interest on interest, and he has several other rights of a similar nature \((a)\). On the other hand a mercantile trader is subject to a number of special obligations: he is bound to keep regular books of account, and to draw up inventories and balance sheets at prescribed intervals; to keep copies of all business letters forwarded by him, and to preserve such copies and all business letters received by him, as well as all books of account, for at least ten years. (A disregard of these provisions subjects him to criminal punishment in the event of his bankruptcy, see Bankruptcy Code, sects. 239, 240.) If his business consists in the execution of orders for principals, he is bound to execute any order given to him by a customer unless immediately on receipt of the order he expressly declines to execute it. He is also under a special duty as regards the custody of goods or securities placed under his care.

\((a)\) Certain privileges are also conferred on mercantile traders by sects. 53, 54 of the Bourse Law of 1908.
All transactions entered upon by a mercantile trader in the course of his business are deemed mercantile transactions on his side, though they may not be mercantile transactions on the side of the other contracting party (for instance, a publishing contract is a mercantile transaction on the publisher's side, but not on the author's side). As a general rule, the provisions affecting mercantile transactions apply to transactions which are mercantile on one side only, but there are many exceptions to this rule (see e.g., sects. 346, 352, 369, 377).

The Commercial Code contains the rules relating to mercantile traders, mercantile associations and mercantile transactions only in so far as they differ from the general rules. It is therefore necessary in every case to ascertain the general rule as well as that laid down in the Commercial Code. Thus the law relating to mercantile unlimited partnerships, in so far as it does not differ from the general partnership law, has to be looked for in sects. 705—740 of the Civil Code, and the law relating to mercantile sale of goods, in so far as it does not differ from the general law, has to be looked for in sects. 433—458 of the same Code. Again, the provisions in the Commercial Code relating to the form of agreements, suretyship, penalties, interest, title to goods, or to instruments to bearer, pledge and lien, &c., are only supplemental to the various rules on these subjects contained in the Civil Code; and in the same way the rules as to mercantile sale, com-
mission merchants, forwarding agents, warehousemen and carriers are only given in so far as they modify or supplement the general law.

It will accordingly be seen that the Commercial Code does not deal exhaustively with the subjects which come within its purview, and it must be added that even the subjects themselves which would naturally come under the heads mentioned above are not all touched upon. Thus the law as to private limited companies which of late years has assumed a very great practical importance, has been left outside the Code, being dealt with in a separate statute, of which a translation is given in Appendix B. The law as to negotiable instruments is only given in so far as it relates to a comparatively unimportant class of such instruments (see sects. 363—365). The other rules on this subject have to be looked for in the Bill of Exchange Code (b) (originally enacted in the years 1848—1850 and re-enacted in an amended form in 1909), in the statute as to cheques enacted in 1908 and in the provisions of the Civil Code (sects. 793—808) as to obligations to bearer. The rules relating to the duties of mercantile traders with reference to the custody of negotiable instruments entrusted to them are laid down in a statute dealing specifically with this subject (enacted in 1896), of which a translation is given in Appendix A. of this book. The law as

(b) An annotated translation of this Code, by Mr. Sydney Leader, has just been published by Messrs. Sweet & Maxwell (The German Law of Bills of Exchange and Cheques).
to transactions on the Stock Exchange and other public exchanges is to a large extent regulated by the Bourse Law (originally enacted in 1896 and re-enacted in an amended form in 1908). There are also special statutes relating to the law as to publishing contracts and as to insurance contracts (exclusive of which were contracts relating to marine insurance) enacted respectively in 1901 and 1908.

Other subjects which are generally referred to in English books on Commercial Law, as, for instance, the laws as to patents, designs, trade marks, artistic and literary copyright, and similar matters are also dealt with by specific enactments, as well as bankruptcy and the law as to the avoidance of transactions intended to defeat creditors.

The observations made above will show that there are very few matters which are regulated by the Commercial Code in their entirety, and that in most cases the Civil Code or some special statute must be consulted in conjunction with it. On the other hand, it would not be safe to advise on any point arising out of a commercial transaction governed by German law without referring to the Commercial Code. In this connection it is of the utmost importance to remember that the codification of a large part of German law has not made it easier for a layman to ascertain doubtful points without professional assistance; he may find a rule in one of the Codes which to his untutored mind seems to cover in the most complete manner the question which he wishes to solve, but he can never be sure
that there is not some other provision in existence either in the same Code or elsewhere which applies to the particular circumstances of his case and completely modifies the rule which he has seen. In this translation the modifying enactments have as far as possible been indicated by cross-references in the notes.

E. J. S.
Note.

Where references occur in the notes to Dr. E. J. Schuster's Principles of Civil Law (Clarendon Press, 1907, see Preface), the abbreviation "Schuster" has for the sake of brevity been made use of.

Explanations of technical terms which seem to require elucidation will be found by means of references contained in the Index, either to the explanatory notes or to the definitions occurring in the text of the Code itself.
GERMAN COMMERCIAL CODE.

Book I.—Mercantile Trade.

Part I.—MERCANTILE TRADERS.

1. Mercantile trader in this Code means any person carrying on a mercantile trade.

By mercantile trade is meant every trade that has for its object one of the undermentioned kinds of business:—

(1) The production and resale of moveable things (hereinafter called merchandise), or negotiable instruments irrespective of whether such merchandise is resold without change or after being worked upon or altered in some way:

(2) The undertaking of work upon or alteration of merchandise for others so long as such trade exceeds the limits of a mere handicraft:

(3) The undertaking of insurance for a premium:

(4) The businesses of banker and money-changer:

(5)—(a) The business of the forwarding of goods or the carriage of passengers by sea;
(b) the business of carrier of goods; (c) the carrying on of any undertaking for the carriage of passengers by land or on inland waters; or (d) the business of towage:

(6) The business of commission merchant, forwarding agent, or warehouseman:

(7) The business of mercantile agent or broker:

(8) The business of publisher and all other businesses concerned with book or art-dealing:

(9) That of printer, so long as it exceeds the limit of a mere handicraft.

2. An undertaking carried on for purposes of trade in a manner and on a scale which requires a mercantile business organisation, even when it does not fall under any of the heads mentioned in the last section, is for the purposes of this Code a mercantile trade, provided the undertaker's trade-name is entered in the Mercantile Register. Such entry is obligatory upon the undertaker, and must be made in the manner prescribed for the registration of mercantile trade-names.

3. Sects. 1 and 2 have no application to the occupations of agriculture and forestry.

If an undertaking is connected with the business of agriculture or forestry in such manner that it is only auxiliary thereto, sect. 2 applies, with the reservation that the undertaker has a right but no obligation to register the undertaking in the Mercantile Register. Even if transactions of a description
specified in sect. 1 occur in such an establishment, its business shall nevertheless not be deemed to be a mercantile trade unless the undertaker has availed himself of his right to enter his trade-name in the Mercantile Register in accordance with sect. 2. Once the entry is made, the entry of the trade-name cannot be cancelled except in accordance with the general rules which hold good for the cancellation of entries relating to mercantile trade-names.

4. The rules about trade-names, books of account, and powers of procuration have no application to handicraftsmen, or to persons whose business does not exceed the limits of a small trade.

A combination for the carrying on of a business to which the said rules do not apply cannot be the basis of an "unlimited mercantile partnership" (a) or of a "limited partnership" (b).

The State Governments are authorised to publish rules by which the limits of "small trade" can be more certainly determined on the basis of liability to taxation as fixed by the amount of business done or in default of this upon some other basis.

5. When once a trade-name is entered in the Mercantile Register, evidence that the trade carried on under such trade-name is not a "mercantile trade," or that it is one of the trades referred to in sect. 4, paragraph 1, is inadmissible as against a party relying upon the registration.

(a) See post, sect. 105. (b) See post, sect. 161.
The rules applicable to mercantile traders apply also to mercantile associations (e). The rights and obligations of an association to which the law imputes the status of a mercantile trader, irrespective of the object of the business, are not affected by anything contained in sect. 4, paragraph 1.

The application of the rules concerning mercantile traders contained in this Code is not affected by the rules of public law (cc) under which the right to trade is in certain cases forbidden or made dependent upon specified conditions.

PART II.—THE MERCANTILE REGISTER.

8. The Mercantile Register is under the control of the Courts.

9. The right to inspect the Mercantile Register and the documents filed with the Court in charge thereof is open to everyone.

Copies of the entries can be obtained upon application; the same rule applies to the documents filed with the Court provided the applicant can give proof of a legitimate interest in the contents of such documents. Copies can, if desired, be authenticated.

The Court must, if desired, give a certificate that further entries concerning the subject-matter

(e) *I.e.*, to the various kinds of mercantile partnerships and share companies.

(cc) See the Trade Regulations Act (Gewerbe-Ordnung), sects. 16, 29, 31, 33, 43, 44, 55—63. By the rules contained in these sections certain trades are not allowed to be carried on without a license, and certain classes of persons (*e.g.*, public officials, and persons serving in the army) are prohibited from carrying on trades at all.
of an entry are not in existence or that a particular entry has not been made.

10. The Court must publish the entries made in the Mercantile Register in the German Imperial Gazette and at least one other paper.
   Where not otherwise ordered by law the publication must set forth the whole contents of the entry. The publication shall be deemed to have been completed upon the expiration of the day of appearance of such one of the papers whereby it is made as shall appear last in point of time.

11. The Court must publish every year in December a list of the newspapers in which during the ensuing year the publications provided for in sect. 10 are to be made.

12. The applications for entry in the Mercantile Register must be made and specimens of the signatures necessary for the retention of the Court must be furnished personally by the applicants at the Court, or else handed in in publicly authenticated form (d).

   Publicly authenticated form is also necessary for an application by power of attorney. Successors in title must give proof of their rights as such, as far as possible, in publicly authenticated documents.

13. Where not otherwise ordered in this Code, the entries in the Mercantile Register and the appli-

(d) i.e. in a document authenticated by a competent official or by a public notary. See Schuster, p. 91.
cations, furnishing of signatures, and other steps prescribed as necessary for registration in the Mercantile Register must be effected in the Registry Court of each district in which the owner of the trade-name has a branch establishment in the same way as in that of the district where the head establishment is situated.

An entry to be made at the Court of the branch establishment's district cannot take place without proof that an entry has been made at the Court of the head establishment's district.

These rules apply also when the head establishment is situated outside the German Empire. In so far as the law of the foreign country does not make a variation necessary, the applications, furnishing of signatures and entries must be effected in the Court of the district of the branch establishment in the same way as would be appropriate if the head establishment was in Germany.

14. Anyone bound to make any application for registration, &c. must be required to do so by the Registry Court under penalty of a fine not exceeding the sum of M.300 on each occasion.

15. If a fact which ought to be registered in the Mercantile Register is not registered and published, the person among the entries concerning whom the fact ought to have been registered cannot avail himself of the fact as against another party, unless such party was aware of the fact.

If the fact has been registered and published,
such fact can be relied upon as against the other party, unless he can prove that he neither knew nor ought to have known of it (e).

As regards business relations with a branch establishment which has been entered in the Mercantile Register, entry and publication by means of the Court of the branch establishment’s district is sufficient for the purposes of this section.

16. If a final or enforceable (f) order of the Court in which an action is tried establishes the duty of any one party to join in an application for entry in the Mercantile Register to be made by several parties, or if such duty on the part of such one party follows upon any declaration made by the Court, an application made by the other party or parties concerned is sufficient in order to obtain registration. If the order upon the ground of which the entry was made is reversed, the fact of such reversal must be entered in the Mercantile Register upon the application of any of the parties.

If a final or enforceable order of the Court decides that a particular entry is not permissible (ff), such entry cannot be made without the consent of the party by whom the order was obtained.

(e) E.g., a person who has retired from a partnership, and whose retirement has been registered, can rely on his retirement as a defence against a partnership creditor whose claim arose subsequently to such retirement, unless the creditor can prove that he neither knew nor ought to have known of the retirement.

(f) In Germany no order is enforceable while still appealable, unless specially made so upon application.

(ff) I.e., not permissible without the consent of a particular party.
Part III.—Mercantile Trade-Names.

17. The trade-name of a mercantile trader is the name under which he carries on business and which he signs.

A mercantile trader can sue and be sued under his trade-name.

18. A mercantile trader who carries on business without a partner, or only with a dormant partner, must use as his trade-name his surname with at least one of his first names without abbreviation.

No addition may be appended to his trade-name which would make it appear that he was trading in partnership, or which would otherwise be calculated to give a misleading impression as to the nature or extent of the business, or the circumstances of the owner.

Additions which serve to differentiate the person or the business are permitted.

19. The trade-name of an unlimited mercantile partnership must either include the name of at least one partner, with an addition indicating the existence of a partnership, or the names of all the partners.

The trade-name of a limited partnership must include the name of at least one of the general \((g)\) partners with an addition indicating the existence of a partnership.

The addition of first names is not necessary.

\((g)\) See post, sect. 161.
The names of persons other than full partners (h) may not be included in the trade-name of an unlimited mercantile partnership or a limited partnership.

20. The trade-name of a share company (i) and that of a share company en commandite (j) must as a rule bear reference to the object of the undertaking; the former besides this must include the designation "share company," the latter "share company en commandite."

21. If without any change of ownership the name of the owner of a business or of a partner whose name is included in the trade-name is changed, the existing trade-name may be continued in use.

22. Anyone acquiring an existing mercantile business, whether inter vivos or upon the death of the former owner, may, subject to the express consent of the former owner or his heirs, continue the existing trade-name either with or without some addition indicating that he is a successor. The regulations contained in sect. 20 as to what must be included in the firm-names of a "share company" or "share company en commandite" are not hereby affected.

If a mercantile business is acquired upon a grant

(h) The German term here translated "full partners" is a comprehensive one, and includes ordinary partners in an unlimited partnership, and "general partners" in a limited partnership. (See post, sect. 161.)

(i) See post, sects. 178 et seq.; Schuster, pp. 43—45.

(j) See post, sect. 320; Schuster, p. 45.
of usufruct \((k)\) or a letting agreement or any similar arrangement, these rules hold good *mutatis mutandis*.

23. A trade-name cannot be alienated apart from the mercantile business for the purposes of which it is used.

24. An existing trade-name may be continued in use irrespective of any changes caused by the admission of a partner by the owner of a mercantile business, or by the entry of a new partner into a mercantile partnership, or by the retirement or expulsion of a partner from a mercantile partnership, provided \((l)\) always, that upon the retirement of a partner whose name is included in the trade-name the express consent of such partner or of his heirs to the continuation of the trade-name must be obtained.

25. Anyone carrying on a mercantile business acquired by Act *inter vivos* under the previously existing trade-name either with or without an addition signifying that he is the successor of the former owner, is responsible for all such former owner’s obligations incurred in the course of the business. The debts owing to the former owner in connection with the business in so far as the debtors are concerned are deemed to have passed to the person who has acquired the business, provided that the former owner or his heirs have assented to the continuance of the trade-name.

\(k\) *i.e.*, a right to the possession of and the profits derived from an object of property belonging to another. (See Schuster, p. 422.)

\(l\) Beginning of paragraph 2 in the German.
Any agreement to the contrary is inoperative as against a third party, unless it is registered in the Mercantile Register and published, or unless the third party has been informed of it by either of the two parties to such agreement (y).

Where the old trade-name is dropped, the new owner of a mercantile business is not liable for previously existing business obligations unless a public announcement is made in a manner in accordance with mercantile custom as to the obligations having been taken over, or unless there is some other special ground imposing such liability on the new owner.

26. Where the new owner of a mercantile business is liable for previously existing business obligations on the ground of the continuation of the trade-name, or of the publication referred to in sect. 25, paragraph 3, the creditors' claims against the former owner become barred after the lapse of five years, if not already barred under the rules of public law (z).

In the case provided for in sect. 25, paragraph 1, the period of limitation begins to run from the end of the day on which the new owner is entered in the Mercantile Register of the Court of the district in which his head establishment is situated, in the case provided for in sect. 25, paragraph 3, from the end of the day on which the public announcement of the change of ownership has been made. Where the creditor's right to demand per-

(y) Literally, "the purchaser or the vendor of the business."
(z) As to these rules of public law, see Schuster, p. 131, and Civil Code, 195, 196, 197.
formance only matured at a later date the period of limitation begins to run from such later date.

27. If a mercantile business, which on the decease of its owner forms part of his estate, is carried on by his heirs, the liability of the heirs for the previously existing business liabilities is regulated mutatis mutandis, by the rules of sect. 25.

The unlimited liability created by sect. 25, paragraph 1, does not come into operation if the business is discontinued before the expiration of a period of three months from the time at which the heirs first became aware of the devolution of the estate. The period is deemed to run mutatis mutandis according to the rules as to prescription contained in sect. 206 of the Civil Code. If the right to renounce the inheritance remains operative after the lapse of the three months, the period of respite does not come to an end before the period during which the inheritance can be renounced.

28. Upon the entry of a partner with unlimited liability or a limited partner into a business formerly owned by a sole owner, the newly-formed partnership, even when the previously existing trade-name is not continued, is liable for all the former sole owner's liabilities incurred in the course of business. The rights arising out of debts due to the former owner in connection with the business, as against the debtors, are deemed to have passed to the newly-formed partnership.

Any agreement to the contrary is inoperative as against a third party, unless it is entered in the
Mercantile Register and published, or unless the third party has been informed by one of the partners.

29. Every mercantile trader must furnish a statement of his trade-name and the address of his head establishment to the Court of the district in which such head establishment is situated for entry in the Mercantile Register. He must also furnish a specimen signature of his trade-name for retention by the Court.

30. Every new trade-name must be clearly differentiated from all trade-names already existing at the same place or in the same communal district and entered in the Mercantile Register.

If a mercantile trader has the same first name and surname as a mercantile trader who has already registered his, and wishes to use these names as a trade-name himself also, he must introduce some addition into the trade-name clearly differentiating it from the one already registered.

If in a place or communal district where it is desired to institute a branch establishment the same trade-name has been already registered, an addition in accordance with paragraph 2 of the present section must be introduced into the trade-name registered for the branch establishment.

The State Governments can make provisions under which neighbouring places or neighbouring communal districts are to be regarded as one for the purposes of this section.

31. A change in a trade-name or in the ownership thereof, as well as the removal of an establishment
to a different place must be notified for entry in the Mercantile Register in accordance with the rules laid down in sect. 29.

The same rule applies upon the extinction of a trade-name. If the notification of the extinction cannot be effected by the persons whose duty it is to effect it in the manner specified in sect. 14, the Court must *motu proprio* cause such extinction to be entered in the Register.

32. If a mercantile trader has been adjudicated a bankrupt, such adjudication must be entered in the Mercantile Register by the Court *motu proprio*. The same rule applies if the adjudication is set aside on appeal as well as if the bankruptcy is annulled or revoked (*m*). No publication of the entries is necessary. The rules contained in sect. 15 have no application.

33. In the case of a corporate (*n*) body the registration of which in the Mercantile Register is required by reason of the object or the method and extent of its business, the application must be made by the members of the directorate collectively.

The application must have annexed to it a copy of the regulations of the corporate body and the

(*m*) Under German Bankruptcy Law proposals for a composition in satisfaction of the bankrupt's debts are in all cases made after the adjudication (*konkurs-eröffnung*); but if the composition is accepted and approved in the prescribed manner the bankruptcy is annulled (*aufgehoben*). The bankruptcy is revoked (*eingestellt*) on the application of the bankrupt himself if the creditors' unanimous assent to such revocation can be obtained. (See German Bankruptcy Code, 173—206.)

(*u*) See Schuster, p. 32.
documents relating to the appointment of the directorate either in the original or in publicly authenticated copies (o). The application for the registration of a branch establishment need not have annexed to it the documents relating to the appointment of the directorate.

In the entry the trade-name and principal place of business of the corporate body, the object of the undertaking, and the names of the members of the directorate must be given. Any special provisions contained in the regulations as to the power of agency of the directorate on behalf of the corporate body or as to the period for which the undertaking is to remain in existence must likewise be entered.

34. Every change in the facts required to be registered by virtue of sect. 33, paragraph 3, or in the regulations, must be notified for entry in the Mercantile Register. The dissolution of a corporate body, if it is not the result of bankruptcy, as well as the names of the liquidators and any special conditions as to their powers of agency must also be notified.

Upon the entry of a change in the regulations it is sufficient, provided such change does not concern one of the facts specified in sect. 33, paragraph 3, to refer to the documents filed with the Court concerning the change.

(o) I.e., copies authenticated by a judicial officer or notary; see note to sect. 12, ante.
The application must be made by the directorate, or, if the entry is not made till after notification of the names of the first liquidators, by the liquidators.

The entry of the names of directors or liquidators appointed by the Court is made by the Court *motu proprio*.

In the case of bankruptcy the provisions of sect. 32 apply.

35. The members of the directorate and the liquidators of a corporate body must also furnish specimens of their signatures for retention by the Court.

36. A business undertaking conducted by the Empire, one of the federal states, or any German Communal Authority need not be registered in the Mercantile Register. If, notwithstanding this, the application for registration is made, the entry is to be limited to a statement of the trade-name, the principal place of business, and the object of the undertaking.

37. Anyone making use of a trade-name to which he has no right, according to the rules of the present part of this Code, must be required to relinquish the use of such trade-name by the competent Registry Court under penalty of fines, such fines not to exceed the limits laid down in sect. 14.

Anyone whose rights are injuriously affected by another person's unauthorised use of a trade-name has a right to demand such party's relinquishment of its use without prejudice to any claim for damages to
which he may be entitled by virtue of any other rule of law.

PART IV.—MERCANTILE BOOKS OF ACCOUNT.

38. Every mercantile trader must keep books of account from which the business done and the disposition of his capital are apparent, according to the principles of proper book-keeping.

He must retain copies (made by hand or mechanical means) of all business letters which he sends, and keep these and the business letters which he receives arranged in proper order.

39. Every mercantile trader must, upon opening business, make an exact statement of his immoveable property, of all debts owing to him and from him, of his amount of cash in hand, and of all other objects of property belonging to him, the value of each object of property being separately mentioned, and draw up a balance sheet showing the relation between his assets and his liabilities.

He must subsequently draw up a similar inventory and balance sheet at the close of every business year; the duration of a business year is not to exceed twelve months. The drawing up of the inventory and balance sheet must be accomplished within the time reasonably required for such an operation in the ordinary course of business.

If a mercantile trader possesses a stock of merchandise of which it is inconvenient owing to the
nature of the business to make an inventory every year, it is sufficient if one is made biennially. The obligation of preparing an annual balance sheet is not affected hereby.

40. The balance sheet must be made up with reference to Imperial currency.

In the inventory and balance sheet each item enumerated among the assets and liabilities must be set down at the value which ought to be ascribed to it at the date in respect of which the inventory and balance sheet are being drawn up.

Doubtful book debts must be set down at their probable values; unrecoverable debts must be written off.

41. The inventory and balance sheet must be signed by the mercantile trader. If there is more than one partner with unlimited liability they must all sign.

The inventory and balance sheet may be entered into a book specially kept for the purpose, or a separate document may be prepared on each occasion. In the latter case such documents must be collected and kept together in proper consecutive order.

42. In the case of an undertaking conducted by the Empire, or by a Federal State, or by a German communal authority, the accounts need not be balanced in the manner laid down in sects. 39—41.

43. The entries in the books and the other prescribed records must be made by the mercantile
trader in a living language, and the writing must be in the characters of such a language.

The books must be bound and the pages or leaves numbered consecutively.

No blank spaces must be left in places where as a rule there should be writing. The original contents of an entry may not be crossed out or otherwise rendered illegible; nothing may be erased, and no alterations may be made in a manner which leaves it uncertain whether they were made at the time of the original entry or subsequently.

44. Mercantile traders must retain their books till the expiration of ten years from the date of the last entry made therein.

The same rule applies to business letters received, copies of business letters sent, inventories and balance sheets.

45. In the course of an action the Court may upon application or motu proprio order the production of the mercantile books of any party to such action.

The enactments contained in the Code of Civil Procedure as to the duty of a party to an action to produce documents to the other party are not affected by this provision.

46. If mercantile books are produced in the course of an action, their contents must be inspected with the assistance of the parties to such an extent as may be necessary having regard to the point at issue, and in appropriate cases an extract must be
made. The other contents of the books must be laid before the Court to such extent as may be necessary to prove that the books have been kept in the proper manner.

47. In cases of the division of property, more particularly in the case of the administration of the estate of a deceased person, the partition of any common fund, or the dissolution of a partnership, the Court may order the production of mercantile books for the purpose of taking cognizance of the whole of their contents.

PART V.—POWER OF PROCURATION AND MERCANTILE POWER OF AGENCY.

48. A power of procuration can only be conferred by the owner of a mercantile business or his statutory agent (oo), and only by means of an express declaration.

Such a power may be conferred on several persons collectively in one declaration, and when so conferred is hereinafter referred to as a joint power of procuration.

49. A power of procuration confers authority upon its recipient to act on behalf of his principal in respect of all judicial proceedings and other transactions that come within the scope of a mercantile trade, provided (pp) always, that no holder of a power of procuration shall have authority to alienate or charge land unless specially authorised to do so.

(oo) See Schuster, pp. 115, 550, 566, and see post, note to sect. 78.
(pp) Beginning of para. 2 in the German.
50. No restriction of the scope of the authority conferred by a power of procuration is operative as against third parties.

This applies in particular to restrictions seeking to limit the application of a power of procuration to special transactions or kinds of transactions, or to make it exerciseable only under specified circumstances, or during a specified period or at particular places.

A restriction seeking to limit the exercise of a power of procuration to transactions incidental to the business of one of several branch establishments belonging to the same owner is operative as against a third party only if the branch establishments are conducted under different trade-names. For the purposes of this rule a difference in trade-names is deemed to be constituted when the branch establishment uses some addition to the firm-name which differentiates it as the trade-name of the branch establishment.

51. The holder of a power of procuration must sign in such a way that the signature includes his own name and some addition indicating the existence of a power of procuration as well as the firm-name.

52. A power of procuration is revocable at any time without regard to the duration of the principal agreement in consequence of which it was conferred, without prejudice, however, to any claim to which the procuration holder may be entitled by virtue of such agreement.
A power of procuration is not transferable.

A power of procuration is not extinguished by the death of the owner of the mercantile business by whom it was conferred.

53. The creation of a power of procuration must be notified by the owner of the business for entry in the Mercantile Register. If the power of procuration conferred is a joint one, this must also be notified for entry.

The holder of a power of procuration must furnish the Court with a specimen signature in his handwriting of the trade-name together with his own name, for its retention.

The extinction of a power of procuration must be notified for entry in the same manner as its creation.

54. If anyone, without a power of procuration having been conferred upon him, has authority to carry on a mercantile business, or to enter on a particular kind of transaction belonging to a mercantile business, or any specified transaction occurring in the course of such a business, such authority (hereinafter called mercantile power of agency) extends to all proceedings and acts in the law incidental to such a mercantile business or to such particular kind of transaction or specified transaction.

The holder of a mercantile power of agency is not empowered to alienate or charge immovable property, to incur obligations in connection with bills of exchange, to raise loans or carry on legal proceedings unless specially authorised thereto.
Any other limitations on a mercantile power of agency are operative as against a third party only in so far as they were known or ought to have been known to him.

55. The rules contained in sect. 54 also apply to persons holding a mercantile power of agency who are employed as commercial travellers to transact business in places where the owner of the business has no branch establishment.

Such travellers shall be more particularly deemed to be empowered to collect the amounts due on the sales effected by them and to allow time for the payment of such amounts.

Notices as to defects in goods, declarations that goods have been rejected, and are held at the vendor’s disposal, and other declarations of a similar nature may be made to such travellers inter præsentés.

56. Any person employed in a shop or public warehouse (p) shall be held to be empowered to make sales and give receipts in such a manner as is customary in shops or warehouses of the same kind as that in which he is employed.

57. The holder of a mercantile power of agency must refrain from using any signature indicating a power of procuration, but his signature must include some expression indicating a mercantile power of agency.

(p) I.e., a warehouse where goods may be deposited by the public upon payment of charges.
58. The holder of a mercantile power of agency cannot transfer his agency to another without the consent of the owner of the business.

PART VI.—MERCANTILE EMPLOYEES AND APPRENTICES

59. Any person employed in a mercantile business to perform mercantile services for a remuneration (hereinafter called a mercantile employee) must, in the absence of any special agreements as to the nature and extent of his services or as to his remuneration, perform the services and receive the remuneration usual according to local custom. In default of any local custom the services to be performed must be held to be such as appear reasonable under the circumstances of the case.

60. A mercantile employee may not without the consent of his employer either carry on a mercantile trade or enter upon transactions in the same branch of trade as his employer either for his own or for a third party's account.

Consent to the carrying on of a mercantile trade may be held to have been given, if the employer on the appointment of the employee is aware that he carried on such trade, but refrains from making any express stipulation as to the relinquishment thereof.

(a) The rights and liabilities of mercantile employees, in so far as not regulated by this part of this Code, are determined by the rules as to agreements for service contained in the Civil Code, sects. 611 et seq. See Schuster, p. 238 et seq.
61. If a mercantile employee violates the obligations imposed upon him by sect. 60, the employer can claim damages, or in the alternative he can claim to take over for his own account the transactions entered upon by the employee for his private account; if the employee enters upon transactions for the account of a third party the employer may claim for himself any remuneration earned by the employee thereby or an assignment to him of the rights of action in respect thereof.

The above-mentioned claims of the employer become barred in three months from the time at which the employer became aware of the conclusion of the transaction in question, or irrespective of any knowledge by the employer in five years from the conclusion of such transaction.

62. The employer is bound to make such arrangements with regard to the place of work and the appliances and apparatus used in connection therewith, and also with regard to the method and hours of work, that the employee is protected, as far as the nature of the work permits, from any danger to his health; and further to provide for the maintenance of morality and decency in such place of work.

If the employee is boarded in by the employer, the latter must make such arrangements with regard to dwelling and sleeping accommodation, diet, and hours of work and recreation as are required to ensure the health and morality of the employee and the due performance of his religious observances.

If the employer fails to perform his obligations
with regard to the way of life and health of his employee, his liability to pay damages is regulated *mutatis mutandis* by the provisions of sects. 842—6 of the Civil Code dealing with unlawful acts (*b*).

The obligations imposed upon the employer by this section cannot be extinguished or limited in advance by contract.

63. If a mercantile employee is disabled from working by any misfortune not due to his own fault, he retains his right to salary, board and lodging while under such disability, during a period of six weeks, but not longer.

The employee need not allow the amount received by him during the period of his disability from sick or accident insurance to be deducted from the amount due to him under the above provisions. Any agreement seeking to override the provisions of this section is null and void.

64. The salary of mercantile employees must be paid at the close of every month. Any agreement seeking to establish payments at longer intervals is null and void.

65. If an agreement is made for the receipt of commission by a mercantile employee in respect of business transacted or introduced by him, the provisions of sect. 88 and sect. 91, paragraph 1, as to mercantile agents become applicable.

66. The relation between employer and employee

(*b*) See Schuster, pp. 188, 337, 338.
can, if entered upon for an indefinite period, be terminated by either party at the end of any calendar quarter at six weeks' notice.

67 (c). If an agreement for a shorter or longer period of notice is made, such period must be equal for both sides; it may not be less than one month.

Notice can only be given to terminate at the end of a calendar month.

The provisions of paragraph 1 hereof apply also if the relation of service is entered upon for a definite period, with a proviso that in default of notice before the expiration of the period it shall be held to have been continued.

Any agreement seeking to override the provisions of this section is null and void.

68. The provisions of sect. 67 do not apply if the employee receives a salary of M.5,000 a year, or over.

They further do not apply if the employee is engaged for employment at a mercantile establishment situated outside Europe, and the contract provides that if the employer terminates the relation of service he is to bear the costs of the employee's journey home.

69. If a mercantile employee is only engaged as a temporary assistant, unless the relation of service is prolonged for over three months, sect. 67 does not apply, provided always that the period of notice must in this case also be equal for both sides.

(c) See post, s. 68.
70. The relation of service may be terminated by either party without notice on any cogent ground.

If the termination is occasioned by the wrongful behaviour of either party, such party is liable to pay damages for any loss resulting from the ending of the employment.

71. The following causes are to be regarded more particularly as cogent grounds for the termination of his employment by a mercantile employee, without notice, unless the case is rendered exceptional by special circumstances:—

(1) Inability of the employee to continue his duties:

(2) Failure of the employer to pay remuneration or provide proper board and lodging as agreed upon:

(3) Refusal of the employer to perform the obligations imposed on him by sect. 62.

(4) Mistreatment of the employee by the employer by using physical violence against him, by seriously insulting him, or by addressing immoral demands to him, or failure by the employer to protect the employee from such mistreatment at the hands of a fellow employee or a member of his own family.

72. The following causes are to be regarded more particularly as cogent grounds for the dismissal of a mercantile employee by his employer, without
notice, unless the case is rendered exceptional by special circumstances:—

(1) Infidelity or abuse of confidence by the employee or breach of the obligations imposed on him by sect. 60:

(2) Unauthorised absence from his work on the part of the employee for what under the circumstances is a considerable time or persistent neglect of the duties imposed upon him:

(3) Failure to perform his work owing to continuous illness, criminal punishment, or absence on military service of duration exceeding eight weeks:

(4) Use by the employee of physical violence, or serious insult against his employer or anyone representing him.

The rights of the employee under sect. 63 are not affected by the present section if the termination of the employment is the result of prolonged absence from work owing to a misfortune for which he is not himself responsible.

73. Upon the termination of the service the mercantile employee has the right to demand a certificate in writing as to the description and duration of the employment. The certificate must also, should the employee desire it, deal with his conduct and the work performed by him.

The certificate must upon the application of the
employee be authenticated by the local police authorities free of charges and stamp duty.

74. An agreement between employer and employee, limiting the trading activity of the latter after the termination of the relation of service, only binds the employee in so far as the restrictions imposed as to the time, place, and nature of trade are so limited that they do not inequitably embarrass the future of the employee.

Such restrictions cannot be imposed for more than three years from the date of the termination of the employment.

The agreement \((d)\) is null and void if the employee was a minor at the time of its conclusion.

75. If an employer by his unlawful conduct gives an employee ground for terminating the employment in accordance with sects. 70 and 71, the employer cannot put into force any claims arising out of a contract of the description specified in sect. 74. The same rule applies if the employment is terminated by the employer, unless there was some cogent ground for the dismissal for which he was not himself responsible, or unless the employee during the period of restraint continues to receive remuneration from him on the same scale as before.

If the employee has agreed to pay a penalty in

\((d)\) An agreement with a minor is in any case void, unless made with the consent of his statutory agent. (See Schuster, pp. 115, 550, 366; and see post, sect. 78 (note).) The effect of this paragraph is to render an agreement limiting the minor's trading activity void even if made with such consent.
the event of his not fulfilling his contractual obligations, the employer's rights are limited to the exaction of this penalty, and any claim he might otherwise have had to the specific performance of these obligations by the employee or to further damages is barred. The rules of the Civil Code as to the reduction of excessive penalties fixed by contract (e) are unaffected by this section.

Agreements seeking to override the provisions of this section are null and void.

76. The provisions of sects. 60—63, 74, and 75 apply also to apprentices.

The master is bound to see that the apprentice receives instruction in such work of a mercantile nature as is incidental to the business carried on; he must conduct the education of the apprentice either personally or by means of a suitable substitute specially told off for the purpose. The instruction must take place as regards the order and duration of its respective parts in the manner most suitable for purposes of education.

The master must not diminish the time and opportunities necessary for the apprentice's education by making him perform other services, and he must also see that he has the time and opportunities necessary for attending Divine Service on Sundays.

(e) B. G. B., 340, 341, 342, 343. See Schuster, 189, 190. By German Law, in contradistinction to English Law, parties may agree to the payment of a penalty in addition to full damages. But if the amount seems out of proportion to the importance of the matter it may be reduced by the Court to such an amount as appears to the Court to be reasonable.
and holidays. He must encourage the industry and morality of the apprentice.

With regard to the master's obligation to allow the apprentice sufficient time to attend a continuation school the provisions of sect. 120 of the Trade Regulations Statute (f) apply.

77. The duration of the apprenticeship is regulated by the contract creating it, or in default of this by the local by-laws or customs.

The apprenticeship can, unless a longer probationary period has been agreed upon, be terminated at any time during the first month after its commencement without notice. Any stipulation seeking to prolong the probationary period beyond three months is null and void.

After the expiration of the probationary period the notice necessary for terminating the apprenticeship is to be regulated in accordance with the provisions of sects. 70—72. Neglect by the master of his duties to his apprentice in a manner endangering his health, morality, or education is more particularly to be deemed a cogent ground for termination on the part of the apprentice.

In case of the death of the master the apprenticeship may be terminated within a month of such death without notice.

78. If the statutory agent (g) of the apprentice or

(f) By sect. 120 of this statute employers are bound to allow time to employees under eighteen years of age to attend a continuation school if they desire it.

(g) An infant's statutory agent is the person who has power to act
the apprentice himself, if of full age, presents to the master a written declaration that the apprentice is about to transfer to another trade or occupation, the apprenticeship terminates, unless the apprentice shall have been previously dismissed, after the expiration of a month.

If the apprentice notwithstanding a declaration made to the contrary within nine months after the termination of his apprenticeship enters another business of the same description as apprentice or mercantile employee, he is bound to compensate his former master for any damage occasioned to him by the termination of the apprenticeship. In respect of such compensation the new master or employer is jointly and severally liable with the apprentice, provided that he was aware of the true circumstances of the case.

79. Claims against the apprentice for the unauthorised relinquishment of his apprenticeship can only be enforced if the contract of apprenticeship is in writing.

80. On the termination of the apprenticeship the master must furnish the apprentice with a written certificate as to the length of the period of apprenticeship, the knowledge and skill therein acquired, and the conduct of the apprentice.

on behalf of the infant if incapable, or to give the required consent to the acts of any infant whose capacity is restricted. The statutory agent of an infant is the person exercising parental power over the infant. As to statutory agency, see Schuster, pp. 115 and 550.
Such certificate must upon the application of the apprentice be authenticated by the local police authorities stamp-free and without charges.

81. Persons deprived of their honorary civic functions (h) may neither take apprentices themselves nor take any part in their instruction. A master may not employ such persons in the instruction of apprentices.

If apprentices are employed in a manner which violates this regulation, the police authorities may enforce their discharge from the apprenticeship.

82. A master violating his obligations to his apprentice under sect. 62, paragraphs 1 and 2, and sect. 76, paragraphs 2 and 3, in a manner likely to injure his health, morality, or education, may be subjected to a fine not exceeding M.150.

A similar fine may be imposed upon masters instructing their apprentices or allowing them to be instructed in a manner contrary to the provisions of sect. 81.

83. The conditions of work of persons, who in the course of a mercantile trade perform other than mercantile services, are regulated by the rules in force in respect of the particular work performed by such persons.

(h) A person deprived of such functions cannot sit on a jury or occupy any honorary public office. See Schuster, p. 264 (note).
PART VII.—MERCANTILE AGENTS (a).

84. A mercantile agent is a person who is permanently engaged by another person (hereinafter called the principal) to transact business either as an intermediary or in the principal's name for the purposes of the principal's mercantile trade without being an employee in the principal's establishment. A mercantile agent must in the performance of his duties attend to his principal's business with the diligence of a careful mercantile trader (a).

It is his duty to keep his principal properly informed upon all necessary matters, and in particular to immediately advise him of any transaction entered upon.

85. If a mercantile agent who is only empowered to act as an intermediary, enters upon a transaction with a third party in the name of his principal, it shall be deemed to be ratified by the principal unless the latter, immediately upon being informed of it, expressly repudiates it by notice to the third party.

86. A mercantile agent is not entitled, in the absence of a special authority to that effect, to receive payments or to allow payment by instalments after the due date on behalf of his principal.

The demonstrations of defects in goods, declara-

(a) Not to be confused with the holders of a power of mercantile agency. See sect. 54, ante.
tions that they have been rejected and are held at the vendor's disposal, and other declarations of a similar description may be made to a mercantile agent.

87. If a mercantile agent is employed as a commercial traveller, the provisions of sect. 55 apply.

88. In the absence of any agreement to the contrary as to remuneration of a mercantile agent, a commission becomes due to him upon every transaction entered upon which has been brought about by his agency (b). If the work done by the agent consists in effecting sales, or acting as an intermediary in respect thereof, the question of the agent's claim to commission does not arise till payment has been made, and must then be relative to the actual sum received.

If a transaction remains wholly or partially incompletely owing to the conduct of the principal, unless the character of the person with whom the transaction was made furnishes cogent grounds for such conduct, the full amount of commission may be claimed by the agent.

If the amount of the commission is not fixed, the customary commission must be paid.

Accounts as to the amount due for commission must, in the absence of any agreement to the contrary, be taken every calendar half-year.

89. If a mercantile agent is expressly appointed for a particular district, he is entitled, in the absence

(b) See also sect. 354, paragraph 1.
of any agreement or custom to the contrary, to commission upon transactions entered upon in such district by or on behalf of the principal without the co-operation of the agent.

90. A mercantile agent cannot, in the absence of an agreement or custom to the contrary, claim reimbursement for costs and expenses arising in the ordinary course of business.

91. A mercantile agent has the right at the statement of accounts with his principal to demand an extract from the principal's books as to the transactions entered upon through his agency. He has the same right with regard to transactions in respect of which commission may be due to him in accordance with sect. 89.

92. An agreement between a mercantile agent and his principal entered upon for an indefinite period may be terminated by either party at six weeks' notice, to take effect at the end of a calendar quarter.

The agreement can be terminated by either party without notice upon any cogent ground.

Part VIII.—Mercantile Brokers (a).

93. A person who, in the regular course of his trade, acts as an intermediary on behalf of other persons, without being in any continuous contractual

(a) For further rules relating to brokers, see B. G. B. 652-6; Schuster, pp. 278-9.
relation with them, in the formation of contracts relating to (1) the purchase or sale of goods or negotiable instruments, (2) insurance, (3) the forwarding of goods, bottomry and affreightment, or (4) any other objects of mercantile intercourse, has the rights and obligations of a mercantile broker.

The provisions of the present part of this Code have no application to transactions entered upon as an intermediary in respect of transactions other than of the description specified above, e.g., in particular transactions connected with immoveable property, even when such transactions are completed through the agency of a mercantile broker.

94. The mercantile broker must, where not specially excused by the parties between whom he is acting as an intermediary or by local custom in respect of the particular kind of goods dealt in, deliver to each party immediately upon the conclusion of the transaction a signed contract-note specifying the names of the parties and the subject-matter and terms of the contract. In particular upon the sale of goods or negotiable instruments the contract-note must state the description, number, price and time for delivery of the objects sold.

In transactions not to be completed on the spot the contract-notes must be presented to the parties for their signatures, and each party must be sent the contract-note signed by the other.

If any party refuses to receive or sign the contract-note, the other party must be immediately informed thereof by the broker.
95. If a party accepts a contract-note, on which a mercantile broker has reserved to himself the right to nominate the other party, the first party is bound in his contract with the other party subsequently nominated, unless well-founded objections can be raised against such party.

The nomination of such party must take place within the period prescribed by local custom, or in default of such custom, within a period reasonable according to the circumstances.

If no nomination is made or well-founded objections can be raised against the person or firm nominated, the first party may claim to have the contract performed by the mercantile broker. Such a claim is ousted if the party, upon being requested by the mercantile broker to make a declaration whether he claims the performance of the contract or not, does not immediately do so.

96. A mercantile broker must, unless excused by the parties or by local custom with regard to the particular kind of goods dealt in, in the case of sales of goods by sample effected by him as intermediary, retain all samples of goods with which he has been entrusted until the goods in question have been accepted without any objection being raised as to their quality or until the transaction has been otherwise finally disposed of. He must identify the sample by means of a mark.

97. A mercantile broker shall not be deemed to have authority to receive payments or to give a
discharge for any other service stipulated for by the contract.

98. A mercantile broker is responsible to both parties for damage incurred by his default.

99. In the absence of a special agreement between the parties, or any local custom to the contrary, the mercantile broker's remuneration must be paid in equal shares by both parties.

100. A mercantile broker must keep a journal, in which all transactions concluded are to be daily entered. The entries must be made in chronological order and must include the matters specified in sect. 94, paragraph 1. The entries must each day be signed by the mercantile broker.

The provisions of sects. 43 and 44, as to the method of keeping and as to the retention of mercantile books, apply also to a mercantile broker's journal.

101. A mercantile broker is bound at any time to supply the parties upon their request with signed extracts from his journal containing all entries made by him with respect to the transaction negotiated between them.

102. In the course of the hearing of a case the Court can, independently of the request of either party, order the production of the journal in order to see whether it is consistent with the contract-note, the extracts from the journal, or any other piece of evidence.
103. Mercantile brokers failing to observe the regulations as to the keeping and retention of journals, may be subjected to a fine not exceeding M.1,000.

104. The regulations as to contract-notes and journals have no applications to persons acting as middlemen in dealings in merchandise transacted between persons carrying on small trades (c).

(c) See sect. 4, ante.
Book II.—**Mercantile Associations**<sup>(a)</sup> and Dormant Partnership.

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**PART I.—UNLIMITED PARTNERSHIP.**

Head I. *Formation of the Partnership.*

105. A partnership formed for the purpose of carrying on a mercantile trade under a trade-name is an unlimited mercantile partnership if there is no limitation of the liability of any of the partners in respect of the debts of the partnership.

The Rules of the Civil Code<sup>(b)</sup> as to partnership apply to an unlimited mercantile partnership, where the present part of this Code does not expressly provide otherwise.

106. The partnership must apply for registration in the Mercantile Register of the Court in whose district its place of business is situated.

The application must state:

(1) The name, first name, description and place of residence of each partner.

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<sup>(a)</sup> The German term "handels-gesellschaft," rendered here "mercantile associations," is an expression which includes companies as well as the various kinds of partnerships.

<sup>(b)</sup> Civil Code, §§ 705—740. See Schuster, pp. 303—309.
(2) The trade-name and place of business of the partnership.

(3) The date of the commencement of the partnership.

107. A change in the trade-name of a partnership, the removal of its place of business to another locality, or the entrance of a new partner must be notified for entry in the Mercantile Register.

108. Notifications and applications must be made with the co-operation of all the partners.

Partners who are to have power to act on behalf of partnership must supply the Court for its retention with specimen signatures in their handwriting of the trade-name together with their own.

Head II. *Mutual Rights and Liabilities of Partners (inter se).*

109. The mutual rights and liabilities of partners are regulated in the first place by the terms of the partnership contract; the rules of sects. 110—122 only apply in the absence of any express stipulation to the contrary contained in such contract.

110. If a partner while acting on behalf of the partnership incurs any outlay which under the circumstances he was entitled to consider necessary, or while conducting partnership business suffers any loss which is directly attributable to such business or to risks inseparably connected therewith, he is entitled to be indemnified by the partnership.
Interest for such outlay or loss as from the date upon which it was incurred must be paid by the partnership (b).

111. A partner who fails to pay in his contribution to the partnership capital at the proper time, or to repay any moneys received from the partnership, or who draws money from the partnership funds, without being authorised to do so, must pay interest as from the day on which the money in question ought to have been paid in or repaid or was drawn.

His liability to pay further damages is not excluded by the foregoing paragraph.

112. A partner is not entitled, without the consent of the other partners, either to transact for his own account business of the same description as that transacted by the partnership, or to become a full (c) partner in another mercantile partnership which transacts business of the same kind.

A partner in a mercantile partnership shall be deemed to have obtained the consent of the remaining partners to his participation in another partnership business as full partner, if such participation was known to them at the time of the formation of the partnership, and yet no

(b) As to the rate of interest, see post, sect. 352.

(c) The German term here translated by "full partner" is a comprehensive one, and includes either an ordinary partner in an unlimited partnership, a general partner in a limited partnership (see post, sect. 161), or a general member of a share company en commandite (see post, sect. 320), a form of association which for the purpose of translation must in this section be held to be included in the expression "mercantile partnership."
stipulation was made as to the relinquishment of such participation.

113. Upon the breach by a partner of the obligations imposed on him by sect. 112, the partnership may claim damages; alternatively it may demand the transfer of the business entered into by such partner for his own account to the partnership account and the surrender to the partnership of the remuneration received by him for business entered into for the account of a third party or any claims he may have to such remuneration.

Claims arising under the foregoing paragraph may be enforced if a resolution in favour of such enforcement is passed by the remaining partners.

Such claims become barred in three months from the date upon which the conclusion of transactions for the partner's private account or his participation in another partnership business came to the knowledge of the remaining partners or irrespective of such knowledge within five years of the date upon which the facts upon which the claims are based came into existence.

The provisions of this section are without prejudice to the right of the remaining partners to demand the dissolution of the partnership.

114. Every partner has the right to conduct the business (d) of the partnership and is bound to do so.

(d) As to the scope and meaning of this term, see post, sect. 116.
If in creating the partnership contract the conduct of the business is expressly given over to one or more of the partners, the remaining partners shall be deemed to be excluded therefrom.

115. If all or several of the partners are authorised to conduct the business, each of them has the right to enter upon transactions separately; but if any other of the partners so authorised requests a partner to abstain from a particular transaction, the request must be complied with.

If it is stipulated by the partnership contract that the partners authorised to conduct business may only do so collectively, all such partners must concur in every transaction entered upon, unless delay involves risk.

116. The authority to conduct business extends to all transactions incidental to the ordinary course of business of the mercantile trade carried on by the partnership.

The undertaking of transactions outside such ordinary course of business requires a resolution by all the partners.

A power of procuration may not be conferred without the consent of all the partners authorised to conduct the business unless delay involves risk. Powers of procuration may be revoked by any partner authorised to grant them or to take part in the granting thereof.

117. The power of a partner to conduct the business of the partnership may be withdrawn from him
upon the application of the remaining partners by an order of the Court upon any cogent ground, *e.g.*, in particular any grave breach of duty on the part of such partner, or his incapacity to conduct business in a proper manner.

118. Any partner, even when not authorised to conduct the business, has the right to inform himself personally of the affairs of the partnership, inspect the books of account and documents of the partnership, and prepare himself a balance sheet therefrom. Any agreement prohibiting or placing any limitation upon this right ceases to be operative if there is any ground for assuming dishonesty in the conduct of the business.

119. Resolutions cannot be framed without the consent of all partners entitled to participate in the framing of resolutions.

If by the partnership contract the majority of votes is to be decisive, such majority shall, if nothing appears to the contrary, be deemed to be the numerical (e) majority of the partners.

120. At the close of every business year the profit and loss of the year must be ascertained upon the basis of the balance sheet, and apportioned between the partners.

The sum due to each partner must be credited to him on capital account, and the loss which falls on

(e) *I.e.*, as opposed to a majority reckoned according to the amount of the contributions to capital.
him, as well as the sum drawn by him during the year, is debited to the same account.

121. Out of the profits of the year each partner is in the first place entitled to interest upon his contribution to the partnership capital at the rate of 4 per cent. per annum. If such profits are not sufficient for the payment of 4 per cent. per annum, the rate of interest to be paid is reduced accordingly.

In calculating the share of profits due to a partner in accordance with the foregoing paragraph, payments made by a partner in increase of his contribution to capital during the course of the business year must be taken into account to an extent proportionate to the time which has elapsed since they were made. Amounts drawn by a partner from his contribution to capital during the course of the business year must be taken into account to an extent proportionate to the time which elapsed before they were drawn.

The balance (if any) of the year’s profits remaining after an apportionment thereof made in accordance with paragraphs 1 and 2 of this section is to be divided between the partners in equal shares; any loss that there may be is to be borne by the partners in equal shares.

122. Each partner has the right to draw upon the partnership funds up to an amount equal to 4 per cent. on the sum standing to his credit on capital account at the close of the last business year, and
he may also draw the amount credited to him as profit for the last business year over and above the 4 per cent. upon his capital if this is practicable without obvious injury to the partnership business.

Subject to the above paragraph a partner may not reduce the sum standing to his credit upon capital account without the consent of the other partners.

Head III. *Rights and Liabilities of Partners in Relation to Third Parties.*

123. An unlimited mercantile partnership becomes operative in relation to third parties from the date at which the partnership is entered in the Mercantile Register.

If the partnership commences business before the making of such entry, then it becomes operative from the date of the commencement of business, except where the effect of sect. 2 is to the contrary.

Any agreement that the partnership is not to come into force until a later date is inoperative as against third parties.

124. An unlimited mercantile partnership can, under its trade-name, acquire rights and enter upon obligations, acquire ownership and other real rights over land, and sue and be sued before a Court.

To levy execution upon partnership property an
enforceable judgment \( (f) \) must be obtained against the partnership.

125. Every partner has authority to act on behalf of the partnership if not expressly deprived of such authority by the partnership contract.

The partnership contract may provide with respect either to all or some of the partners that they are not to have the power to act on behalf of the partnership except in conjunction with one another (such power of agency \( (g) \) is hereinafter called "a power of collective agency"). Partners in possession of a power of collective agency may give authority to one or more out of their number to enter upon a specified transaction or a specified kind of transaction. If a declaration has to be made as against the partnership it is sufficient to make such declaration to one of the partners upon whom a power of collective agency has been conferred.

The partnership contract may provide that the partners, if two or more do not act jointly with one another, cannot act on behalf of the partnership except in conjunction with the holder of a power of procuration. In this case the rules of paragraph 2, sentences 2 and 3 of this section, apply mutatis mutandis.

\( (f) \) In Germany judgments are not enforceable, while still appealable, unless special leave is obtained to enforce them.

\( (g) \) The expression "power of agency" has been used to signify the power to act on behalf of the partnership; as to the meaning and extent of this power, see post, sect. 126.
The exclusion of a partner from the power to act on behalf of the partnership, the creation of a collective agency or of an arrangement such as that described in paragraph 3, sentence 1, of this section, or any change in the power of agency of a partner, must be notified by all the partners for entry in the Mercantile Register.

126. The power of agency of the partners extends to all judicial proceedings and other transactions and acts in the law, including the alienation and charging of land and the granting or revocation of a power of procuration.

Any limitation of the scope of the power of agency is inoperative as against third parties; this applies especially to limitations seeking to restrict the exercise of the power to specified transactions or kinds of transactions, or to prohibit its use except under specified circumstances, during a specified period, or at particular places.

With regard to the limitation of the exercise of the power to the business of one of several branches owned by a partnership, sect. 50, paragraph 3, applies mutatis mutandis.

127. The power of agency can be withdrawn from a partner by an order of the Court upon the application of the remaining partners, if there is any cogent ground for such withdrawal, e.g., in particular gross neglect of duty or incapacity to represent the partnership in a proper manner.
128. The partners personally are jointly and severally liable to the partnership creditors for the obligations of the partnership. Any agreement to the contrary is inoperative as against third parties.

129. If a claim is made against a partner in respect of a partnership liability, he cannot set up any defence which it is not open to the partnership to set up unless such defence arises out of circumstances connected with himself personally.

The partner may refuse to satisfy the creditor's claim so long as the partnership has the right to avoid the act in the law which forms the basis thereof (h).

The partner may also refuse to satisfy the claim if it can be met by setting off against it a payment due from the creditor to the partnership.

An enforceable judgment entitling the creditor to levy execution upon the goods of the partnership does not entitle him to do so upon the goods of individual partners.

130. Any person entering an existing partnership is liable in the manner specified in sects. 128, 129 for partnership liabilities incurred before he became a partner, irrespective of whether any change has been made in the trade-name or not.

Any agreement to the contrary is inoperative as against third parties.

(h) This refers to voidable transactions, i.e., transactions which are not void themselves but may be rendered so by a definite act within a specified period of time. (See Schuster, p. 82.)
Head IV.—*The Dissolution of a Partnership and the Retirement or Expulsion of Partners.*

131. An unlimited mercantile partnership is dissolved—

1. By the expiration of the period of time for which it was formed.
2. By a resolution of the partners.
3. By the bankruptcy of the partnership.
4. In the absence of any provision to the contrary in the partnership contract by the death of a partner.
5. By the bankruptcy of one of the partners.
6. By due notice (i) being given or by an order of the Court.

132. If a partnership is entered upon for any indefinite period, it can only be terminated by a partner at the end of a business year; and such partner must give at least six months' notice of his intention to terminate.

133. In the presence of any cogent ground, a partnership may be dissolved by order of the Court upon the application of one of the partners, before the expiration of the period agreed for its duration, or in the case of a partnership entered into for an indefinite period without notice being given.

(i) *I.e.,* notice which is permissible under the terms of the contract, or under the provisions of sects. 132, 134 and 135.
Such a cogent ground is furnished in particular when a partner wilfully or by gross negligence violates any essential obligation imposed upon him by the partnership contract, or if the performance of such an obligation becomes impossible.

Any agreement excluding the right of a partner to demand the dissolution of a partnership or limiting such right in contravention of these rules is null and void.

134. A partnership entered into for the life of one of the partners or tacitly continued after the expiration of the period agreed for its duration, is for the purposes of sects. 132 and 133 subject to the same rules as a partnership entered into for an indefinite period.

135. If the private creditor of a partner, upon whose moveable property execution has been levied within the last six months without the satisfaction thereby of the debt owing, such debt being one not merely provisionally (k) enforceable by execution, causes his claim to be transferred and charged upon the share of partnership property to which his debtor would be entitled on dissolution, he may terminate the partnership at the end of the business year by giving six months' notice irrespective of whether such partnership was entered into for a definite or an indefinite period.

(k) I.e., a debt based upon a judgment which is final. A provisionally enforceable judgment is one which is enforceable though still appealable. As a general rule a judgment is not enforceable while still appealable.
136. If a partnership is dissolved otherwise than by notice a partner's authority to conduct partnership business shall be deemed to continue until he has or ought to have become aware of the dissolution.

137. If the partnership is dissolved by the death of a partner, the heir (l) of the deceased partner must immediately inform the remaining partners of such death, and in matters which do not allow delay must proceed with such business as it was the duty of the deceased partner to conduct, until the remaining partners in conjunction with him can make other arrangements in respect thereof. In a similar way the remaining partners must provisionally carry on the business which it is their duty to transact. To this extent the partnership shall be deemed to remain in existence.

The provisions of paragraph 1, sentences 2 and 3 of this section, apply also in the event of a dissolution of the partnership by the bankruptcy of a partner.

138. If it is provided by the partnership contract that in the event of one partner terminating by notice, dying or becoming bankrupt, the partnership is to be carried on by the remaining partners, such one partner ceases to belong to the partnership

(l) As to the meaning of the German expression "erbe" here translated by "heir," see Schuster, pp. 576, 581, 582. An erbe is at the same time the real and personal representative of the deceased and his residuary legatee.
from the moment at which, in the absence of such a provision, the partnership would have been dissolved.

139. If it is provided by the partnership contract that in the event of the death of one of the partners the partnership is to be continued with his heirs \((m)\), each of such heirs may refuse to continue in the partnership except as a limited partner \((n)\) entitled to the same proportion of profits as the deceased, and except upon the understanding that the part of the capital of the deceased invested in the business which he inherits may be recognised as the contribution to partnership capital, which as a limited partner he is bound to make.

If the remaining partners refuse to accept such terms, the heir may without previous notice declare that he will retire from the partnership.

These rights can only be exercised within a period of three months from the time at which the heir became aware of the devolution of the inheritance. This period shall be deemed to run \emph{mutatis mutandis} in a manner regulated by the provisions of sect. 206 of the Civil Code. If the right to disclaim the inheritance remains in existence after the expiration of three months, such period shall be extended till the expiration of the period within which the inheritance may be disclaimed \((o)\).

\((m)\) See note to sect. 137, \textit{ante}.

\((n)\) As to limited partnership, the term which I have used to translate the German Kommandit-gesellschaft, see \textit{post}, sects. 161—177.

\((o)\) An inheritance may be disclaimed within six weeks from the
If the heir retires from the partnership or becomes a limited partner within the period specified in the foregoing paragraph, or if the partnership is dissolved within such period, the heir is not liable for any previously existing partnership debts except in accordance with the provisions of the Civil Law dealing with the liability of heirs for the debts of the estate.

The provisions of paragraphs 1 to 4 of this section cannot be rendered inoperative by the partnership contract; but in the event of an heir making his continuation in the partnership conditional upon his holding the position of a limited partner, a stipulation that he shall be entitled to a share in the profits other than that to which the deceased was entitled is good.

140. Upon the occurrence of any event connected with one partner which according to sect. 133 entitles the remaining partners to demand the dissolution of the partnership, the Court may upon the application of the remaining partners instead of such dissolution order the expulsion of the partner in question.

For the purpose of the division of property between the partnership and the expelled partner, the partnership property must be assessed at the date at which the heir became aware of the death of the deceased.

As to disclaimer of inheritance, see Schuster, p. 638.

(?) The provisions of the Civil Law allow an heir to take certain steps for restricting his liability to the value of the estate which he takes. If he fails to take these steps he is liable for the debts of the estate to an unlimited extent.
value at which it stood at the time when the application for the expulsion was first made.

141. If the private creditor of a partner makes use of his rights under sect. 135, the remaining partners can, upon the passing of a resolution to that effect, declare to such creditor that they intend to carry on the partnership. In this case the partner concerned ceases to be a member of the partnership at the end of the business year.

These rules apply also to the bankruptcy of a partner, subject to the provision that in that case the declaration must be made to the trustee in bankruptcy and the exclusion of the bankrupt from the partnership dates from the adjudication of bankruptcy.

142. In the case of a partnership consisting of only two partners, should circumstances arise with respect to one of them, which if the partnership consisted of more than two partners would give the remaining partners the right to expel him, the other partner can upon application to the Court obtain an order authorising him to take over the business with all its assets and liabilities without any process of liquidation.

If in the case of a partnership of two, the private creditor of one of the partners makes use of his powers under sect. 135, or if one of the partners is made a bankrupt, the other partner has the right to take over the business in the manner specified in the foregoing paragraph.
The division of property between the partners is governed *mutatis mutandis* by the rules applicable on the retirement of a partner.

143. The dissolution of a partnership, when not brought about by the bankruptcy of the partnership, must be notified by the partners collectively for entry in the Mercantile Register.

The same rule applies to the retirement or expulsion of a partner.

If it may be assumed that the dissolution of the partnership or the retirement (q) of a partner therefrom follows upon the death of a partner, the entry may be made without the co-operation of his heirs, if any special difficulties lie in the way of such co-operation.

144. If the dissolution of a partnership is brought about by reason of its being adjudicated bankrupt, but such adjudication is subsequently annulled by the acceptance of a compulsory composition (r) or revoked as the result of the application of the partnership, the partners may pass a resolution for the continuation of the partnership.

Such continuation must be notified for entry in the Mercantile Register by the partners collectively.

\[(q)\] In some cases in the German sense of the word a partner's retirement does not ensue upon his death, inasmuch as by the partnership agreement his rights thereunder are to continue to be exercised, and his duties to be performed by his heirs.

\[(r)\] Under the German Bankruptcy Code a composition must be accepted if a resolution to that effect is passed by a majority of creditors representing at least three-fourths of the aggregate amount of the claims. As to German bankruptcy procedure, see note to sect. 32, ante.
Head V. Liquidation of a Partnership.

145. After the dissolution of a partnership the liquidation shall take place, unless some other method of adjustment of property between the partners has been agreed upon or unless the partnership is adjudicated bankrupt.

If the dissolution is brought about by notice given by a creditor of one of the partners or by the bankruptcy of one of the partners the liquidation can only be dispensed with by the consent of the creditor or of the trustee in bankruptcy.

146. The liquidation, where not entrusted to individual partners or other persons by resolution of the partners or by the partnership contract, shall be carried out by the entire number of partners acting as liquidators. Where a deceased partner has more than one heir they must appoint a single representative to represent them all.

Upon the application of any person interested the nomination of the liquidators may, upon any cogent grounds, be made by the Court of the district in which the principal place of business of the partnership is situated. The Court may in such a case appoint persons other than members of the partnership as liquidators. The term "person interested" for the purposes of this paragraph includes besides the partners any creditor who has given notice under sect. 135.
In the event of the bankruptcy of a partner his place is taken by his trustee in bankruptcy.

147. The removal of liquidators may be brought about by a unanimous resolution of the persons interested (see sect. 146, paragraphs 1 and 2), or upon cogent grounds, by the Court on the application of a person interested.

148. The names of the liquidators must be notified by the partners collectively for entry in the Mercantile Register. The same rule applies to any change in the liquidators or their powers of agency. In the case of the death of one of the partners, if the statements in the notification may be assumed to correspond with the facts, the entry may be made without the co-operation of the heirs if there is any special difficulty in the way of such co-operation.

The entry of the appointment and removal of liquidators by the Court shall be made by the Court motu proprio.

The liquidators must furnish the Court with specimens of the signatures of their own name together with the trade-name(s) for its retention.

149. The liquidators must terminate current transactions, call in debts due, convert the remaining partnership property into money and satisfy the creditors; in order to terminate pending transactions they can enter upon fresh transactions. Liquidators have power within the limits of the sphere of their

(s) I.e., the trade-name of the partnership in liquidation. See post, sect. 153.
duties to act on behalf of the partnership in all acts in the law and extra-judicial transactions.

150. The liquidators, where there are more than one, have power to undertake transactions connected with the liquidation only when acting in conjunction with one another, in the absence of any agreement allowing them to do so independently; such an agreement if made must be entered in the Mercantile Register.

Paragraph 1 of this section does not prevent the liquidators from authorising individual members of their own number to enter upon particular transactions or kinds of transaction. If a declaration has to be made against the partnership the rule laid down in sect. 125, paragraph 2, sentence 3, applies *mutatis mutandis*.

151. Any limitation of the scope of the liquidator's powers is inoperative as against third parties.

152. As against persons interested *(t)* within the meaning of sect. 146, paragraphs 2 and 3, the liquidators, even when appointed by the Court, must comply with resolutions with regard to the conduct of the business passed unanimously by such persons.

153. The liquidators must sign in some way by which their own names are appended to the trade-name used hitherto as that of the partnership, and some indication is given that the partnership is in liquidation.

*(t) I.e., if they do not comply with such resolutions, they are liable to the persons interested, but not to anyone else.*
154. The liquidators must draw up a balance sheet, both at the beginning and at the end of the liquidation.

155. Any partnership property remaining after the payment of all debts must be distributed by the liquidators among the partners in proportion to their respective contributions to the partnership capital as shown in the final balance sheet.

Any superfluous money which may come into the liquidator's hands during the liquidation is to be divided provisionally; but enough must be retained to cover not yet matured or disputed liabilities, and to insure the receipt by the respective partners of the share due to them on the final division of property. The provisions of sect. 122, paragraph 1, do not apply during the period of liquidation.

In the event of a dispute between the partners as to the distribution of the partnership property, the distribution must be deferred by the liquidators until the dispute is settled.

156. Up to the close of the liquidation the rights and liabilities of the partners inter se, and those of the partnership as against third parties, are regulated by the rules of Heads II. and III. of the present part of this Code, provided that nothing to the contrary is contained under the present head (Head V.), or rendered necessary in order to carry out the liquidation.

157. At the close of the liquidation the extinction
of the trade-name must be notified by the liquidators for entry in the Mercantile Register.

The books and documents of the dissolved partnership are to be given to one of the partners or to a third party for retention by them. Such partner or third party will, in default of any agreement in respect thereto, be nominated by the Court of the district in which the principal place of business of the partnership is situated.

The right to inspect and make use of such books and papers is retained by the partners and their heirs.

158. If the partners agree upon some method of division of property other than liquidation (u), the rules laid down as to liquidation apply notwithstanding mutatis mutandis in respect of the relations between the partners and third parties, so long as any partnership property remains undistributed.

Head VI. Prescription.

159. Claims against a partner arising out of partnership liabilities become barred in five years from the date of the dissolution of the partnership or the retirement or expulsion of such partner therefrom, in so far as the claim against the partnership out of which they arise is not subject to a shorter period of prescription (x).

(u) E.g., if one partner buys the others out at a valuation, or if the business is sold as a going concern.

(x) As to claims subject to a shorter period of prescription, see Civil Code, §§ 196, 197; Schuster, pp. 131, 132.
The period of prescription begins to run from the end of the day on which the dissolution of the partnership or the retirement or expulsion of the partner is entered in the Mercantile Register of the Court of the district in which the principal place of business of the partnership is situated.

If the creditor's claim does not fall due till after the registration, the period of prescription begins to run from the date upon which the claim falls due.

160. Any interruption (y) of the prescription as against the dissolved partnership is operative also as against individual partners, who were members of the partnership at the time of its dissolution.

**Part II.—LIMITED PARTNERSHIP.**

161. A limited partnership is a partnership having for its object the carrying on of a mercantile trade under a trade-name, and consisting of one or more partners (hereinafter called limited partners) whose liability in respect of the obligations of the partnership is limited to the amount of a fixed contribution, and of one or more partners (hereinafter called general partners) whose liability in respect thereof is unlimited.

Where not otherwise herein expressly provided the rules in force for an unlimited mercantile partnership apply also to a limited partnership.

(y) As to interruption of prescription, see Schuster, pp. 132-3.
162. The application for registration in addition to the matters specified in sect. 106 must state which of the partners are limited partners and must specify the amount of their several contributions to capital.

In the public notification of the entry made in the Register only the number of the general partners need be given, the name, description and place of residence of the limited partners need not be given.

These rules apply also mutatis mutandis in the case of the entry of a limited partner into an existing mercantile partnership and the retirement or expulsion of a limited partner from a limited partnership.

163. With regard to the relations of partners inter se, in the absence of any stipulation to the contrary in the partnership contract the special rules laid down in sects. 164—169 apply.

164. Limited partners are excluded from the conduct of the partnership business; they have no right to forbid any transaction being entered into by a general partner unless such transaction is outside the usual scope of the business of the partnership, provided always that nothing contained in this section affects the rules laid down in sect. 116, paragraph 3.

165. Sects. 112 and 113 have no application to limited partners.

166. A limited partner has the right to demand
copies of the annual balance sheet and to test their correctness by inspecting the books and documents.

Limited partners do not possess the further rights given under sect. 118 to partners excluded from the conduct of the business.

Upon the application of a limited partner the Court may at any time upon cogent grounds order that the contents of a balance sheet should be communicated to him, or that he should be furnished with other information or be given an opportunity to inspect books and documents.

167. The rules of sect. 120 as to the calculation of profit and loss apply also to the case of limited partners.

But the profit due to a limited partner is not added on to his share in the partnership capital, unless such share falls short of the amount of his fixed contribution.

A limited partner only shares in loss to the extent of the share he has already contributed to the capital and the still unpaid part of his fixed contribution.

168. The share in the profits each partner is entitled to is regulated in so far as the profits do not exceed four per cent. on the amount of the contributions to capital by the rules of sect. 121, paragraphs 1 and 2.

With respect to profits in excess of this amount and with respect to loss, in the absence of any agreement to the contrary, the ratio according to
which the apportionment is to be made shall depend upon the circumstances.

169. Sect. 122 has no application to a limited partner. A limited partner is only entitled to have his share of the profits paid out to him, and is not entitled to this if his share in the partnership capital has sunk below the amount of his fixed contribution or would sink below such amount in the event of such payment out being made.

A limited partner is not obliged to pay back profits once drawn to meet subsequent losses.

170. A limited partner has no power to act on behalf of the partnership.

171. A limited partner is directly liable to the partnership creditors to the extent of his contribution to capital; but this liability does not apply to so much of his contribution as has been paid (z).

In the event of the bankruptcy of the partnership the rights of the partnership creditors under paragraph 1 of this section must be exercised through the trustee in bankruptcy.

172. The amount of a limited partner’s fixed contribution as between such limited partners and the partnership creditors is fixed by the amount stated in the entry in the Mercantile Register.

(z) If a limited partner has paid up all his contribution to capital (as fixed by the partnership agreement) he has no direct liability to the partnership creditors, but if he has not paid it all up he is directly liable to the extent of so much of his contribution as remains unpaid.
Partnership creditors cannot avail themselves of any unregistered increase in a limited partner's fixed contribution as entered in the Mercantile Register, unless notice of such increase has been duly given in accordance with mercantile custom or otherwise notified to them by the partnership.

Any agreement between the partners releasing a limited partner from the payment of his contribution, or giving him time for its payment, is inoperative as against the partnership creditors.

If part of a limited partner's contribution has been repaid to him, it shall be deemed never to have been paid as between such limited partner and the creditors. The same rule holds good if a limited partner takes any share of profits while his share in the capital, owing to losses incurred, is less than the paid-up amount of his contribution, or if by drawing a sum of money he reduces his share in the capital to an amount less than the paid-up amount of his contribution.

A limited partner is in no case obliged to pay back money drawn in good faith as profits upon the basis of a balance sheet made up in good faith.

173. Any person entering an existing mercantile partnership as a limited partner is liable, in accordance with the provisions of sects. 171 and 172, for the obligations of the partnership incurred before his entry thereinto, irrespective of whether the trade-name has been changed or not.
Any agreement to the contrary is inoperative as against third parties.

174. A reduction in the fixed contribution of a limited partner is not operative as against the partnership creditors until it is entered in the Mercantile Register of the Court of the district in which the principal place of business of the partnership is situated. A reduction, when so entered, is not operative as against creditors whose claims were already in existence at the time of the making of the entry.

175. The increase as well as the reduction of any fixed contribution must be notified for entry in the Mercantile Register by all the partners collectively, and must then be published as required by sect. 162, paragraph 2. The provisions of sect. 14 do not apply to the entry to be made in the Mercantile Register of the district in which the principal place of business is situated (a).

176. If the partnership commences business before its entry in the Mercantile Register of the district in which its principal place of business is situated, every limited partner consenting to such commencement of business is liable in respect of all obligations incurred by the partnership before the making of such entry to the same extent as a

(a) But if the entry is made in the register wherein the principal place of business is entered, penalties may be inflicted if it is not also made in the register containing the entry of the branch establishments.
general partner, unless his status as a limited partner was known to the creditors. This rule does not apply if its operation would conflict with the rules of sect. 2.

If a limited partner enters an existing mercantile partnership, paragraph 1, sentence 1 of this section applies, mutatis mutandis, in respect of obligations incurred during the period intervening between his entry into the partnership and the registration thereof in the Mercantile Register.

177. The death of a limited partner does not bring about the dissolution of the partnership.

PART III.—SHARE COMPANIES.

Head I. General Rules.

178. All the members of a share company have an interest in the share capital of the company to the extent of their contributions, without any personal liability for its obligations.

179. Shares (b) are indivisible.

They can be made out to bearer or in the name of the holder. Shares issued before payment of the full face value of the share, or, in the case of issue at a premium, before the payment of the full amount of the price at which the shares are issued,

(b) The word "Aktie" (share) is used indiscriminately to express the right of the shareholder in respect of the company's capital, and the certificate which serves as evidence of that right.
may not be made out to bearer. The same rule applies to certificates issued provisionally to the allottees of shares before the actual issue of the shares (hereinafter called provisional certificates).

If shares made out in the name of the holder are issued before the price of issue is paid up in full, a statement of the amount of the calls already paid up must appear on the certificates.

180. The nominal amount of a share must be at least 1,000 marks.

In the case of undertakings intended to assist public objects, the Federal Council may, to meet special local requirements, give its consent to the issue of shares made out in the holder’s name for any smaller amount not being less than M.200. The same consent may be granted in the case of undertakings in respect of the shares of which a definite rate of interest has been guaranteed unconditionally and without any time limit by the Empire, a Federal State, a Communal Union, or any other public corporation.

Shares made out in the holder’s name, which are not transferable without the consent of the company, may be for an amount less than M.1,000, but not less than M.200.

There must appear upon the shares, in the case referred to in paragraph 2 of this section, a statement as to the permission that has been obtained, and in the case referred to in paragraph 3, a statement as to the limitations in respect of their trans-
ferability affecting the shareholders by virtue of sect. 222, paragraph 4.

These rules apply also to provisional certificates.

181. The signature of share certificates and provisional certificates may be effected by mechanical means. The validity of the signature can by a regulation appearing on the face of the document be made dependent on the observance of a specified form.

182. The settling of the contents of the memorandum of association must be effected by at least five persons who are taking over shares and recorded by a judicial officer or a notary (c). The record must state the amount, and in the event of the issue of more than one class of shares, the class of the shares taken over by each of them.

The memorandum of association must specify:

(1) The trade-name and place of business of the company.
(2) The object of the undertaking.
(3) The amount of the capital and of the individual shares.
(4) The method of appointment and composition of the directorate.
(5) The manner of summoning a general meeting of the shareholders.
(6) The manner in which public announcements are to be made by the company.

(c) See Schuster, p. 90, Authentication by public Act.
Announcements that have to be made in the public press must be inserted in the German Imperial Gazette. Other papers for this purpose must be specified in the memorandum of association.

183. In the absence of any provision in the memorandum of association as to whether the shares are to be made out to bearer or in the name of the holder, they must be made out in the name of the holder.

The memorandum of association may contain a provision that shares made out in the name of the holder may at his request be converted into shares to bearer or vice versa.

184. Shares may not be issued at a lower price than their nominal amount.

The issue of shares at a higher price than their nominal amount is permissible, if sanctioned by the memorandum of association.

185. The memorandum of association may confer different rights upon the holders of distinct classes of shares, including in particular rights in respect of the division of the profits or assets of the company.

186. Any special advantage to which an individual shareholder is to be entitled must be recorded together with the name of the person so entitled in the memorandum of association.

In the event of any contribution to capital being made by shareholders otherwise than in cash (d)

(d) I.e., in the event of shares being issued for any consideration other than cash payment.
payment, or in the event of any plant, either already existing or to be subsequently manufactured, or any other object of property being acquired by the company in the course of construction, the nature of the property received as a contribution or acquired, the person from whom it is so received or acquired, and the amount of shares to be allotted, or the price to be paid in return therefor, must be stated in the memorandum of association.

Apart from this the total sum paid at the cost of the company to shareholders or others as reimbursement of expenses incurred or as remuneration for services performed in the course of the promotion of the company or the operations preliminary thereto must be separately stated in the memorandum of association.

Every agreement concerning the matters mentioned in this section, which is not duly stated in the memorandum of association, is inoperative as against the company.

187. The shareholders who have taken part in the settling of the memorandum of association or have made their contribution to the capital of the company otherwise than by cash payments shall be deemed to be the promoters of the company.

188. If all the shares are taken over by the promoters, the formation of the company shall be deemed to date from such taking over of the shares.

If such taking over is not effected simultaneously with the settling of the memorandum of association
it can be effected by a special transaction recorded by a judicial officer or public notary (d). The record in this case must state any further amount of shares taken over by the individual promoters.

189. If not all the shares are taken over by the promoters, the formation of the company must be preceded by the subscription for all the remainder of the shares.

The subscription for the shares must be effected by a written declaration, from which the interest thereby acquired must appear by a statement of the number and, in the event of the issue of more than one class of shares, the amount or class of shares subscribed for.

Such declaration (hereinafter called the application) must be made out in duplicate and must state:—

(1) The date upon which the memorandum of association was settled, the matters directed by sects. 182, paragraph 2, and 186, to be set out therein, and if more than one class of share is issued with different rights appertaining thereto, the total amount of each class issued.

(2) The name, description and place of residence of the promoters.

(3) The amount payable upon issue of the shares and all fixed amounts subsequently payable.

(d) See sect. 182, ante, note.
(4) The date upon which the subscription ceases to be binding in the event of the company not having been then formed.

Applications which do not specify the above matters in full or which limit the liability of the subscriber otherwise than in the manner specified under No. 4 of the above heads are null and void. If, notwithstanding the fact that an application is by the rules of this section null and void or by reason of the delay in the formation of the company has ceased to be binding, the entry of the company in the Mercantile Register subsequently takes place, the subscriber who signed such application is liable to the company in the same manner as if the application had been valid, if by right of a declaration made therein complying with the requirements of paragraph 2 of this section he votes at the general meeting of shareholders called to pass the resolution for the formation of the company or subsequently exercises any rights or fulfils any obligations as a shareholder.

Any limitation of liability not stated in the application is inoperative as against the company.

190. If all the shares are taken over by the promoters, the first board of supervision (e) must be appointed by them simultaneously with the formation of the company, or by a special transaction recorded by a judicial officer or public notary.

If the promoters do not take over all the shares,

(e) See post, sects. 243—249.
a general meeting of shareholders must be called for
the election of the board of supervision as soon as
the original capital has been subscribed.

These rules apply also to the appointment of the
first directorate, unless by the memorandum of
association the directorate is to be appointed other-
wise than by election at a general meeting.

191. In the cases specified by sect. 186, para-
graph 2, the promoters must state in a written
declaration the principal circumstances which show
that the price paid for the property contributed to
capital in place of cash or otherwise acquired, is a
reasonable one.

They must also specify any previous legal trans-
actions which have led up to the acquisition of such
property by the company, the price of acquisition
and cost of production of any such property acquired
or produced during the last two years, and, in the
case of a business undertaking being taken over by
the company, the results of the operations carried
on thereby during the last two business years.

192. The members of the directorate and board
of supervision must investigate the circumstances of
the promotion.

If a member of either of these boards is one of
the promoters, or has taken any special advantage,
or has stipulated for any compensation or remunera-
tion in respect of the promotion or the proceedings
preliminary thereto, or in the case of circumstances
such as those specified in sect. 186, paragraph 2, an
additional investigation must take place by means of specially appointed auditors (hereinafter called the auditors).

The auditors are appointed by the authority representing commercial interests ($f$), or in default of such body, by the Court of the district in which the place of business of the company is situated.

193. The investigation must in particular be directed to the correctness and sufficiency of the statements made by the promoters in respect of the subscription and payment of the original capital, as well as the matters specified in sect. 186. The contents of the declaration mentioned in sect. 191 must also be investigated, i.e., examination must be made as to whether there are any grounds for suspecting the reasonableness of the price paid for the objects of property which have been contributed to capital in lieu of cash or taken over by the company.

A written report must be made as to the investigation of the matters specified in paragraph 1 of this section.

If the auditors are appointed by the authority representing the commercial interests they must furnish a copy of their report to such authority. Such report is open for inspection by anyone.

($f$) The authority representing commercial interests in the place where the company's place of business is situated. In every place of any importance in Germany there is a body appointed to represent commercial interests, which is usually called a "Chamber of Commerce."
194. In the event of disputes arising between the auditors appointed in the manner specified in sect. 192, paragraph 2 and the promoters as to the scope of the explanation and information to be furnished by the promoters, such disputes are to be decided by the authority by whom the auditors were appointed, the decision of which is to be final. So long as the promoters refuse to conform to such decision, the report of investigation cannot be made (g).

The auditors have a claim to reimbursement for reasonable expenditure and to remuneration for their services. The amount payable in respect of such reimbursement or remuneration is to be settled by the authority named in paragraph 1 of this section.

195. The application for the registration of the company in the Mercantile Register must be made at the Court of the district in which the proposed place of business of the company is situated by the promoters and the members of the directorate and board of supervision collectively.

The following documents must be annexed to the application:—

(1) The memorandum of association and the records specified in sect. 182, paragraph 1, and sect. 188, paragraph 2.

(g) And therefore cannot be entered in the Mercantile Register, and the company cannot therefore be incorporated. (See sects. 195 and 200.)
(2) In case of any of the special arrangements, specified in sect. 186, the agreements upon the basis of which they rest or which were concluded upon their being entered into, the declaration provided for by sect. 191, and an account of the expenses of promotion falling upon the company showing the description and amount of remuneration paid, and the persons by whom each item of remuneration was received.

(3) If the shares have not all been taken over by the promoters, then (as evidence of the subscription of the original capital) the duplicates of the applications together with a list of all the shareholders signed by the promoters showing the shares allotted to each shareholder as well as the amounts paid upon them.

(4) The documents relating to the appointment of the directorate and the board of supervision.

(5) The reports made in accordance with sect. 193, paragraph 2, as well as the documentary evidence upon which such reports were founded, and in a case where sect. 193, paragraph 3, has application, the certificate that the auditors' report has been duly handed in to the authority representing commercial interests.
(6) If the undertaking is one which by reason of its object cannot be carried on without the consent of the State or is one requiring the consent of a public authority in accordance with sect. 180, paragraph 2, the documents conferring the necessary consent.

The application must also contain a declaration that the amount due upon every share in so far as it has to be paid not otherwise than in cash has been so paid and is in the possession of the directorate. The price at which the shares were issued, and the amount paid up in cash upon allotment must be notified; such amount must be at least one-fourth of the nominal amount, and in the case of shares issued at a premium must include the premium in addition. Payments shall be deemed to be made only if made in German coin, imperial paper-money, or such legally authorised notes of German banks as are legal currency.

The directors must furnish the Court with specimens of their signatures for its retention.

The documents annexed to the application are retained by the Court in the original or in duly authenticated copies (h).

196. If the promoters have not taken over all the shares, the Court specified in sect. 195 must summon a general meeting of all the shareholders

(h) See note to sect. 12, ante; Schuster, p. 90.
included in the list, to pass a resolution as to the formation of the company.

Such general meeting shall take place under the direction of the Court.

Statements must be made by the directorate and board of supervision as to the results of the investigations which have to be made by them with regard to the promotion based on the reports mentioned in sect. 193, paragraph 2, and the documents from which they were compiled. Every member of the directorate and board of supervision can withdraw his signature from the application for registration up to the time of the passing of the resolution by which the company is formed.

The majority voting for the formation of the company must include at least one-fourth of the total number of shareholders entered on the list; the aggregate amount of their shares must represent at least one-fourth of the total capital. Even if there is a majority of these dimensions no formation can take place if part of the shareholders forming such majority have acquired their shares under or are otherwise affected by the circumstances specified in sect. 186, and if apart from them the majority of the votes recorded by the shareholders is against the formation.

The consent of all the shareholders present in person or by proxy is necessary if the terms of the memorandum of association with regard to the matters specified in sect. 182, paragraph 2, Nos. 1—
4, sect. 183, sect. 184, paragraph 2, and sect. 185 are to be altered or the arrangements specified in sect. 186 extended at the expense of the company. The consent of all the shareholders must also be obtained if the duration of the company is to be prolonged beyond the time specified in the memorandum of association, or if it is desired to abrogate any of the rules of the memorandum of association making the passing of resolutions subject to specially stringent conditions under special circumstances.

The passing of the resolution must be adjourned if such adjournment is required by a bare majority (i).

197. Except where otherwise provided by sects. 190 and 196, the same rules apply mutatis mutandis to the method in which general meetings are to be summoned and resolutions passed before the registration of the company as are applicable after its registration.

198. The entry registering a company in the Mercantile Register must include particulars as to its trade-name, place of business and object, the amount of its original capital, the date upon which the memorandum of association was settled, and the composition of its directorate.

Any special provisions which may be contained by the memorandum of association as to the duration of the company or the authority of the directors

(i) i.e., a bare numerical majority. See post, sect. 251.
or liquidators to act as the company's agents must also be entered.

199. The notice publicly announcing the registration must state, besides what is included in the entry:

(1) The other provisions of the memorandum of association specified in sects. 182, paragraphs 2 and 3, 183, 185 and 186.
(2) The price at which the shares were issued.
(3) The name, description and place of residence of the promoters, and whether all the shares are being taken over by them or not.
(4) The name, description and place of residence of the members of the first board of supervision.

It must announce at the same time that the documents annexed to the company's application for registration, and in particular the report of the investigations made by the directorate, board of supervision and auditors, may be inspected at the Court. Under the circumstances specified in sect. 193, paragraph 3, it must further state that the auditor's report may be inspected at the office of the authority representing commercial interests.

200. Before the entry in the Mercantile Register of the district in which the company's principal place of business is situated the company, as such, has no existence. Any persons purporting to act
in the name of the company before the making of such entry are personally, and, if there are more than one, jointly and severally liable.

The transfer of any interest in the company made before its registration is inoperative as against the company. Shares or provisional certificates cannot be issued before the registration of the company.

201. The application of a company for registration in the Mercantile Register of the Court of the district in which it possesses a branch establishment must be made by the members of the directorate collectively.

There must be annexed to the application either the original memorandum of association or a publicly authenticated copy (k) thereof. The rules of sect. 195, paragraphs 2 and 3, do not apply.

The entry in the Mercantile Register must include the information specified in sect. 198.

The notice publicly announcing the registration must state, besides what is included in the entry, the provisions of the memorandum of association as to the matters specified in sect. 182, paragraphs 2 and 3, sects. 183 and 185; if the entry is made within two years of the date at which the company was entered in the register of the district in which its principal place of business is situated, all the information specified in sect. 199 must be included in

(k) See ante, sect. 12, note, and Schuster, p. 90.
the announcement. In this case the application must have annexed to it a copy of the announcement made by the Court upon the occasion of the registration of the company's principal place of business.

If the principal place of business of the company is situated outside the State in which the branch establishment has to be registered, proof of the company's existence as a share company must be annexed to the application, and if the undertaking by reason of its object or otherwise requires the consent of the State in order to be carried on within its territory, proof of such consent must further be annexed thereto. The statements to be published in accordance with paragraph 4 of this section must be included in the application.

202. The promoters are jointly and severally liable to the company for the correctness and sufficiency of the information as to the subscription and payment of the capital and the matters specified in sect. 186 supplied by them for entry in the Mercantile Register; they must in particular, irrespective of their liability to indemnify the company for any loss arising otherwise, make good any capital falsely stated to have been subscribed as well as any payments on shares falsely stated to have been made, and they must repay to the company the amount of any remuneration paid by the company and wrongly excluded from the list of promotion expenses furnished.
All the promoters are jointly and severally liable to indemnify the company for any loss occasioned by the reckless dealings of any of their number in respect of contributions to capital or purchases made by the company of the description specified in s. 186. This liability does not attach to a promoter, if he was neither aware of the incorrectness or insufficiency of the information supplied or of the reckless dealings in question, nor ought to have been aware thereof by the exercise of the diligence of a careful business man.

If a shareholder accepted as such by any promoter or promoters is insolvent, such promoter is or such promoters are jointly and severally liable to the company for any loss arising out of his insolvency if they accepted him with knowledge thereof.

In conjunction with the promoters the following persons are jointly and severally liable to indemnify the company:

(1) The recipient of any remuneration wrongfully excluded from the list of notifiable expenses of promotion, if at the time of his receipt thereof he was or ought to have been aware that the matter was intended to be or had been concealed from the public, and any third persons who wilfully aided and abetted such concealment.

(2) Any person who knowingly assisted the promoters in any reckless dealings in respect of contributions to capital or purchases made on behalf of the company.
203. Anyone who before the registration of a company or within two years of such registration publicly advertises the shares in such company in order to bring them into the market, is in case of the incorrectness or insufficiency of the information supplied by the promoters for entry in the Mercantile Register with respect to the subscription and payment of the capital or the matters specified in sect. 186, or in case of any reckless dealings in respect of special payments of contributions to capital or purchases of property on behalf of the company, jointly and severally liable to the company, together with the persons specified in sect. 202, for the loss arising therefrom, provided that he was aware of the incorrectness or insufficiency of such information or of such reckless dealings, or by the use of the diligence of a careful business man ought to have become aware thereof.

204. Members of the directorate and board of supervision who in the course of the investigation provided for by sects. 192 and 193 fail to exercise the diligence of careful business men, are jointly and severally liable to the company for any damage arising therefrom, provided that compensation for such damage cannot be recovered from the persons rendered liable by sects. 202 and 203.

205. Compromises or settlements in respect of a company's claims arising out of the promotion against the persons rendered liable by sects. 202—4 are permissible only after the expiration of a period
of five years from the registration of the company, and in all cases require the consent of a general meeting of the shareholders; they are not permissible if opposed at such general meeting by the votes of a minority the amount of whose shares constitutes an amount not less than a fifth part of the capital of the company. The above limitation as to time does not apply to a composition made by an insolvent person with his creditors in order to prevent or cancel (l) an adjudication of bankruptcy.

206. The claims of the company against persons rendered liable by sects. 202—204 become barred upon the expiration of a period of five years from the date of the registration of the company.

207. Contracts entered into by the company for the acquisition of plant either already in existence or to be subsequently made and intended to be permanently used in the company's business, or for the purchase of immovable at a price in excess of one tenth part of the original capital of the company, are not valid without the consent of a general meeting if made before the expiration of a period of two years from the date of the registration of the company.

Before the passing of the resolution giving such consent the circumstances relating to the proposed contract must be investigated by the board of

(l) The word here used in the German, "beseitigung," includes both annulment and revocation. See ante, note to sect. 32.
supervision and a written report of the results of such investigation must be made by them.

The resolution sanctioning the contract requires a majority whose shares amount to at least three-fourths of the capital held by the shareholders voting. In the case of a contract made in the first year after the registration of the company, the shares held by the majority voting in favour of the resolution must amount to at least one-fourth of the total capital of the company.

After the consent of the general meeting has been obtained, the original contract, or a publicly authenticated copy thereof, together with the report of the Board of Supervision and the original documents on which it was based, must be filed by the Directorate with the Court in charge of the Mercantile Register. Such documents need not, however, be filed with the Court in charge of the Mercantile Register in which a branch establishment is registered.

If the acquisition of immoveables forms the object of the undertaking the rules of paragraphs 1—4 of this section have no application to such acquisition. The said rules have likewise no application to the acquisition of immoveables upon an enforced sale by auction.

208. If the company acquires property of the kind specified in sect. 207 before the expiration of the period specified in paragraph 1 thereof for the purpose of carrying out any agreement entered into by
the promoters before the registration of the company the rules of sects. 202, 205 and 206 apply with regard to the company's right to indemnity and the persons liable to pay such indemnity.

209. Shares or provisional certificates made out for a smaller amount than that specified by sect. 180 are null and void. The persons issuing them are jointly and severally liable to the holders for any damage caused by their issue.

The same rule applies in the case of provisional certificates issued to bearer as to shares or provisional certificates issued before the registration of the company.

Head II. Rights and Liabilities of the Company and its Members.

210. A share company has as such independent rights and obligations. It can acquire the ownership of and other real rights over land and can sue and be sued.

A share company is classed as a mercantile association (m), even when the object of the undertaking does not consist in the carrying on of a mercantile trade.

211. The liability of a shareholder in respect of the payment of his contribution to the capital of the company is limited to the nominal amount of

(m) The German term "handels-gesellschaft," rendered in this section "mercantile association," is an expression which includes the various kinds of partnership as well as companies.
his shares, or in the case of their issue at a premium, to the price of issue.

212. In addition to contributions to capital, obligations may be imposed upon the shareholders by the memorandum of association in respect of periodical services to be performed otherwise than by money payments, provided that in such case the shareholder's interest in the company cannot be transferred without the consent of the company. The obligation in respect of such services and the extent thereof must appear upon the shares or provisional certificates.

The memorandum of association may provide for the payment of penalties in the event of the non-discharge or imperfect discharge of such obligations.

The memorandum of association may contain a provision to the effect that the company's consent to the transfer of a shareholder's interest may only be refused upon cogent grounds.

213. Shareholders have not the right to demand the repayment of their contributions to capital; as long as the company remains in existence, they have no claim except upon the net profits of the company, in so far as the division of these is not prohibited by law or by the memorandum of association.

214. The interest of the shareholders in the company's profits is regulated according to the amount of the shares which they hold.

If an equal amount has not been paid upon all
the shares, the shareholders have a right to 4 per cent. per annum upon such payments as have been made, before any other payment is made; if the profits of the year are not sufficient for this, the amount to which they are entitled is calculated upon a correspondingly lower basis. The amount payable in respect of money called up during the course of the year is calculated in accordance with the time which has run since the date at which the call was made.

Another method for the division of the profits may be provided for by the memorandum of association.

215. The promise or payment of a fixed percentage of interest on shares is not allowed; only such amount as is shown by the annual balance sheet as net profits may be divided among the shareholders. A fixed rate of interest may be guaranteed to the shareholders for the period which intervenes between the preliminary preparations for the undertaking and the commencement of business; in this case the memorandum of association must specify the latest date up to which the payment of such interest may be continued.

216. In return for periodical services which shareholders are bound to perform in addition to contributing to the capital of the company, remuneration not in excess of the value of such services may be
paid irrespective of whether the annual balance sheet shows a net profit or not.

217. The shareholders are liable for the obligations of the company to the extent of any payments which they may have received from the company in contravention of the rules of this Code, provided always that a shareholder is in no case under an obligation to pay back money received by him in good faith as his share in the profits of the company or as interest.

If a company is adjudicated bankrupt (n), the rights of the company's creditors against shareholders are, during the course of the proceedings, exercised through the trustee in bankruptcy. Claims based upon the rules contained in this section become barred in five years from the receipt of the payment in question.

218. A shareholder who fails to pay any calls due upon his shares at the proper time must pay interest as from the day upon which the payment ought to have been made. The right to claim further damages in respect of such failure to make due payments is not hereby excluded.

The memorandum of association may provide for the payment of penalties in the event of the payments not being made at the proper time.

In the absence of any provision to the contrary in the memorandum of association, notice of calls

(n) In Germany a company is subject to the same rules as an individual person in respect of bankruptcy.
on shares must be given in the manner prescribed in the memorandum of association for the announcements to be made by the company.

219. If payment is not made at the proper time, a period of grace may be allowed to the defaulting shareholder under penalty that upon the expiration of such period without payment having been made, such shareholder will be declared to have forfeited his shares together with any moneys already paid up thereon.

The demand for payment must be published three times in the journals mentioned in sect. 182, paragraph 3 (hereinafter called the Company Journals). The first publication must be made at least three months, the last at least one month, before the expiration of the period of grace allowed for the payment. If the shares are not transferable without the consent of the company, instead of such publication a special demand made once to the defaulting shareholders in lieu of the public announcement will be sufficient; such a demand must allow at least one month's grace from the receipt thereof.

If notwithstanding such demand a shareholder does not make the required payment, he shall be declared to have forfeited his shares, together with any amounts paid up thereon for the benefit of the company. Such declaration is to be published in the Company Journals.

In place of the certificate up till now in existence a new one may be issued, on which the amounts of
all prior calls paid, together with the amount in respect of which the forfeiture has been effected, are marked as paid. A shareholder whose shares have been forfeited is liable to the company for any loss which it may suffer by reason of the non-payment of the last-mentioned amount together with any further calls.

220. If in the case of forfeiture a shareholder fails to pay the amount owing by him to the company on the shares forfeited, such amount may be claimed by the company from his predecessor as holder of the shares and any previous holder of them whose name was entered in the company's books, each predecessor as holder being liable for the amount irrecoverable from his successor. Such irrecoverability is to be presumed if the amount demanded is not paid within a month from the date at which the demand for payment was made to the successor and due notice of the making thereof sent to the predecessor. Against payment of the amount owing the predecessor has the right to claim the share to be freshly issued.

The predecessor's liability is limited to calls made in respect of the shares within a period of two years, such period to commence with the day on which the transfer of interest in the shares was entered in the books of the company.

If the payment of the amount in arrear cannot be obtained from the predecessor, the company may sell the shares at the price quoted on the Stock
Exchange, or, if there is no such quoted price, by public auction.

221. Shareholders and their predecessors in title cannot be released from their obligations to make payments arising out of the provisions of sects. 211 and 220. They cannot set-off a debt due from the company against such obligations.

222. With regard to shares made out in the name of the holder a detailed entry must be made in the company's register of shareholders specifying the name, place of residence, and description of the holder.

Such shares may, in the absence of any provision to the contrary in the memorandum of association, be transferred without the consent of the company.

The transfer may be effected by indorsement. With regard to the form of indorsement, the proof of the holder's title and his obligations as to delivery to the lawful owner, the rules of Articles 11—13, Article 36, sentences 1—4, and Article 74 of the Bills of Exchange Code apply mutatis mutandis (o).

The transfer of shares issued in accordance with sect. 180, paragraph 3, for a lesser nominal amount

(o) Shares in German companies are usually transferred by indorsement in a manner similar to a bill of exchange. They may also be transferred by a declaration of assignment embodied in a different document. The rules of the Bills of Exchange Code mentioned in the text deal with the effect of forged indorsements and other matters. A person who has acquired a share on which there is a forged indorsement in good faith and without gross negligence is not required to deliver it to the lawful owner.
than M. 1,000, requires the consent of the board of supervision and of a general meeting of shareholders. It can only be effected by a declaration specifying the transferee and authenticated by a judicial officer or notary.

223. If shares made out in the holder's name are transferred, the change of ownership must be notified to the company, and upon the production of the shares and due proof of their transfer, entered in its books.

The company is under no obligation to verify the genuineness of any indorsements on the shares transferred, or any signatures on the declarations of assignment (q).

As between himself and the company, no one can be deemed to be a shareholder who is not duly entered as such in the company's register of shareholders.

224. The provisions of sects. 222 and 223 apply also to the entry and transfer of provisional certificates.

225. If a share is the property of several joint owners, the rights in respect thereof can only be exercised by such persons by means of a common representative.

They are jointly and severally liable for any obligations in respect of the share.

(g) See note to sect. 222, ante.
If a declaration has to be made by the company as against the shareholders, in the absence of a common representative of the joint owners it is sufficient if the declaration is made to any one of them. This rule does not apply to the case of a deceased shareholder’s several heirs, until after the expiration of one month from the vesting of the inheritance.

226. A share company may not, in the ordinary course of business, either acquire its own shares or take them as security, except in the execution of a commission to purchase them for a third party.

It may not in the ordinary course of business acquire its own provisional certificates or accept them as security, even in the execution of a commission. The same rule applies to its own shares, where payment has not been made of the full nominal amount, or in case of their issue at a premium the full nominal amount together with the premium.

227. The cancellation of shares (amortisation) can only take place if provided for or authorised by an express term of the memorandum of association. Such term must be contained in the original memorandum of association, or some alteration made therein before the subscription to the shares, unless the cancellation is to be made by purchase, and not by drawing by lot, by notice, or in any similar manner (r).

(r) I.e., the amortisation cannot take place in any other manner
SHARE COMPANIES.

No kind of cancellation, unless made in accordance with the rules laid down for the reduction of the original capital, can be effected except out of the profits shown to be available by the annual balance sheet.

228. If a share or provisional certificate is lost or destroyed, the document, unless any regulation to the contrary is inscribed thereon, may be declared null and void by public notice. The provisions of sect. 799, paragraph 2, and sect. 800 of the Civil Code apply mutatis mutandis.

If dividend warrants(s) have been issued to bearer, any claim founded on such warrants which has not yet accrued due is destroyed by the declaration annulling the share or provisional certificate.

229. If a share or provisional certificate by reason of damage or defacement is no longer capable of being negotiated, the person thereto entitled can, provided the essential parts of the document and the differentiating marks can still be recognised with certainty, demand from the company the issue of a

than by purchase, unless it is authorised by a provision contained in the original memorandum of association or some alteration therein made before the subscription for the shares.

(s) Although the expression "Gewinn-Antheils-Scheine" is here translated dividend warrants, the documents referred to are not strictly the same as what are usually known as dividend warrants in England. "Gewinn-Antheils-Scheine" are warrants or coupons generally issued with the shares, on each of which appears a statement that the bearer is entitled to the dividend for a particular year; the amount of such dividend being, of course, uncertain until the profits for the particular year are divided.
new document upon his giving up to them the one so damaged or defaced.

The costs of any such transaction must be borne by such person and an approximate amount advanced (t).

230. New dividend warrants may not be issued to the holder of a talon if the holder of the share or provisional certificate (in respect of which it was issued) has forbidden such issue (u). In this case the dividend warrants must be handed over to the holder of the share or provisional certificate upon his production of the original document.

Head III. Administration.

231. For the purpose of all judicial and extra-judicial transactions the company is represented by the directorate.

The directorate may consist of one or more persons.

The appointment to the office of director is subject to revocation at any time, provided that such revocation does not affect any claim that the holder of

(t) Before the new document is issued, the person desiring it must pay the company for the expense incurred; as the amount of the expense cannot be known until the transaction is carried out, an approximate amount must be advanced, the superfluity, if any, to be subsequently repaid.

(u) See note to sect. 228, ante. Besides the "dividend warrants" or coupons there is usually issued with each share a document called a "talon" on presentation of which fresh "dividend warrants" are issued (except under the circumstances specified in this section).
such office may have to remuneration in accordance with contract.

232. In the absence of any provision to the contrary in the memorandum of association, where the directors have to make any declaration of intention on behalf of the company and more particularly to sign on its behalf, the co-operation of the entire directorate is necessary, provided always that it is in the power of the directorate to authorise any particular director or directors to undertake any particular transaction or class of transactions. Declarations as against a company are sufficiently made if made to one director.

If the memorandum of association does not give each individual director the right to act on behalf of the company, it may provide that each individual director has power, in the absence of the other directors, to act on behalf of the company in conjunction with the holder of a power of procuration. The memorandum of association may also contain a provision empowering the board of supervision to authorise individual directors to act on behalf of the company either alone or in conjunction with the holder of a power of procuration. The rules of paragraph 1 of this section, sentences 2 and 3, apply in such cases mutatis mutandis.

233. The directorate must sign in such a way as to include their own names as well as the trade-name of the company, or the designation of the directorate.
234. Every change in the composition of the directorate or the power of agency of individual directors, as well as any arrangement made by order of the board of supervision by virtue of their powers under sect. 232, paragraph 2, sentence 2, must be notified by the directorate for entry in the Mercantile Register.

The notification must have annexed to it a publicly authenticated copy (x) of the documents relating to such alteration or arrangement. This does not apply to a notification made for entry in the Mercantile Register in which a branch establishment is registered.

The directors must furnish the Court with specimens of their signatures for its retention.

235. The directors are liable to the company for the due observance of the limitations on the scope of their powers of agency on behalf of the company imposed upon them by the memorandum of association or by resolutions at a general meeting.

As against third parties a limitation of the powers of the directors to act on behalf of the company is inoperative. This applies more particularly to the case of limitations making such powers exercisable only in respect of particular transactions or kinds of transactions under particular circumstances, during a particular period or at particular places, or making it necessary to obtain the consent of a general meeting, the board of supervision, or any other

(x) See note to sect. 12; Schuster, p. 90.
body representing the company in order to enter upon individual transactions.

236. The directors may not without the consent of the company either carry on a mercantile trade or do business for their own account or for that of a third party in the same branch of commerce as the company, nor may they be interested in a mercantile partnership as general partners. The power to grant such consent rests with the body by whom the directorate is appointed.

Any director violating his obligations to the company arising under paragraph 1 of this section is liable to pay damages to the company; as an alternative remedy the company may demand that such director should transfer the transaction entered upon for his own account to the account of the company, or pay over to the company any remuneration received in respect of transactions entered upon by him for the account of a third party, or assign to the company his claim to such remuneration.

The company's rights of action under the foregoing paragraph become barred in three months from the date at which the conclusion of the transaction in question by the director in question or his interest in the partnership became known to the other directors and the board of supervision; they become barred irrespective of such knowledge in five years from the date upon which they accrued.

237. If the directors are remunerated by a share in the annual profits, such share must be calculated
according to the net profit remaining after making proper provision for depreciation and reserve funds.

238. Unless otherwise provided by the memorandum of association or by resolution of a general meeting, the directorate may only confer powers of procuration with the consent of the board of supervision. This limitation is inoperative as against third parties.

239. The directorate must see that the necessary books are kept by the company.

240. If the loss appearing upon the drawing up of the annual balance sheet or an interim balance sheet reaches a figure equal to half the amount of the capital of the company, the directorate must without delay summon a general meeting and inform such meeting thereof.

As soon as the company becomes insolvent, the directorate must apply for the initiation of bankruptcy proceedings; the same rule applies if upon the drawing up of the annual balance sheet or an interim balance sheet, it appears that the company's assets are not sufficient to cover its liabilities.

241. The directors must in their conduct of the business apply the diligence of a careful business man.

Directors committing a breach of duty are jointly and severally liable to the company for any damage arising out of such breach.

In particular they are bound to compensate the
company if in contravention of the rules of this Code—

(1) Contributions to capital are repaid to shareholders.

(2) Interest or dividends are improperly paid to the shareholders.

(3) Shares or provisional certificates in the company itself are acquired, taken as security or cancelled by the company.

(4) Shares are issued before full payment of the nominal amount or in the case of issue at a premium, the price of issue.

(5) The assets of the company are divided or the original capital is partially repaid.

(6) Payments are made after the company has become insolvent or when its liabilities exceed its assets.

In the cases specified in the foregoing paragraph a right to compensation can be enforced by the company’s creditors as well, in so far as their claims remain unsatisfied by the company. The liability on the part of the directors to pay such compensation to the creditors cannot be avoided either on the ground of a release by the company or on the plea that the transaction in question was the result of the resolution of a general meeting.

Rights of action arising out of these rules become barred in five years.

242. Rules applying to directors apply also to persons representing them.

243. In the absence of any provision in the memorandum of association fixing a higher number,
the board of supervision shall consist of three members, to be elected by a general meeting.

The period for which the first board of supervision is elected extends to the conclusion of the first general meeting called for the purpose of passing a resolution with reference to the annual balance sheet after the expiration of one year from the date of the company’s registration.

Subsequently to this the board of supervision cannot be elected for a period extending beyond the conclusion of the general meeting called to consider the balance sheet for the fourth year after the appointment of such board of supervision, exclusive of the year in which such appointment was made.

An appointment to membership of the board of supervision may be revoked by a general meeting before the expiration of the period for which the member in question was elected. If not otherwise provided by the memorandum of association, the resolution by which such appointment is revoked requires to be supported by a majority holding shares of an aggregate amount equal to at least three-fourths of the total amount of capital represented at the meeting.

244. Any change in the composition of the board of supervision must be immediately published by the directorate in the Company Journals (\textit{vv}), and must also be notified by them for entry in the Mercantile Register.

245. If the members of the board of supervision

\((vv)\) See ante, sect. 219.
receive a remuneration for their services consisting in a share in the annual profits, such share must be calculated according to the net profits remaining after making proper provision for depreciation and reserve funds and the setting aside for the shareholders of a fixed amount equal to at least four per cent. of the paid-up capital.

If the remuneration of the members of the board of supervision is fixed by the memorandum of association, any alteration in the provisions thereof in reduction of such remuneration may be effected by the resolution of a bare majority\(^{(xx)}\) at a general meeting.

A remuneration can be granted to the members of the first board of supervision only by the resolution of a general meeting. Such resolution cannot be passed earlier than at the general meeting at the conclusion of which the period for which they were elected expires.

246. The board of supervision must watch the conduct of the company’s business in all its branches, and for that purpose keep itself informed of the course of all the transactions in which the company is concerned. It may at any time demand a report as to such transactions from the directorate, and either in its entirety or by means of representatives which it may select from its number, inspect the company’s books and documents as well as the state of the cash held by the company and such property as it holds in the form of negotiable instruments

\(^{(xx)}\) See post, sect. 251.
and merchandise. It must investigate the annual accounts and balance sheets and the proposals for the division of profits, and report thereon to the general meeting.

It must call a general meeting whenever it is necessary to do so in the interests of the company.

Further duties on the part of the board of supervision may be specified by the memorandum of association.

Its members may not transfer the performance of their duties to other parties.

247. The board of supervision has authority to act on behalf of the company in transactions between the company and the directors, and to conduct any legal proceedings against the latter which may have been enjoined by the resolution of a general meeting.

If the liability of the members of the board of supervision themselves is in question they can proceed against the directors without the authority of, and even in opposition to, a resolution of a general meeting.

248. Members of the board of supervision may not at the same time be directors or permanent representatives of directors, or conduct business for the company as its officers.

The board of supervision may appoint individual members of its own body to act in the place of incapacitated directors, but only for a period, the limits of which are to be fixed beforehand. During
this period and until the revocation of the appointment the person appointed may not act as a member of the board of supervision.

The rules of sect. 236 do not apply to a person appointed to act in the place of a director in this manner. Directors upon leaving the directorate cannot be elected on to the board of supervision before receiving their discharge as directors (2).

249. The members of the board of supervision must exercise in the discharge of their duties the diligence of a careful business man.

Members of the board of supervision committing any breach of duty are jointly and severally liable to the company, together with the directors, for any damage resulting therefrom.

In particular they are liable in damages to the company if transactions of the kind specified in sect. 241, paragraph 3, are undertaken with their knowledge and without their interference. The rules of sect. 241, paragraph 4, apply to the enforcement of claims in respect of such liability.

Rights of action arising under the rules of paragraphs 1—3 of this section become barred in five years.

250. The shareholders' rights in relation to the affairs of the company, and more particularly to the method of carrying on business, are exercised by means of resolutions at general meetings.

251. For the passing of resolutions at a general

(2) See sect. 269, para. 1.
meeting a numerical majority of votes given (hereinafter called a "bare majority") is sufficient, except in cases where a larger majority or other additional conditions are rendered necessary by law or by the memorandum of association.

With respect to voting at the election of officers different conditions may be laid down by the memorandum of association (a).

252. Every share carries with it the right to vote, the value of which when exercised is proportionate to the amount of the shares held.

The memorandum of association may provide for the case of more than one share being held by the same person by fixing a limit to the amount of shares in respect of which the right to vote may be exercised, or by other modifications. If more than one class of shares is issued, the memorandum of association may attach a more valuable right to one class than to another.

The right to vote may be exercised by a proxy, for the appointment of whom the written form (b) is necessary and sufficient. The document containing

(a) In other words, in the case of resolutions generally the minimum majority required is a "bare majority." This rule cannot be relaxed by the memorandum of association, though additional conditions may be imposed by it.

With regard to the election of officers, on the other hand, the memorandum of association may lay down altogether different conditions, e.g., may say that a "bare majority" is unnecessary, and that if the votes are equal on either side the election may be decided by lot.

(b) i.e., it must be in writing, and must be signed by the party appointing the proxy, or must have a mark affixed by him to it in the presence of a judicial officer or notary. See Schuster, p. 91.
such appointment is to remain in the custody of the company.

Any person to be released or freed from an obligation by a proposed resolution may not exercise his own vote, or vote as proxy for another in favour of such resolution. The same rule applies to a resolution as to the conclusion of a transaction between the company and a shareholder, or the institution or settlement of legal proceedings between the company and a shareholder (c).

Save as aforesaid the conditions as to the right to vote and the method in which it is to be exercised are regulated by the memorandum of association.

253. The power of summoning a general meeting rests with the directors, in so far as it is not conferred upon other persons by law or the memorandum of association.

A general meeting must be summoned upon all occasions when the interests of the company demand it in addition to those expressly specified by law or by the memorandum of association.

254. A general meeting must be called if a demand in writing is made therefor by shareholders, the aggregate value of whose shares amounts to a twentieth part of the capital of the company; such written demand must state the purpose for which and the ground upon which such meeting is to be called. If in the memorandum of association there

(c) I.e., the shareholder in question may not vote when such resolution is put to the general meeting.
is a provision fixing the amount of shares which will entitle shareholders to demand a general meeting at a smaller fraction of the capital, such provision is here applicable.

In a similar way the shareholders have the right to demand that particular matters should be placed on the agenda for a general meeting.

If the demand for the summoning of a general meeting is not complied with either by the directorate or by the board of supervision, the Court of the district in which the company's principal place of business is situated may authorise the shareholders by whom the demand was made to summon a general meeting or to place the particular matters on the agenda for a general meeting. The Court may at the same time determine how the chair is to be taken at the meetings. The authority of the Court must be mentioned in the form of notice used.

Whether the costs of the proceedings above referred to are to be borne by the company or not is a question to be decided by resolution at the general meeting summoned.

255. A general meeting must be summoned in the method prescribed in the memorandum of association at least two weeks before the date fixed for such meeting, exclusive of the day upon which the notice of summons was given and the day of the meeting.

If by a provision of the memorandum of association the right to vote cannot be exercised unless the
voters' shares have been deposited (d) for a given time before the general meeting, notice of such general meeting must be given in time to allow at least two clear weeks for the effecting of the deposit. Deposit with a notary is sufficient for the purpose.

If the memorandum of association contains no provision such as that referred to in paragraph 2 of this section, applications to take part in the general meeting must be granted if sent in not later than on the third day before the general meeting (e).

256. The purpose for which a general meeting is to be called must be stated on the notice summoning it. A copy of the proposals to be laid before such meeting must be given to every shareholder who applies for it.

Resolutions may not be passed relating to matters, of the proposal to deal with which due notice has not been given in the proper manner at least one week before the day of the meeting. If the proposed resolutions require by law or by the rules of the memorandum of association more than a bare majority in order to be passed, notice of them must be given at least two weeks before the day of the general meeting. In cases where the right to vote

(d) As to the word "hinterlegung," here translated deposited, see Schuster, p. 178.
(e) I.e., if no deposit of shares is required, any shareholder may take part in a general meeting who sends in an application to do so on the third day before the general meeting.
cannot be exercised without a previous deposit of shares, the above-mentioned periods of notice are to run as up to the date by which the deposits have to be made instead of the date of the general meeting.

No notice is required for passing a resolution put at a general meeting to summon an extraordinary general meeting or as regards particular proposals (ee), or for the mere discussion of matters in respect of which no resolutions are to be passed.

257. Every shareholder who deposits a share with the company has the right to demand that special notice of a general meeting and its objects should be sent to him by registered letter as soon as public notice is given thereof. He is entitled to receive notice in the same manner as to resolutions passed at a general meeting.

258. At the general meeting a list must be made of the shareholders present or their proxies, giving their names and addresses and the amount of shares by right of which they have power to vote (f). Such list must be open for general inspection before the commencement of voting; it must be signed by the chairman of the meeting.

259. Every resolution of a general meeting must, in order to be valid, be authenticated by a minute taken by a judicial officer or notary and recording

(ee) I.e., proposals relating to the subject-matter of which notice has been given.

(f) Literally, "the amount of shares which they represent."
the proceedings by which such resolution was passed.

The minute must state the place and date of the proceedings, the name of the judicial officer or notary, and the method of passing and result of the resolutions.

The list of persons present at the general meeting made in accordance with sect. 258 must be annexed to the minute, as must the documents proving that the general meeting was properly summoned, unless such documents are specified in the minutes with an indication of their contents.

The minutes must be executed by the judicial officer or notary, the execution need not be witnessed.

A publicly authenticated (g) copy of the minutes must be furnished by the directors for entry in the Mercantile Register immediately after the general meeting.

260. The approval of the year’s balance sheet, the division of profits, and the release of the directorate and board of supervision are subjects for general resolutions at a general meeting.

The directorate must, within the first three months of each business year, present to the board of supervision a balance sheet and a profit and loss account for the last year, and a report showing the state of the assets and affairs of the company, and must then lay these documents before a general meeting,

(g) See ante, note to sect. 12.
together with the comments of the board of supervision. The time within which this duty must be performed may be varied by the memorandum of association, but may in no case exceed six months.

261. As regards the preparation of the balance sheet, the provisions of sect. 40 apply, subject to the due observance of the following rules:—

(1) Negotiable instruments and merchandise that have an exchange, or market quotation, may not be valued higher than at the price at which they were quoted at the time in respect of which the balance sheet was prepared, or if such price exceeds the price for which they were acquired or produced, then not higher than at the last-mentioned price:

(2) The highest value to be put upon other property is the purchase price or cost of production:

(3) Plant and other property intended not for re-sale, but to be permanently employed in the business, may be valued at its purchase price or cost of production without regard to the fact that its intrinsic value may be smaller, provided that a sufficient sum is written off to cover wear and tear, or a sum corresponding in amount thereto has been placed to the credit of a renovation fund:

(4) The costs of formation and administration
must not be set down as assets on the balance sheet:

(5) The amount of the capital and of every reserve fund or renovation fund must be set down among the liabilities:

(6) The profit and loss appearing upon the balancing of the collective assets and liabilities must be expressly stated at the foot of the balance sheet.

262. A reserve fund must be created to cover any loss which may appear upon the balance sheet. To the credit thereof must be placed—

(1) At least one-twentieth part of the net profits for each year so long as the reserve fund does not exceed one-tenth part of the capital of the company or such higher proportion thereof as may be stipulated in the memorandum of association:

(2) The sum resulting from premiums payable upon the issue of shares at a premium either upon the formation of the company or the increase of its capital after the deduction of the costs of the issue:

(3) The sum resulting from payments made by members without any increase in the capital of the company for the acquisition of preferential rights in respect of their shares, unless such sum is already appropriated to meet any extraordinary amounts
to be written off or extraordinary losses to be covered.

263. The documents specified in sect. 260, paragraph 2, must remain on view in the offices of the company for the inspection of the shareholders during the last two weeks at least before the day of the general meeting.

Every shareholder must, upon application, be supplied with a copy of the balance sheet, the profit and loss account, and the comments of the board of supervision thereon at least two weeks before the date of the general meeting.

If the right to vote cannot be exercised without the deposit of shares, then the latest day upon which such deposit can be made must be substituted for the day of the general meeting.

264. Proceedings as to the passing of the balance sheet must be adjourned if at the general meeting a resolution to that effect is passed by a bare majority or by a minority, the aggregate amount of whose shares represents at least one-tenth part of the capital, but in the latter case only if they bring forward some complaint as to definite items in the balance sheet.

If the proceedings have been adjourned on the demand of such a minority a fresh adjournment can only be obtained if no proper explanation has been given in respect of the items complained of.

265. After the balance sheet and profit and loss account have been passed by a general meeting they
must be immediately published by the directorate by a notice inserted in the Company Journals.

Such notice, together with the report referred to in sect. 260 and the comments of the board of supervision thereon, must be filed with the Court in charge of the Mercantile Register. This does not apply to the Mercantile Register in which a branch establishment is registered.

266. A "bare majority" (h) at a general meeting suffices for the appointment of auditors for the investigation of the balance sheet, or the investigation of the circumstances of the promotion, or the conduct of the business.

If at a general meeting a proposal for the appointment of auditors to investigate an occurrence connected with the promotion or one connected with the conduct of the business which took place less than two years before the meeting is rejected, such auditors may be appointed by the Court of the district in which the company’s principal place of business is situated upon the application of shareholders, the aggregate amount of whose shares represents at least a tenth part of the capital of the company.

Such application may only be granted if prima facie evidence is given that the occurrence in question was accompanied by dishonest practices, or by serious breaches of the law or of the rules laid down by the memorandum of association. The

(h) See ante, sect. 251.
applicants must, pending a decision as to the application, deposit their shares and furnish *primâ facie* evidence that they have been the owners thereof for at least six months before the general meeting.

Before the appointment of the auditors a hearing must be granted to the directorate and board of supervision. The appointment may, if desired, be made conditional upon a payment being made as security for costs, the amount of which is to be in the discretion of the Court.

267. In the case specified in sect. 266 the directorate must allow the auditors to inspect the books and papers of the company, and investigate the state of the cash, negotiable instruments, and merchandise held by the company.

The report on the result of such investigations must be filed without delay with the Court in charge of the Mercantile Register, and the consideration of such report must be placed by the directorate on the agenda to be notified for the next general meeting. The report need not be filed with the Court in charge of the Mercantile Register in which a branch establishment is registered.

In the case specified in sect. 265 it is for a general meeting to decide whether the resulting costs are to be borne by the company or not. If the Court refuses to grant the application for the appointment of auditors, or if the results of the investigation show that there were no grounds for
the making of such application, any shareholders who have been guilty of reckless conduct\(^{(i)}\) are jointly and severally liable to the company for any damage resulting to the company in consequence of such application.

268. The company's rights of action arising out of the promotion against the persons rendered liable by sects. 202—204 and 208, or arising out of the conduct of the business against the members of the directorate and board of supervision must be enforced if a resolution in favour of such enforcement is passed at a general meeting by a bare majority\(^{(ii)}\), or if such enforcement is demanded by a minority, the aggregate amount of whose shares is not less than a tenth part of the capital of the company.

Special representatives may be elected at a general meeting for the purpose of conducting the legal proceedings on behalf of the company. If the proceedings are to be taken upon the demand of a minority, persons designated by such minority may be appointed as its representatives for the purpose of such proceedings by the Court of the district in which the company's principal place of business is situated. If no special representatives are appointed the provisions of sect. 247 apply even when the proceedings are to be instituted upon the demand of a minority.

\(^{(i)}\) \textit{I.e.}, in unnecessarily causing the application for the appointment of the auditors.

\(^{(ii)}\) See \textit{ante}, sect. 251.
269. The institution of proceedings upon the demand of a minority must take place within three months from the date of the general meeting at which the demand therefor was made. To the writ (k) must be annexed a publicly authenticated (l) copy of the minutes of such general meeting in so far as they concern the proceedings in question.

The minority must, till the termination of such proceedings, deposit shares, the aggregate value of which amounts to one-tenth part of the capital of the company, and prima facie evidence must be given that such shares have been the property of the shareholders composing such minority for at least six months prior to the general meeting.

Upon the application of the defendant the Court must order the minority to give security for the damage which the defendant may incur by the proceeding in such manner and to such extent as the Court in its discretion may direct. The rules of the Civil Procedure Act as to the period of grace allowed for the provision of security and the consequences of default apply also in the above case.

The minority is liable to the company for any costs of such proceedings.

Any shareholders who have been guilty of reckless conduct are jointly and severally liable to the

(k) The word "writ" is here used as the nearest equivalent to the German "klage," the document by which proceedings are instituted, but which differs from English writs when not specially indorsed, in that it serves as a statement of claim as well as a writ.

(l) See note to sect. 12, ante.
defendant for any damage incurred by him owing to groundlessly instituted proceedings.

270. In respect of proceedings instituted to enforce a right of action upon the demand of a minority in accordance with sect. 268, paragraph 1, a waiver of the claim or a compromise may not be made by the company unless consented to by such a number of the shareholders composing the minority that the shares held by the remaining members thereof no longer represent one-tenth part of the capital of the company.

271. The validity of a resolution passed at a general meeting may be impugned by means of an action at law on the ground of its violation of the law or of the provisions of the memorandum of association.

The action must be commenced within one month (after the passing of the resolution).

The validity of a resolution may be impugned by any shareholder who was present at the general meeting at which it was passed, provided that he has caused a protest against such resolution to be recorded in the minutes of the meeting and by every shareholder who was not present at such meeting, if he was unlawfully prevented from being present thereat, or if the ground upon which he seeks to impugn the validity of the resolution is the improper manner in which the general meeting at which it was passed was summoned, or notice given as to the subject-matter of such resolution. If the ground
upon which the validity of the resolution is disputed is that such resolution seeks to direct provision to be made for depreciation or reserve funds to an amount in excess of that allowed by law or by the memorandum of association, proceedings are only permissible if the shares held by the shareholder or shareholders seeking to institute them amount to at least a twentieth part of the capital of the company.

Such proceedings for impugning a resolution may also be taken by the directorate, and, if the resolution they are directed against deals with a measure, the introduction of which would render the members of the directorate and board of supervision liable to be criminally punished or to pay damages to the creditors of the company, by each individual member of the directorate and the board of supervision.

272. Proceedings must be directed against the company. The company is represented in such proceedings by the directorate, provided that it is not the directorate itself which is instituting them, and by the board of supervision.

The Provincial Court of the district in which the company's principal place of business is situated has exclusive jurisdiction in such proceedings, the hearing of which is not to take place before the expiration of the period specified in sect. 271, paragraph 2. If there are several actions directed against the validity of a resolution they must be consolidated and heard and decided simultaneously.

The Court may direct the shareholders bringing
the action to give the company security for the expense of any damage that may arise therefrom. The form and amount of such security is within the discretion of the Court. The rules of the Civil Procedure Act (m) as to the period of grace allowed for the provision of security and the consequences of default are applicable.

The institution of the proceedings and the date appointed for the hearing thereof must be immediately notified by the directorate in the Company Journals.

273. If the resolution is declared by a final judgment of the Court to be null and void, such judgment is binding upon all shareholders, whether it is in favour of them or against them, and whether they were parties to the proceedings or not. The judgment must immediately be filed by the directorate with the Court in charge of the Mercantile Register. If the resolution was entered in the register, the judgment must also be entered; the entry of the judgment must be publicly notified in the same manner as that of the resolution.

If a company suffers damage by reason of groundless proceedings instituted to impugn the validity of a resolution, any persons guilty of recklessness in the institution of such proceedings are jointly and severally liable to the company in respect of such damage.

(m) Civil Procedure Act, s. 113. The Court may require a plaintiff to furnish security within a certain period. Should he fail to do this the writ may be cancelled upon the application of the defendant.
Head IV. Changes in the Memorandum of Association.

274. A change in the memorandum of association can only be effected by resolution of a general meeting. The execution of merely verbal changes may by a resolution of the general meeting be entrusted to the board of supervision.

In the notice ordered to be sent out by sect. 256, paragraphs 1 and 2, the essential character of the proposed alteration in the memorandum of association must be clearly indicated.

275. Unless otherwise provided by the memorandum of association, resolutions of the description specified in sect. 274, paragraph 1, require a majority whose shares amount to at least three-fourths of the aggregate capital represented at the voting.

A majority of these dimensions is in all (n) cases necessary for the passing of resolutions seeking to effect a change in the object of the undertaking of the company; more stringent conditions may be laid down by the memorandum of association.

If a change is to be made in the existing preferential relations between different classes of shares to the disadvantage of one class of shareholders, such change requires to be sanctioned not only by the resolution of a general meeting but by a separate resolution passed by the shareholders disadvantageously affected, which cannot be passed except by a majority of the dimensions specified in

(n) I.e., even if the memorandum of association seeks to provide otherwise.
paragraph 1 of this section. The passing of the resolution by the shareholders disadvantageously affected can only take place if notice thereof has been expressly included in the notification of the agenda for the general meeting sent out in accordance with sect. 256, paragraph 2.

276. A duty on the part of the shareholders in respect of services of the description specified in sect. 212, if not provided for in the original memorandum of association can only be created with the consent of all the shareholders who would be affected by such duty.

277. A change in the memorandum of association must be notified for entry in the Mercantile Register, and such notification, where not otherwise hereinafter provided, is to be made by the directorate.

If the change does not concern any of the subjects specified in sect. 198, it will be sufficient if the entry merely refers to the documents concerning such change which were handed in to the Court. Public notice must be given of all changes relating to the matters directed to be notified by sects. 199 and 201.

The change does not take effect before it has been entered in the Mercantile Register of the district in which the company's principal place of business is situated.

278 (o). The capital of a company may not be increased by a fresh issue of shares before all the

(o) As to this and the following sections, see sect. 305.
capital hitherto subscribed has been fully paid up. In the case of insurance companies, this rule may be varied by the memorandum of association, and the increase of the capital need not be prevented by arrears outstanding in respect of a relatively unimportant part of the capital called up.

If several classes of shares are in existence to which different preferential rights are attached, an increase in capital in order to be made needs to be sanctioned not only by the resolution of a general meeting, but by a separate resolution passed by each individual class of shareholders. In respect of such resolutions the rules of sect. 275, paragraph 1, and paragraph 3, sentence 2, are applicable.

If the new shares by which the capital is to be increased are to be issued at a premium, the minimum premium at which they may be issued must be specified in the resolution for the increase of capital.

279. If any contribution to the new capital is either to be paid otherwise than in cash or set off against the price payable by the company in respect of any property to be purchased by the company, the description of the contribution thus made or property acquired, the name of the person making such contribution or disposing of such property to the company, and the amount of shares to be given in exchange for such contribution or the purchase price to be paid for the property must be incorporated in the resolution sanctioning the increase of capital.
Any arrangement of this kind which is not incorporated in such resolution in the above specified manner is inoperative as against the company. The rules of sects. 207 and 208 remain unaffected hereby.

280. A resolution respecting an increase of capital must be notified by all the members of the directorate and board of supervision for entry in the Mercantile Register.

Such notification must contain an assurance that all the original capital has been paid up, or if not, that only the amounts specified in the notification remain outstanding.

281. The subscription to the new shares is effected by application. Each application must be made out in duplicate. Upon the applications must appear, besides the matters specified in sect. 189:

(1) The date of the resolution authorising the increase of capital.
(2) The amount of the issue of shares to be made, and of the fixed payments to be made in respect thereof.
(3) Any arrangements of the description specified in sect. 279, or if several classes of shares with different rights attached thereto are being issued, the total amount of each class issued.
(4) The date at which the subscription will cease to be binding upon the subscriber, if the increase of the capital has not yet been
effected and entered in the Mercantile Register.

The rules of sect. 189, paragraphs 4 and 5, are applicable *mutatis mutandis*, the registration of the increase of capital in the Mercantile Register being for the purposes of the present section substituted for the registration of the company.

282. Where not otherwise provided by the resolution sanctioning the increase of capital, every shareholder has a right to claim to have allotted to him an amount of the newly issued shares proportionate to his holding in the previously existing capital.

The price at which the new shares are issued to the shareholders must be publicly notified by the directorate in the Company Journals. Such notification may state a limited period for the exercise of the above-mentioned rights, provided that such period is not less than a fortnight.

283. Any agreement conferring rights to the allotment of new shares about to be issued takes effect subject to the rights of the shareholders specified in sect. 282.

Any such agreement made before the passing of the resolution for an increase of capital is inoperative as against the company.

284. The increase of capital must upon completion be notified for entry in the Mercantile Register by the members of the directorate and the board of supervision collectively.
There must be annexed to the notification:

1. The duplicates of the applications and a list of the subscribers signed by the directors, specifying the shares allotted to each and the payments made in respect thereof.

2. In the case referred to in sect. 279, the contracts upon which the arrangements of the description therein specified are based or the contracts which were concluded in order to enable them to be carried out.

3. An account of the expense incurred by the company in respect of the issue of new shares.

4. If the increase of capital requires the consent of the State by reason of the nature of the undertaking, or if consent is required in accordance with sect. 182, paragraph 2, the document confirming such consent.

The rules of sect. 195, paragraph 2, apply.

The documents annexed to the notification are to be retained by the Court in the original or in duly attested copies.

The public notification announcing the entry in the Mercantile Register must state the price at which the shares are issued.

285. The notification and entry as to the accomplishment of the increase of capital can be combined
with the notification and entry as to the resolution authorising it.

**286.** The notifications specified in sects. 280 and 284 must be made by the directorate to the Court of the district in which the company has a branch establishment for purposes of entry in the Mercantile Register of such district. The rule stated in sect. 284, paragraph 5, applies to the making of such notification, but not the rules of sect. 280, paragraph 2, and sect. 284, paragraphs 2—4.

**287.** Shares and provisional certificates in respect of the new capital cannot be issued before the completion of the increase of capital has been entered in the Mercantile Register.

Any purported transfer of an interest in such new capital is inoperative as against the company until such entry has been effected.

**288.** A reduction in the capital of a company can be sanctioned only by the resolution of a majority whose shares amount to at least three-fourths of the capital represented at the voting in respect of such resolution. More stringent conditions may be rendered necessary for the passing of such a resolution by the memorandum of association.

The resolution must be worded so as to state the object of the proposed reduction of capital, mentioning in particular if it is in partial repayment of capital to the shareholders and the method in which the measure is to be carried out.

If several classes of shares are in existence with
different preferential rights attached thereto, besides the resolution of the general meeting, a special resolution passed separately by each class of shareholders, is necessary. The rules of paragraph 1 of this section and of sect. 278, paragraph 3, sentence 2, apply to the passing of these resolutions.

289. A resolution as to the reduction of the capital of a company must be notified by all the directors for entry in the Mercantile Register.

Following upon such resolution and after the entry thereof, the directors must request the company's creditors to send in their claims. Such request must be made publicly three times by means of a notice inserted in the Company Journals, and privately by special notice to the creditors known to the directors.

The claims of creditors which accrued before the last appearance of the above-mentioned notices in the Company Journals, must be satisfied or security must be given in respect thereof, if due application has been made therefor.

Payments to the shareholders upon the ground of the reduction of capital may not be made before the expiration of one year from the date of the third appearance of the public notices referred to in paragraph 2, and the satisfaction of the claims of all the creditors who have presented themselves either by payment or by the giving of security. Any release of the shareholders from the liability to make payments in respect of the shares based on the diminution of capital does not take effect until
such period has expired and such claims have been satisfied.

290. If a reduction of capital is to be effected by a diminution of the number of the shares by exchange, stamping, or any similar method, the company may declare any shares null and void which have not been handed in to them in spite of notice duly made requiring them to be handed in. The same rule applies in respect of shares which have been handed in, but not in a number sufficient to entitle the owner to receive new shares in exchange, and which are not placed at the company's disposal for realisation for the account of the owner.

The notice requiring shares to be handed in must state that in the event specified above the shares will be declared null and void. Such declaration can only take place if the notice has been published in the manner prescribed by sect. 219, paragraph 2; it must be effected by means of advertisements inserted in the Company Journals.

The new shares to be issued in the place of those declared null and void must be sold by the company for the account of the owner at the price quoted on the Stock Exchange, or in default of any such price, by public auction. The money obtained must be paid out to the owners, or, if the company has a right to have it deposited, deposited (p).

(p) E.g., if they belong to an infant or any person who cannot give a proper discharge, or if the title to them is in dispute. (See Schuster, p. 178.)
291. The reduction of capital when completed must be notified for entry in the Mercantile Register by all the directors.

Head V. *The Dissolution and Annullment of a Company.*

292. A share company is dissolved—

(1) By expiration of the period specified in the memorandum of association for the duration of the company.

(2) By the resolution of a general meeting; such resolution must be supported by a majority representing at least three-fourths of the capital held by the shareholders voting in respect thereof. More stringent conditions for the passing of such resolution may be laid down by the memorandum of association.

(3) By the bankruptcy of the company.

The rules laid down under the present Head (V.) apply also upon the dissolution of the company on any other grounds *q*.

293. The dissolution of the company, except when brought about by bankruptcy, must be notified by the directors for entry in the Mercantile Register.

294. After the company has been dissolved the *q* This section does not state the grounds of dissolution exhaustively. (Sec sect. 303.)
liquidation takes place, unless the company has been adjudicated bankrupt.

Until the termination of the liquidation the rules laid down under the foregoing Heads continue to apply, except when the contrary is rendered necessary by the rules under the present Head (V.), or by the object of the liquidation.

295. In the liquidation the directors act as liquidators, unless other persons are nominated to fill this office by the memorandum of association or the resolution of a general meeting.

Upon the application of the board of supervision or of a number of shareholders whose aggregate contributions to capital amount to at least the twentieth part of the capital of the company, the appointment of liquidators may upon cogent grounds be made by the Court of the district in which the company's principal place of business is situated. The shareholders making such application must furnish *prima facie* evidence that they have held their shares for at least six months prior to the making of the application.

The Court may deprive liquidators of their office under the same conditions as it may appoint them. Liquidators not appointed by the Court may be deprived of their office by a general meeting before the expiration of the period for which they were appointed.

296. The names of the first liquidators must be notified by the directors for entry in the Mercantile
Register, any change in the composition of their own numbers must be notified by the liquidators themselves. If upon the appointment of the liquidators any provision is made as to their powers of agency, such provision must also be notified for entry.

Annexed to the notification must be a publicly authenticated (r) copy of the documents dealing with their appointment or the change notified; this rule does not apply to the notification to be made to the Court in charge of the Mercantile Register in which a branch establishment is registered.

The entry of the appointment or removal from office of liquidators by the Court is effected by the Court motu proprio.

The liquidators must provide the Court with a specimen signature of the company’s trade-name together with their own, for its retention.

297. The liquidators must, in view of the dissolution of the company, call upon the creditors to send in their claims by means of a notice referring to the dissolution, which must be inserted three times in the Company Journals.

298. The nature and extent of the liquidators’ functions and the form in which they must sign the trade-name are regulated by the rules of sects. 149, 151, 153.

In all other respects they must exercise the rights (r) See note to sect. 12.
and duties of directors and are under the control of the board of supervision in the same manner as directors.

With respect to the co-operation of all the liquidators in declarations to be made on behalf of the company, the rule of sect. 232, paragraph 1, sentence 1, applies unless a contrary provision in respect of liquidators was contained in the memorandum of association or made upon their appointment.

Powers of procuration may not be conferred by liquidators. The rules of sect. 236 do not apply.

299. The liquidators must draw up a balance sheet for the commencement of the liquidation and from that time on for the close of every year during which the liquidation continues; the rules as to what constitutes the business year of the company previously observed may be retained.

The rules of sects. 260 and 263—267 apply with the exception of those dealing with the division of profits and those of sects. 261 and 262.

300. The assets of the company remaining after the payment of its liabilities shall be distributed among the shareholders.

The distribution is made in proportion to the amount of shares held, unless several classes of shares with different rights attached thereto are in existence.

If the amount payable on the shares has not in all cases been paid up to the same extent, the
money actually paid must first be returned and any surplus divided in proportion to the nominal amounts of the shares held. If the assets are not sufficient to allow the repayment of all the money paid up, the loss must fall upon the shareholders in proportion to the amount of the shares which they hold; any amounts payable on shares and still outstanding must be got in, so far as it may be necessary for the purposes of this section.

301. The distribution of the assets may not take place until the expiration of a period of one year from the date of the third publication of the notice prescribed in sect. 297 calling upon the creditors to send in their claims.

If no claim is sent in by a creditor who is known to the liquidators, the amount owing to him must be deposited with a public authority, if there is a right to make such deposit(s).

If a liability on the part of the company cannot be immediately performed or is disputed, the assets may not be divided until security has been given to the creditor in respect of such liability.

302. When the liquidation is terminated and the final account submitted, the liquidators must notify the extinction of the company's trade-name for entry in the Mercantile Register.

The company’s books and papers are to be deposited for ten years for safe-keeping in some place of security to be named by the Court of the

(s) See supra, p. 136, and Schuster, p. 178.
district in which the company's principal place of business is situated.

Shareholders and creditors of the company may obtain authority from the Court to inspect such books and papers.

If, subsequently to the division of the company's assets, further assets in addition are discovered, the Court of the district in which the company's principal place of business is situated must upon the application of an interested party re-appoint the old liquidators or appoint fresh ones.

303. A realization of the assets of a company by a general sale of its entire property is only permissible if authorised by a resolution of a general meeting. Such resolution must be supported by a majority representing at least three-fourths of the aggregate amount of capital held by the shareholders voting; more stringent conditions requisite for the passing of such resolution may be laid down by the memorandum of association.

The effect of such resolution is to dissolve the company if not already dissolved.

The rules of sects. 294—302 apply in such case with the reservation that in this case the liquidators have authority to enter upon all such transactions and to perform all such acts in the law as are necessary in order to put the resolution into force. The delivery up of the assets to the purchaser may not take place unless the conditions laid down by sects. 297 and 301 for the division of the com-
pany's property among the shareholders have been complied with.

304. If the assets of a share company are taken over in their entirety by the German Empire, a federal State or a German communal authority situated in the German Empire, an agreement dispensing with the liquidation may be made upon the arrangement being entered into.

Such an agreement needs the consent of a general meeting to be given in the manner specified in sect. 303, paragraph 1.

The resolution of the general meeting must, together with the dissolution of the company, be notified by the directors for entry in the Mercantile Register; annexed to the notification must be the contract entered into with the purchaser either in the original or in a publicly authenticated copy.

The resolution cannot take effect before it has been registered at the Court of the district in which the company's principal place of business is situated.

Upon the entry of such resolution the transfer of the company's property, including its liabilities, shall be deemed to be complete; the trade-name of the company is extinguished.

305. If the assets of a share company are taken over in their entirety by another share company, or a share company en commandite, payment therefor being made in shares in the company so acquiring them, the increase of capital of such company is
not affected by the rules of sect. 278, paragraph 1; sect. 280, paragraph 2; sects. 281, 282, 283, paragraph 1; sect. 284, paragraph 2, No. 1, and paragraph 3.

Annexed to the notification to the Court in charge of the Mercantile Register as to the increase in capital must be the original or a publicly authenticated copy of the contract of purchase, which must have been approved by a general meeting of the dissolved company.

The rules of sect. 290 apply to the exchange of the shares of the dissolved company for those of the purchasing company.

306. If in the case of an arrangement of the description specified in sect. 305 an agreement is made that no liquidation of the assets of the dissolved company is to take place, the rules of sect. 304 apply *mutatis mutandis* concurrently with the following special rules:

1. The assets of the dissolved company must be administered separately by the purchasing company:

2. The legal domicile (*t*) of the dissolved company remains unaltered until the amalgamation of the assets of both companies.

Until such amalgamation as between the purchasing company or its creditors and the creditors of the dissolved company, the assets acquired are to be deemed to remain the assets of the dissolved company.

(*t*) *I.e.*, the place in which it can sue and be sued.
The amalgamation of the assets may not be effected till notice in accordance with sect. 297 has been given by the purchasing company to the creditors of the dissolved company, requesting them to send in their claims, and can only be effected conditionally on the due observance of the rules laid down in sect. 301 with reference to the distribution of assets among the shareholders.

The members of the directorate and board of supervision of the purchasing company are jointly and severally liable to the creditors of the dissolved company for the separate administration of such assets, with the reservation that the members of the board of supervision are only liable if an amalgamation of assets has taken place with their knowledge and without their interference.

307. If a share company is dissolved with the object of the alienation of its assets in their entirety or with the object of being converted into another company, if the object in question is not achieved, a resolution for the renewed carrying on of the company may be passed by a general meeting.

The same rule applies in the event of the dissolution of a company by bankruptcy, if the bankruptcy proceedings are subsequently annulled (u) upon the acceptance of a compulsory composition, or revoked upon the application of the bankrupt company.

The renewed carrying on of the company must be notified by the directorate for entry in the Mercantile Register.

(u) See note to sect. 144.
308. If the trade-name of a company is extinguished by the alienation of its assets to another company or to a corporate body (v) without any previous liquidation having taken place, any action taken to impugn the validity of the resolution sanctioning such alienation must be directed against the successors in title of the dissolved company.

309. If the memorandum of association does not contain the essential provisions specified in sect. 182, paragraph 2, or if any of such provisions is void, every member of the company and of the directorate and board of supervision may, by means of the issue of a writ, claim to have the company declared a nullity. The rules of sects. 272 and 273 apply mutatis mutandis.

310. Any defect in the memorandum of association in respect of the provisions as to the trade-name or place of business of the company, the object of the undertaking, the appointment or composition of the directorate, the form of the notices to be used by the company, or the method of summoning general meetings, may be rectified by the resolution of a general meeting passed in accordance with the rules of this Code as to the method of making alterations in the memorandum of association. If the defect to be rectified is in respect of a provision as to the method of summoning general meetings, the general meeting

(v) See Schuster, p. 32.
called for the purpose of such rectification must be summoned by means of advertisements inserted in the journals nominated for the publication of the entries to be made in the Mercantile Register of the district in which the company's place of business is situated.

311. If the nullity of a company has been entered in the Mercantile Register, the winding-up of its affairs must be governed mutatis mutandis by the rules laid down in respect of the dissolution of a company.

The validity of contracts entered into with third parties is not affected by the company being declared a nullity.

The members of the company must make any payments due upon their shares in so far as such payments are rendered necessary by the liabilities entered into in the name of the company.

Head VI. **Penal Rules.**

312. Members of the directorate or board of supervision or liquidators, in the event of their wilfully acting to the disadvantage of the company, are punishable by imprisonment and simultaneously by a fine not exceeding M. 20,000.

Sentence of loss of civic rights may also be passed upon them.

If there are extenuating circumstances, only a fine may be imposed.
313. Sentence of imprisonment and of a fine not exceeding M. 20,000 simultaneously may be passed on:—

(1) Promoters or members of the directorate or board of supervision who, for the purposes of the entry of the company in the Mercantile Register, knowingly give false information in respect of the subscription or payment of the original capital, the price at which the shares were issued, or arrangements of the description specified in sect. 186.

(2) Persons who knowingly make false statements in respect of the above-mentioned matters in an advertisement of shares of the description specified in sect. 203.

(3) Members of the directorate or board of supervision who, for the purposes of the entry of an increase in capital in the Mercantile Register, wilfully make false statements in respect of (a) the payment of the previously existing capital or the subscription or payment of the additional capital; or (b) the price at which the shares were issued; or (c) any arrangements that may have been made of the description specified in sect. 279.

Such persons may also be sentenced to loss of honorary civic functions (x).

If there are extenuating circumstances only a fine may be imposed.

(x) See ante, note to sect. 81, and Schuster, p. 264, note.
314. Members of the directorate or board of supervision or liquidators are punishable by imprisonment for a period not exceeding one year and simultaneously by a fine not exceeding M. 20,000 if they wilfully—

(1) Misrepresent or conceal the true state of the company's affairs in statements made by them or in their reports as to the financial position of the company, or in their speeches at a general meeting.

(2) Issue shares made out in the name of the holder not bearing upon them the information specified in sect. 179, paragraph 4, or issue shares made out to bearer before the full payment of the nominal amount of such shares, or in the event of their issue at a premium the nominal amount together with the premium.

(3) Issue shares or provisional certificates (y) before the company is registered in the Mercantile Register, or in the case of an increase of capital before such increase is registered therein.

(4) Issue shares or provisional certificates for a lesser amount than M. 1,000 in any case other than those specified in sect. 180, paragraphs 2 and 3.

(5) In the cases specified in sect. 180, paragraphs 2 and 3, issue shares or provisional certifi-

(y) See ante, sect. 179.
icates not bearing upon them the information specified in sect. 180, paragraph 4.

Offenders under No. 1 may be also sentenced simultaneously to loss of honorary civic functions.

If there are extenuating circumstances only a fine may be imposed.

315. Sentence of imprisonment for a period of not exceeding five months and simultaneously a fine of an amount not exceeding M. 20,000 may be imposed upon—

(1) Directors or liquidators if a company has remained without any board of supervision for longer than three months, and upon directors, liquidators, and members of the board of supervision if for more than three months there have not been enough members of the latter to form a quorum.

(2) Directors or liquidators, if in breach of the rules of sect. 240, paragraph 2, and sect. 298, paragraph 2, they omit to apply for the initiation of bankruptcy proceedings.

If there are extenuating circumstances only a fine may be imposed.

No punishment may be inflicted upon any person who can prove that the omission to appoint or complete the board of supervision or apply for the initiation of bankruptcy proceedings was not due to any default on his part.
316. Anyone who, where shares or provisional certificates have to be deposited, knowingly issues false documents to serve as evidence of a right to vote, or for such purpose fraudulently alters documents in existence, or makes use of any such a document for the purpose of voting knowing it to be false or fraudulently altered, shall be punishable with imprisonment for a period not exceeding one year, and may be simultaneously sentenced to pay a fine of M. 10,000. Sentence of loss of honorary civic functions may also be passed. If there are extenuating circumstances only a fine may be inflicted.

317. A shareholder agreeing in consideration of some special advantage granted or promised to him to vote in a particular manner or to abstain from voting at a general meeting, shall be punishable by a fine not exceeding M. 3,000, or by imprisonment for a period not exceeding one year.

The same punishment is to be inflicted upon any person granting or promising any special advantage to a shareholder in consideration of his exercising his vote in a particular manner or abstaining from voting at a general meeting.

318. Anyone making use of shares belonging to another person whom he is not authorised to represent, without the consent of such other person for the purpose of exercising the right to vote at a general meeting or any of the rights specified in sects. 254, 264, 266, 268, 271, 295, 309, shall be punishable by a fine of not less than M. 10 and not
more than M. 30 in respect of every share so used, the total amount of such fine to be in no case less than M. 1,000. The same punishment is to be imposed upon any person borrowing any other person's shares in return for a remuneration paid and by means of such shares exercising any of the above-mentioned rights, as also upon the person wilfully aiding and abetting him by lending him such shares.

319. The directors or liquidators must be compelled to observe the rules contained in sect. 240, paragraph 1; sect. 260, paragraph 2; sect. 263, paragraph 1; sect. 267, paragraphs 1 and 2; sect. 272, paragraph 4; sects. 299 and 302, paragraph 2, by the Court specified in sect. 195 under penalty of fines, the amount of which is to be regulated by sect. 14, sentence 2.

Penalties are not to be inflicted for failure to comply with the regulations as to notifications to be made to the Court in charge of the Mercantile Register contained in sect. 195, paragraph 1; sect. 277, paragraph 1; sect. 280, paragraph 1; sect. 284, paragraph 1; sect. 304, paragraph 3; and sect. 305, paragraph 2, where the Court concerned is that of the district in which the company's principal place of business is situated.
320. A share company *en commandite* is composed of at least one member with unlimited personal liability in respect of the company's debts (hereinafter called a general member), and other members who share in such liability merely to the extent of their contributions to the capital of the company which is divided into shares (hereinafter called limited members).

The mutual rights and liabilities of the general members as against one another and as against the limited members collectively, as well as against third parties, and in particular the authority of the general members to conduct business and act on behalf of the company, is regulated by the rules laid down for limited partnerships.

In all other respects the rules of the third part relating to share companies apply to share companies *en commandite*, where not rendered inapplicable by the following rules or the absence of a directorate.

321. The settling of the contents of the memorandum of association must be recorded by a judicial officer or notary, and must be effected by a number of persons not less than five, which must include all the general members, and must otherwise consist solely of persons taking over shares as limited members. The record must state the amount of
shares taken over by each of the persons included in such number.

The members who have taken part at the settlement of the contents of the memorandum of association or who have contributed to the capital of the company otherwise than by cash payments, shall be deemed to be the promoters of the company.

322. The memorandum of association must state in addition to the matters provided for in sect. 182, paragraph 2, headings 1—3, 5 and 6, the names, first names, description and place of residence of each general member.

The value and nature of any contributions on the part of general members to the assets of the company which do not form part of the capital (z) of the company, must be stated in the memorandum of association.

The rule stated in sect. 186, paragraph 1, applies to any stipulation conferring a special advantage upon any individual general member.

323. Upon the application for shares must appear besides the information specified in sect. 189, the names of such promoters of the company as are general members thereof.

The declaration to be annexed to the company's application for registration in the Mercantile Register in accordance with sect. 195, paragraph 3, sentence 1, must contain a statement that such amount of the

(z) I.e., which do not form part of the share capital of the company.
contributions to capital which must be paid in cash as has already been called up has been so paid and is in the possession of the general members.

The general members have a right to take part in the proceedings specified in sect. 196. The majority voting in favour of the formation of the company must include at least one-quarter of the limited members whose names appear on the list. The amount of their shares must represent at least one-quarter of the capital other than that taken over by the general members.

In the entry in the Mercantile Register the names of the general members must be stated in place of those of the directors.

Any special provisions contained by the memorandum of association as to the powers of the general members to act on behalf of the company must also be included in the entry.

324. A resolution of the description specified in sect. 207, if it concerns a contract made in the first year after the registration of the company, requires to be supported by a majority whose shares represent at least one-fourth of such part of the share capital of the company as is not held by the general members. The rule stated in sect. 207, paragraph 3, sentence 1, remains unaffected by this section.

325. The rules applying to the directorate of a share company apply mutatis mutandis to the general members in respect of the following matters:—

(1) Notifications, deliveries of documents, and
declarations to be made to the Court in charge of the Mercantile Register:

(2) The summoning of general meetings:

(3) The preparation, submission, and publication of the annual balance sheet and profit and loss account, as well as the submission of statements concerning the business:

(4) The impugnment of the validity of resolutions of a general meeting:

(5) The procedure of appointing auditors to investigate the balance sheet or incidents concerning the promotion or conduct of the business and the obligations of the directors towards the auditors and board of supervision:

(6) The notices to be sent to the company's creditors in the event of a reduction of capital:

(7) The enforcement of the company's claims to compensation arising out of the mode of conduct of the business:

(8) The method of applying for the initiation of bankruptcy proceedings on behalf of the company:

(9) Liability to criminal proceedings and penalties.

326. A general member may not, without the consent of the company, either enter upon transactions in the same branch of commerce as the company or belong to any other mercantile association of the
same description (a) as the company as a general partner or member. Such consent to be valid must be granted by the other general members and by the resolution of a general meeting, unless the power of granting such consent has been transferred to the board of supervision by the memorandum of association or by resolution of a general meeting.

If a general member violates the obligations imposed on him by paragraph 1 of this section, the rule laid down in sect. 236, paragraph 2, applies.

The company's claims under this section become barred after the expiration of a period of three months from the date at which the remaining general members and the board of supervision became aware of the conclusion of the transaction in question or the fact of the general partner's participation in the other mercantile association. They become barred irrespective of such knowledge in five years from the date upon which they accrued.

327. A general member has no vote at a general meeting even when he is a shareholder.

The resolutions of a general meeting require the consent of the general members, if they concern matters which in a limited partnership need the consent of both the limited and general partners.

The consent of the general members is not required for the exercise of the powers belonging to a general meeting or to a minority of shareholders by virtue of sects. 266—269 with respect

(a) I.e., which carries on a business of the same description.
to the appointment of auditors and the enforcement of the company’s rights of action arising out of the promotion or the method of conduct of the business.

Resolutions of a general meeting which require the consent of the general members are not to be filed with the Court in charge of the Mercantile Register before such consent is obtained. In respect of resolutions which require registration in the Mercantile Register the consent of the general members must be recorded in the minute to be drawn up as to the proceedings in respect of such resolutions or in an appendix thereto.

328. In the absence of any provision to the contrary in the memorandum of association, the resolutions of the limited members are to be carried out by the board of supervision.

In any legal proceedings which may be instituted by the limited members collectively against the general members, or *vice versa*, the limited members are to be represented by the board of supervision, unless special representatives for the purpose have been elected at a general meeting. The company is liable for the costs of legal proceedings, for which the limited members are responsible, without prejudice to its right to indemnity against such limited members.

The rule stated in sect. 247, paragraph 2, applies *mutatis mutandis*.

General members cannot be members of the board of supervision.
329. If the general members are entitled out of the proceeds of the year to a share in the profits other than that due to them in respect of the shares which they hold, such share in profits may not be paid out, if there is a deficiency in assets \( b \) exceeding the amount of their contributions to capital represented otherwise than by shares. So long as such deficiency in assets exists they are not allowed to draw in any other way upon such contributions to capital.

The rule stated in sect. 262, No. 1, as to the reserve fund applies with regard to the general members' share of profits.

330. The rules applicable in the case of a limited partnership hold good also in the case of a share company en commandite as regards—

(1) The facts by the occurrence of which dissolution is brought about;

(2) The retirement or expulsion of one of several general members;

with the following modifications:—

The bankruptcy of a limited member does not bring about the dissolution of the company; the creditors of a limited member have no right to give notice to the company demanding its dissolution.

For the giving of such notice by the limited

\( b \) This does not mean "if the company is insolvent." What is meant by a "deficiency in assets" is the amount, if any, by which the liabilities as shown on the balance sheet (upon which the capital of the company is put down among its liabilities) exceed the assets as shown on the balance sheet.
members as well as for the obtaining of their consent to the dissolution of the company the resolution of a general meeting is necessary; such resolution requires to be supported by a majority representing at least three-fourths of the capital held by the members voting in respect of such resolution. The same majority is necessary for a resolution in favour of an application to have the company dissolved by order of the Court. More stringent requirements may be created by the memorandum of association.

A general member may not cease to be such except in the case of his expulsion—unless voluntary retirement is made permissible by the memorandum of association.

The dissolution of the company or the fact of a general member ceasing to be such must be notified by all the general members for entry in the Mercantile Register. The rule stated in sect. 143, paragraph 3, applies.

331. Where not otherwise provided by the memorandum of association, the liquidation is carried out by all the general members and by one or more persons elected as liquidators by a general meeting.

Every general member has power to apply to have liquidators appointed or their authority revoked by the Court.

332. A share company en commandite may be converted into a share company by the resolution of a general meeting and the consent of all the general members.
The rules as to changes in a memorandum of association apply (c).

The aggregate amount of the shares of the majority of limited members voting in favour of the conversion must represent at least one-fourth of the share capital of the company not held by the general members. The resolution must state the measures necessary to carry out the conversion, and in particular the trade-name to be used and the method of appointment of and composition of the directorate.

333. The notification of the resolution for conversion must state the names of the directors for entry in the Mercantile Register, and except in the case of a notification for entry in the Mercantile Register of the district where a branch establishment is situated, must have annexed to it a publicly authenticated copy of the minutes respecting their appointment.

The application for registration in the Mercantile Register of the district in which the principal place of business of the company is situated is not affected by sect. 14.

The application must have annexed to it a balance sheet drawn up with reference to a date not more than two months prior to such application and passed by a general meeting. With respect to such balance sheet, the rules of sects. 261, 263, paragraph 1, and sect. 264 apply.

(c) See ante, sect. 274 et seq.
Upon the entry being effected the general members cease to be such; and the company is a share company from this time forward.

334. Immediately after the entry the directorate must publish a balance sheet complying with the requirements of sect. 333, paragraph 2, in the Company Journals.

The directors must also give notice to the company’s creditors to send in their claims by an announcement referring to the conversion. Such announcement must appear three times in the Company Journals, and creditors known to the company must receive special personal notices.

Creditors whose claims accrued before the last appearances of the above specified public announcements are entitled to receive satisfaction or security if they apply therefor.

The members of the directorate and board of supervision are jointly and severally liable to the company’s creditors for the due observance of these rules, provided always that the members of the board of supervision are only liable in respect of any breach thereof which has taken place with their knowledge and without their intervention.

Part V. DORMANT PARTNERSHIP.

335. Any person participating by means of a contribution of property as a dormant partner in a business establishment in which a mercantile trade
is carried on by another must effect such contribution in such a manner as to make it the property of the owner of the business.

The owner alone acquires rights and incurs obligations by means of the transactions arising in the course of business.

336. In the absence of any express stipulation as to the share to be taken by the dormant partner in the profit and loss of the business, there is an implied agreement that such share shall be a reasonable one according to the circumstances.

The partnership agreement may contain a proviso that the dormant partner is not to share in the loss; but his right to a share in the profit cannot be excluded.

337. At the close of every business year the profit and loss account must be drawn up and the dormant partner’s share in the profit paid out to him.

The dormant partner’s share in the loss is limited to the amount of his contribution paid up or due. Profits which he has once drawn need not be paid back in the event of subsequent losses; but if his contribution to capital has been diminished by losses the yearly profits must be appropriated to make up the deficiency.

In the absence of any express stipulation, profits not drawn by a dormant partner are not added to his contribution to capital.
338. A dormant partner has the right to demand a copy of the annual balance sheet and test its correctness by an inspection of the partnership books or papers.

The further rights conferred by German Civil Code, sect. 716(e), upon partners excluded from the right of conducting partnership business are not exercisable by a dormant partner.

The Court may upon the application of a dormant partner, in the presence of cogent grounds, at any time make an order directing the delivery of a balance sheet, or any other explanatory statement as to partnership affairs, or the production of the partnership books or documents.

339. The termination of a dormant partnership by notice given by one of the partners, or by a creditor of the dormant partner, is regulated mutatis mutandis by sects. 132, 134, 135, provided always, that nothing contained in this section affects the right conferred upon a partner by sect. 723 of the Civil Code to terminate without notice upon any cogent grounds.

A partnership is not dissolved by the death of a dormant partner.

340. Upon the dissolution of the partnership the owner of the business must settle accounts with the dormant partner, and pay over to him any balance in his favour.

(e) i.e., the right to inspect books, obtain information about the business, &c. See Schuster, p. 304.
Any transactions pending at the time of the dissolution are to be conducted to their conclusion by the owner of the business, the dormant partner participating in the profit or loss arising therefrom.

The dormant partner may at the close of every business year demand an account of the transactions brought to termination during such year, the payment of any sums that may be due to him, and information as to the progress of any transactions still pending.

341. Upon the owner of a business becoming bankrupt a dormant partner may prove as a creditor in respect of his contribution to the partnership capital, provided that such contribution is in excess of the share of loss falling to him.

If the dormant partner has not yet paid up his contribution or any part thereof, he must pay into the bankrupt’s estate so much of the amount still due as may be necessary to cover his share in the loss.

342. If upon the ground of any agreement made during the course of the last year before the bankruptcy between the owner of the business and a dormant partner, such partner’s contribution to capital has been wholly or in part repaid to him, or a complete or partial release granted to him in respect of his share of the loss incurred, the validity of such repayment or release may be contested by the trustee in bankruptcy, whether it was made upon a dissolution of the partnership or not.
If the circumstances giving rise to the bankruptcy did not come into existence till after such repayment or release was agreed upon, then no objection to its validity may be raised.

The rules of the Bankruptcy Act (f) as to the method and effect of disputing the validity of payments apply.

(f) See (German) Bankruptcy Act, ss. 29—42.
Book III.—Mercantile Transactions.

Part I. GENERAL RULES.

343. The term "mercantile transaction" denotes any transaction entered upon by a mercantile trader in the course of the mercantile trade which he carries on.

Transactions of the description specified in sect. 1, paragraph 2, entered upon by a mercantile trader are mercantile transactions even if entered upon in the course of a business which is usually concerned with transactions of other descriptions.

344. Any transactions having a legal effect which are entered upon by a mercantile trader shall be deemed, in the absence of proof to the contrary, to have been within the course of his mercantile trade.

Any documentary acknowledgment of a debt signed by a mercantile trader shall be deemed to have been signed in the course of his mercantile trade, unless evidence to the contrary is contained in the document itself.

345. Any transaction which, as far as one of the parties is concerned, is a mercantile transaction is governed as regards both parties alike, subject to
any provision to the contrary contained in this part of this Code, by the rules applying to mercantile transactions.

346. All acts and omissions as between mercantile traders must be interpreted as regards their significance and effect with reference to mercantile usage and customs.

347. If any person, in respect of a transaction, which on his side is a mercantile transaction, owes a duty to another person to use diligence, the standard of diligence required is that habitual to a careful mercantile trader.

The foregoing paragraph does not affect the rules of the Civil Code, according to which the party liable in certain cases has only to answer for gross negligence (g) or is only bound to use such degree of diligence as he habitually applies to his own affairs (h).

348. A penalty agreed to be paid by a mercantile trader in the course of his mercantile business cannot be reduced on the ground of sect. 343 of the Civil Code (i).

349. A surety is not entitled to the beneficium

(g) E.g., in cases of property lost or found, &c., see Civil Code, ss. 300, sub-s. 1, 521, 523, 599, 600, 680, 968.
(h) E.g., inter alia, in cases of unremunerated bailments. Civil Code, s. 690; and see Civil Code, ss. 252, 259, 412, sub-s. 8, 442; and see Schuster, pp. 150, 161.
(i) Civil Code, s. 343. If the amount of a penalty is disproportionately high it may be reduced by the Court to a reasonable amount. (See Schuster, p. 190.)
excussionis (k) if his liability arises either (1) out of a guarantee agreement which was on his side a mercantile transaction, or (2) out of a request to give credit which was on his side a mercantile transaction.

350. The rules as to form prescribed by sect. 766, clause 1; sect. 780 and sect. 781, clause 1, of the Civil Code (l) do not apply to—

(1) A guarantee which constitutes a mercantile transaction upon the side of the surety:

(2) A promise creating an obligation or an acknowledgment of an obligation which constitutes a mercantile transaction on the side of the person incurring such obligation.

351. The rules of sects. 348—350 do not apply to persons carrying on trades of the description specified in sect. 4.

352. The rate of interest implied by law as payable in bilateral (m) mercantile transactions, including interest due in the event of delay (n) in the performance of an obligation, is 5 per cent. The same rate of interest is payable in respect of

(k) See Schuster, pp. 318, 319. A beneficium excussionis is the right by which a surety may require the creditor to prove that he has obtained a judgment against the principal debtor and that his attempt to enforce such judgment was unsuccessful.

(l) See Schuster, p. 323.

(m) I.e., transactions which are mercantile transactions on both sides.

(n) The term used here is a technical one, and has elsewhere been in some places translated by the Roman legal term "Mora." See post, note to sect. 376; and see Schuster, "Mora," p. 160.
a debt arising out of such a contract where there is
an express stipulation for the payment of interest,
but the rate thereof is not specified.

Wherever by this Code interest is made payable
without the rate thereof being specified, such interest
is to be payable at the rate of 5 per cent.

353. Mercantile traders have the right inter se
in respect of claims arising out of bilateral mercantile
transactions to charge interest from the date of the
maturity of such claims, provided always that com-
pound interest is not chargeable under this section.

354. Any person who, in the course of the mer-
cantile trade which he carries on, transacts business
or performs services on behalf of another may, in
the absence of express agreement, claim commission,
and, in the case of the warehousing of goods, ware-
housing charges at rates in accordance with local
custom.

In respect of loans, advances, outlay, and other
disbursements made, he may claim interest calculated
as from the day of the making of such disburse-
ments.

355. If the business relations existing between
any person and a mercantile trader is one of current
account, i.e., if it is of such a nature that the money
values of all claims and performances on both sides,
together with interest thereon, are set down in
account, and if such account is duly balanced at
regular intervals and the amount due thereon to one
side or the other ascertained, the party to whom
such amount is due may charge interest upon such amount from the day upon which the account was balanced even if interest was an item included in the account (o).

The balance of accounts, in the absence of any agreement to the contrary, is struck annually.

Notice may, in the absence of anything appearing to the contrary, be given for a current account to be closed at any time in the course of the period intervening between the regular times for the balancing of accounts. In such case the party to whom a balance is found to be due may claim immediate payment.

356. If a debt which is secured by a pledge or by a guarantee or otherwise is included in a current account, the creditor is not precluded by admitting the correctness of the balance from having recourse to his security to an extent not in excess of the amount found to be due to him on the current account.

If a third party is jointly and severally liable with the principal debtor upon a debt included in a current account, paragraph 1 applies mutatis mutandis to the manner of enforcing payment in respect thereof.

357. If the judgment creditor of one of two parties between whom there exists a relation of current account for the purpose of enforcing pay-

(o) I.e., this constitutes an exception to the general rule that interest on interest is never payable. See Schuster, p. 104.
ment has obtained an attachment and assignment (p) of the balance due to his debtor upon the current account, debit entries made in respect of fresh transactions after such attachment and assignment may not be set off against the claim of such judgment creditor. Transactions entered upon by reason of any right of the one party or of any obligation of the other party to the current account which was in existence before the making of such attachment and assignment, are not fresh transactions within the meaning of this section.

358. In mercantile transactions a payment may only be made or demanded during the customary business hours.

359. If the time agreed upon for a payment is described as “the spring” or “the autumn,” or by any similar expression, in the absence of anything to the contrary appearing, such expression shall be interpreted in accordance with the custom of the place of performance.

If a period of eight days is specified as that within which a payment is to be made, such period shall, in the absence of anything appearing to the contrary, include eight full days (q).

360. Where there is an obligation to deliver goods

(p) “Pfändung und Überweisung,” which is here rendered attachment and assignment, is the German process of enforcing judgment which corresponds to obtaining a garnishee order.

(q) In ordinary colloquial German “acht Tagen” (eight days) means really a week or seven days.
defined generically (r), merchantable goods of an average kind and quality must be delivered.

361. Terms of measurement, weight, currency, or time, made use of in a mercantile contract are, in the absence of anything appearing to the contrary, to be interpreted in accordance with the rule prevailing in the place where such contract is to be performed.

362. If a mercantile trader, whose trade includes the undertaking of transactions on behalf of others, receives a proposal that he should undertake any such transactions from a person between whom and himself regular business relations exist, he is bound to answer immediately or he will be deemed to have accepted such proposal. The same rule applies in respect of a proposal received by a mercantile trader from any person upon whose behalf he has offered to undertake transactions.

If goods accompany the document by which such proposal is made, the mercantile trader must, even if he refuses the proposal, provisionally keep the goods protected from damage at the expense of the proposer, provided that he has security for the outlay incurred and can do so without disadvantage to himself.

363. Any written order by which a mercantile trader is requested to pay or deliver to the order of

(r) *i.e.*, as opposed to goods defined specifically. *E.g.*, an obligation to deliver "4,000 iron bars" as opposed to an obligation to deliver "the 4,000 iron bars now lying in the hold of the S.S. 'Electra.'"
another a sum of money or a negotiable instrument or any fungible thing, provided that such payment or delivery is not made dependent on some counter-performance on the part of the holder, is transferable by indorsement. Any written promise by which a mercantile trader undertakes to make any payments or deliveries of the description above specified to the order of another, provided that such payment is not made dependent on some counter-performance on the part of the holder, is transferable by indorsement.

The following documents are likewise transferable by indorsement if made out to order: Bills of lading, carriers' receipts, warehouse receipts issued by any establishment licensed by the State for that purpose, bottomry bonds, and policies of insurance against risks of carriage.

364. By the indorsement of an instrument all rights arising therefrom out of such instrument are transferred to the indorsee.

The indorsee of an instrument, if in the position of a lawful holder, can only be met by—

(1) Defences arising from the invalidity of the declaration purporting to be made by him on the face of the instrument:

(2) Defences arising from the tenor of the instrument (s):

(s) *I.e.*, from the manner in which the instrument is worded. *E.g.*, a defence that the bill is on its face described as non-transferable.
(3) Defences directly available as between the indorsee and the debtor (t).

The debtor is only obliged to make payment upon the delivery up to him of the instrument with a receipt indorsed thereon.

365. With regard to the form of indorsement required, the holder's title and the method of proof thereof, and the holder's obligation to surrender documents to the true owner, the rules of Arts. 11—13, 36, and 74 (u) of the Bills of Exchange Act apply mutatis mutandis.

If the instrument is destroyed or lost it may be declared inoperative by process of public citation. As soon as the application to obtain such declaration has been made the person entitled to the instrument may, upon furnishing security (x), claim performance from the person liable upon the instrument according to its terms. Such security is to remain operative till the declaration has been effected.

366. If a mercantile trader in the usual course of his trade sells or pledges moveable property which does not belong to him, the rules of the Civil Code operating to the benefit of persons deriving their title from a person without any title to confer (y), are applicable even if the good faith of the persons acquiring such property merely consisted in a belief

(t) E.g., a right of set-off operating directly between transferee and debtor.

(u) See Byles on Bills, Appendix III.

(x) See Schuster, p. 77.

(y) Civil Code, ss. 932—935, and 1207; see Schuster, pp. 396—399.
that the vendor or pledgor was duly authorised to dispose of such property on behalf of the true owner.

If such property is charged with right of a third party, the rules of the Civil Code operating to the benefit of persons deriving their titles from a person without any title to confer, are applicable even if the good faith of the person acquiring such property merely consisted in a belief that the vendor or pledgor had a right to dispose of such property without making the transaction subject to the rights of such third party.

For the purposes of the protection given to parties acting in good faith the statutory right of pledge (z) of commission-merchants, forwarding agents, warehousemen, and carriers—has the same effect as a right of pledge acquired by contract in the manner specified in paragraph 1 of this section.

367. If an instrument issued to bearer which has been stolen from the owner, lost, or otherwise become missing is sold or pledged to a mercantile trader carrying on a banking or change business, evidence of such mercantile trader's good faith will

(z) "Pfandrecht," here translated right of pledge, is a charge on a moveable thing created for the purpose of securing the performance of an existing or future obligation. The person who can exercise this right is called the pledgee (pfand-glaubiger), the person against whom it is exercised is called the pledgor (verpfänder), by his "pfandrecht" the pledgee is entitled to satisfy his claim against the pledgor out of the object pledged. This may be effected by selling it: but the sale must take place in a specified manner. A "pfandrecht" is in some cases given by statute. See sects. 397, 410, 421, 440, post.

As to "pfandrecht" generally, see Schuster, pp. 459—475.
be inadmissible if at the time of such sale or pledging the loss of such instrument had been notified in the German Imperial Gazette by a public authority or by the person rendered liable by the instrument, and if not more than one year has elapsed from the expiration of the year in which such notification was made.

Such evidence will, however, not be inadmissible by reason of such notification if such mercantile trader, owing to special circumstances, was neither aware nor ought to have been aware thereof.

The rules of this section have no application to interest, annuity, or dividend-warrants, payable not later than at the next day of payment subsequent to the date of the sale or pledging, or to banknotes and other instruments to bearer payable at sight and not carrying with them the right to interest.

368. In respect of the sale of property pledged under a bilateral mercantile transaction, the period of grace (a) of one month specified by sect. 1234 of the Civil Code is replaced by one of a week.

This rule applies mutatis mutandis to the statutory right of pledge of commission merchants, forwarding agents, warehousemen and carriers, in the case of

(a) Where a pledgee intends to sell the property pledged he must notify the owner of the property of his intention where practicable. By the Civil Code, s. 1234, one month must elapse between the date of the notification and the date of the sale, or where notification is impracticable between the date upon which the right of sale arose and the date of the sale. See Schuster, pp. 471, 472.
forwarding agents and carriers, even if the contract of forwarding or carriage was a mercantile one on their side only.

369. A mercantile trader has in respect of debts due to him from another mercantile trader and arising out of bilateral mercantile transactions concluded between them, a right of lien (b) over any objects of moveable property or any negotiable instruments belonging to the debtor, which have come into his possession with the consent of the debtor and by reason of any mercantile transactions, so long as he retains them in his possession, including constructive possession, arising from his right of disposal, which he can exercise over them by means of bills of lading, carrier's receipts and warehouse receipts. The lien arises equally in cases where the property in the object thereof has been transferred from the debtor, or a third party on his behalf, to the creditor, but retransferred by him to the debtor.

As against a third party the right of lien holds good if the defences which can be set up against

(b) "Zurückbehaltungsrecht" (here translated lien) is a right of retention, which can be exercised over moveable property by a creditor to secure his debtor's performance of his obligation. A mercantile "Zurückbehaltungsrecht" (the only kind with which this Code is concerned) corresponds roughly to a general lien in English law, while the ordinary "Zurückbehaltungsrecht" corresponds to a particular lien. Unlike the English general lien a mercantile "Zurückbehaltungsrecht" gives the creditor a right to satisfy his debt by a sale of the property which forms the object of it. But this right can only be exercised if an order of the Court is obtained authorising such sale, while under a "Pfandrecht" or right of pledge (see ante, note to sect. 66) no such authorisation is required in order to effect the sale. As to "Zurückbehaltungsrecht," see Schuster, p. 192.
the debtor's claim to the right to dispose of the object of the lien can be set up against the third party also.

The right of lien is excluded, if the retention of the object thereof is inconsistent with any direction given by the debtor at the time of or before the delivery thereof, or with any obligation on the creditor's part to deal in a specified manner therewith.

The debtor may avoid the effects of the right of lien by the furnishing of security (c), but security by means of a guarantee is excluded.

370. The right of lien may also be exercised in respect of debts not yet accrued due in the following cases:—

(1) If the debtor has been adjudicated bankrupt, or if he has suspended payment.
(2) If an execution has been levied upon the property of the debtor but not satisfied.

The right of lien is not defeated by a direction given by the debtor, or an obligation on the part of the creditor to deal with the property in question in a particular manner if the facts specified in paragraph 1, heads No. 1 and No. 2, of this section did not become known to the creditor until after the delivery of the property in question or the creation of such obligation.

371. The creditor has power by virtue of his right of lien to satisfy his debt out of the property

(c) See Schuster, p. 78.
over which such right is exercised. If a third party has any right in respect of such property, which is overridden by the creditor’s right of lien in accordance with sect. 369, paragraph 2, in respect of such satisfaction, the creditor’s debt takes priority over the debt of such third party.

The satisfaction takes place in accordance with the rules laid down as to right of pledge by the Civil Code (d), the month’s period of grace laid down by sect. 1234 thereof being replaced by one of a week.

If such satisfaction is not effected in the course of the execution of a general judgment, it is not permissible before the creditor has obtained an enforceable order declaring his right to satisfaction against the owner of the property, or if he himself is the owner (e), against the debtor; in the latter case the rules of the Civil Code (f) applying to the owner of property apply mutatis mutandis to the debtor. In default of any such enforceable judgment the sale of the property is not lawful.

The action to obtain a judgment authorising satisfaction may be commenced in the Court of the district in which the creditor may be sued either by reason of his personal domicile or by reason of his place of business being situated therein.

(d) See Schuster, pp. 470 et seq.

(e) I.e., in cases where a purchaser refuses to take delivery and the vendor exercises a “pfandrecht” or right of pledge over the goods by way of securing his right to the purchase price.

(f) As to these rules, see Schuster, pp. 471—473,
372. With respect to the creditor's right of satisfaction out of the property which forms the object of the lien, the debtor, if, at the time when the creditor acquired the possession of such property, he was the owner thereof, shall, as between himself and the creditor, be deemed to continue to be the owner, unless the creditor is aware that he has ceased to be so.

If a third party acquires the ownership of such property after it has passed into the possession of the creditor, any enforceable judgment in an action claiming satisfaction brought by the creditor against the debtor holds good as against such third party, if the creditor was unaware at the time of the commencement of the proceedings that the debtor had ceased to be the owner of the property.

PART II. MERCANTILE SALE.

373. If the purchaser is in mora accipiendi (g), the vendor may either store the goods in a public warehouse, at the purchaser's risk and expense, or deposit them in some other safe place.

In addition he may, after having previously given notice to the purchaser of his intention, either sell the goods by public auction, or, if they have a quoted exchange or market price, sell them by private contract at the current price through a broker

(g) I.e., if he refuses to accept the goods when offered at the proper time. See Schuster, p. 161.
authorised to transact such sales, or an authorised auctioneer. If the goods are of a perishable nature and delay involves risk, or if there are other reasons making the giving of notice impracticable, it may be dispensed with.

Such sale must be made for the account of the defaulting purchaser.

Where such sale is effected by auction, both vendor and purchaser may bid thereat.

In the case of a sale by auction the vendor must previously notify the purchaser of the time and place thereof. Upon the completion of the sale, in whatever manner effected, he must immediately notify the purchaser of the result thereof. Neglect to do so renders him liable to pay damages. Where such notifications are impracticable they may be dispensed with.

374. The powers conferred upon the vendor in the event of the purchaser being in morà accipiendi by the Civil Code are unaffected by the rules of sect. 373 (h).

375. If upon the sale of a moveable thing, a detailed specification as to the required form, measurements, &c. thereof is left to the determination of the purchaser, he is bound to furnish such specification.

(h) The vendor may (1) claim reimbursement for the expenses of his unsuccessful tender. (Civil Code, s. 304.) (2) Deposit the goods with a public authority in accordance with Civil Code, s. 372. (See Schuster, p. 178.) As to morà accipiendi or refusal to accept the performance tendered by the other contracting party, see Schuster, p. 161.
If the purchaser is \textit{in morå} (i) with respect to the furnishing of such specification, the vendor may himself make out the specification instead of the purchaser or claim damages for breach of contract in accordance with sect. 326 of the Civil Code, or rescind the contract. In the first alternative the vendor must make known to the purchaser the specification he has himself made out, and name a reasonable period within which the purchaser may send in a different one. If no such specification is sent in by the purchaser within the period named, that made out by the vendor is to hold good for the purposes of the contract.

\textbf{376.} If there is a stipulation that the performance by one party of his part of the contract must be completed at a definitely fixed time or within a definitely fixed period, the other party may, if it is not so completed, either rescind the contract, or if the defaulting party is \textit{in morå} (k), may claim damages for breach of contract instead of specific performance thereof. Such party can only claim

\textit{(i) I.e., refuses to furnish it at the proper time in spite of due demand made therefor. See \textit{post}, note to sect. 376.}

\textit{(k) As to the meaning of the technical term \textit{in morå}, which has been used to render the technical German term "in verzug," see Schuster, p. 160. A contracting party is \textit{in morå} if his part of the contract remains unperformed, the time for performance having arrived and due demand for performance having been made by the other contracting party. Such demand is dispensed with if the time for performance was fixed with reference to the calendar year. A contracting party is not deemed to be \textit{in morå} if the punctual performance of his obligation is prevented by circumstances for which he is not responsible under certain rules.}
specific performance if he gives notice that he intends to enforce it immediately after the definitely fixed time or the expiration of the definitely fixed period.

In an action for damages for breach of contract, if the goods in question have an exchange or market price, the amount of the claim may be based upon the difference between the contract price and the exchange or market price at the time and place at which the contract should have been performed.

If the goods have an exchange or market price, the result of an actual sale or purchase thereof made otherwise than at such price can only be made the basis of the claim for damages if such sale or purchase was effected immediately after the time or the expiration of the period stipulated for performance. The sale or purchase, if not effected by auction, must be effected at current price through a broker authorised to effect sales of a similar nature or an authorised auctioneer.

The rule stated in sect. 373, paragraph 4, applies to such sale by public auction. The creditor must immediately notify the debtor of the sale. In default of such notification he is liable to pay damages for any resulting loss.

377. If the sale is a bilateral mercantile trans-
action the purchaser must examine the goods imme-
diately after their delivery by the vendor, as far as this is practicable in the ordinary course of business, and upon the discovery of any defect must imme-
diately give notice thereof to the vendor.
A purchaser failing to give such notice shall be deemed to have accepted the goods, unless the defect in question is one not discernible by such examination.

Upon the subsequent appearance of a defect not discoverable by such examination, notice thereof must be given immediately upon its being discovered, otherwise the goods will be held to have been accepted notwithstanding such defect.

The purchaser's rights are sufficiently protected by the sending off of the notice at the proper time.

If a vendor intentionally conceals any defect he cannot rely upon the rules of this section.

378. The rules of sect. 377 apply also to a case where goods are delivered the description or quantity of which is other than that contracted for, unless the goods delivered are so obviously at complete variance with the order given that the vendor could not have contemplated the possibility of acceptance by the purchaser.

379. In the case of a sale which is a bilateral mercantile transaction, the purchaser is bound, upon rejecting goods sent to him from another place, to provide for their temporary safe keeping.

If the goods are perishable and there is risk in delay, he may have them sold in accordance with the rules of sect. 373.

380. If the purchase price is fixed by the weight of the goods sold, the weight to be deemed to be intended is that of the goods after the deduction of
the weight of the material used in packing (hereinafter called the tare-weight), unless otherwise provided by the contract or prohibited by the mercantile custom of the place where the vendor has to perform his part of the contract.

Questions as to whether, and if so to what extent, the tare-weight is to be deducted according to a special method of reckoning or in a special manner instead of according to accurate measurement, as well as what, if any, allowance is to be made to the purchaser and what deduction (hereinafter called abatement) is to be made in respect of damaged or unusable goods, are to be decided by the terms of the contract or by the mercantile custom of the place where the vendor has to perform his part of the contract.

381. The rules contained in the present part of this Code as to the sale of goods apply also to the sale of negotiable instruments.

They hold good also in the case of a non-fungible (kk) moveable chattel to be manufactured by the party contracting to do so from material to be supplied by himself.

382. The rules of the present part of this Code do not affect those of sects. 481—492 of the Civil Code dealing with warranties in respect of animals.

(kk) By fungible things are meant things sold by weight or measure, and which, if lost, can be replaced by an equal quantity of things of the same description (e.g., coffee is a fungible thing and an oak chair is a non-fungible thing).
PART III: COMMISSION BUSINESS.

383. A commission merchant is a person who in the regular course of his trade undertakes to buy or sell goods or negotiable instruments in his own name upon the instructions of another (hereinafter called the principal).

384. A commission merchant is bound to transact the business undertaken by him with the diligence of a careful mercantile trader; he must watch over his principal's interest and follow his instructions. He must furnish his principal with all necessary information, and in particular must without delay inform him of the execution of the order given; he must render an account of every transaction entered upon on the principal's instructions and hand over to him anything he may have received in connection with such transactions. A commission merchant is liable to his principal for the carrying out of any transaction entered upon on his instructions, unless when making his report as to the conclusion of such transaction to his principal he names the party with whom it has been concluded.

385. If a commission merchant does not deal in accordance with his instructions, he is liable to his principal in damages; the principal may at his

option refuse to let the transactions stand for his account.

This section does not affect the rules of sect. 685\(^{(m)}\) of the Civil Code.

386. If a commission merchant sells at a lower or buys at a higher price than that in accordance with his instructions, the principal must, if he wishes to repudiate the transaction for his account, make a declaration to that effect immediately upon receiving the notification as to the conclusion of the transaction; failing this he will be held to have ratified the departure from his instructions as to price.

If the commission merchant, when reporting the conclusion of the transaction, offers to cover the difference in price himself, the principal may not repudiate, provided always that the right of the principal to claim damages in respect of any loss incurred in excess of the difference between the two prices remains hereby unaffected.

387. If the commission merchant concludes a transaction on more favourable terms than those mentioned in his instructions, the principal is to have the benefit of such terms.

This applies in particular to sales effected at a

\(^{(m)}\) See Schuster, p. 269. By this section an employee may deviate from his instructions if he has good reason to think his employer would have varied them had he known the true facts. But he may only do so if the matter does not permit of the delay which would be necessary for obtaining fresh instructions.
price above, and purchases effected at a price below that named by the principal as his limit.

388. If goods forwarded to a commission merchant are delivered in a damaged or defective condition recognisable by their outward appearance, the commission merchant must preserve all rights against the carrier of the goods, or the master of the vessel in which they were carried must take care to preserve the evidence of their condition upon delivery, and inform his principal forthwith; failure to do so renders him liable to pay damages.

If the goods are of a perishable nature, or if they are subsequently affected in a manner likely to cause their depreciation, or if there is no time to obtain the instructions of the principal as to the disposal of the goods, or if the principal is dilatory in giving his instructions, the commission merchant may sell the goods in accordance with the rules of sect. 373.

389. If the principal fails to give any instructions as to the disposal of the goods, although it is his duty so to do by reason of the circumstances, the commission merchant may exercise the rights conferred upon a vendor by sect. 373.

390. A commission merchant is liable for the loss or deterioration of goods which come into his custody, unless such loss or deterioration is due to circumstances which could not have been avoided by the diligence of a careful mercantile trader (n).

(n) The burden of proof is on the commission merchant to show that he has exercised the diligence of a careful mercantile trader.
A commission merchant is only liable for failure to insure goods if his principal had instructed him to insure them.

391. Upon the purchase of goods on behalf of a principal by a commission merchant, if the transaction is a mercantile one bilaterally, the principal is affected *mutatis mutandis* by the rules applying to a purchaser contained in sects. 377—379, in respect of—

1. His duty to examine the goods and immediately inform the commission merchant of any defects discovered:

2. The safe keeping of the rejected goods:

3. The sale of goods where there is risk of deterioration.

The principal's right to have assigned to him the claims of the commission merchant against the party from whom the latter bought upon his instructions is unaffected by delay in making a declaration as to any defect discovered.

392. Claims arising out of transactions concluded by a commission merchant cannot be enforced by his principal against the debtor until they have been assigned to him.

But even before such assignment is made, such claims as between the commission merchant or his creditors and the principal are deemed to be vested in the principal.

393. A commission merchant who, without the
consent of his principal, makes an advance or allows credit to a third party, deals at his own risk.

If, however, the mercantile custom of the place at which the transaction is concluded allows credit to be given in respect of the purchase money, such credit may, in default of instructions to the contrary from the principal, be allowed by the commission merchant.

A commission merchant who sells goods on credit without authority to do so, becomes liable to the principal for the immediate payment of the purchase price. If this price would have been less if paid in cash, he is only liable for the lesser amount, and if this amount is less than the lowest price in accordance with his instructions, the difference between the two prices in addition in accordance with sect. 386.

394. The commission merchant is responsible for the performance of the obligations undertaken by the party with whom he concluded the transaction on the instructions of his principal only if he expressly undertook such responsibility or if such responsibility on his part is presumed by the mercantile custom of the place where he carries on business.

The commission merchant is, where so responsible, directly liable to his principal for the strict performance of the agreement entered into in point of time, in so far as performance can be claimed by virtue of the contract. Where so responsible he can claim a special commission (del credere commission).
395. A commission merchant instructed to purchase a bill of exchange, if he endorses it, is bound to do so in the customary manner without making any reservations as to his liability.

396. A commission merchant may claim his commission upon the completion of the transaction. If the transaction has not been completed, he has nevertheless a claim to a commission on re-delivery (o), if such claim is sanctioned by local custom. In addition he may claim commission upon non-completed transactions, the non-completion of which is due solely to some cause for which the principal himself is responsible.

The commission merchant's right to make the charges authorised by sects. 670 and 675 of the Civil Code (p) includes also the right to charge his principal for the warehousing and transport of goods when performed by himself.

397. A commission merchant, so long as he is in possession of the goods which form the subject-matter of his instructions, or more particularly can exercise a right of disposal over them by means of a bill of lading, carrier's receipt or warehouse receipt, has a right of pledge (q) over them available to secure any claims he may have in respect of disbursements made in respect of the goods, his

(o) I.e., on redelivering to the principal the goods entrusted to him to sell.

(p) I.e., charges in respect of any outlay, the necessity of which the commission merchant was entitled to assume. See Schuster, p. 269.

(q) See ante, note to sect. 367.
commission, advances and loans made on the security of the goods and liabilities incurred in connection therewith, either by signing negotiable instruments or otherwise as well as for all claims on current account \((r)\) in respect of business transacted upon commission.

398. The commission merchant may, even when the goods which form the subject-matter of his instructions are his own property, satisfy any claim he may have of the description specified in sect. 397 out of the proceeds of sale of the goods themselves in accordance with the rules applicable to the right of pledge \((s)\).

399. A commission merchant may satisfy any claims he may have of the description specified in sect. 397 out of any payments due from third parties in respect of business transacted on the instructions of his principal in priority to the principal or his creditors.

400. A commission merchant instructed to buy or sell goods which have a market price or securities quoted on any public exchange may, in the absence of instructions to the contrary from his principal, carry out the transaction in such a manner that he himself becomes the purchaser or vendor of the goods or securities in question \((t)\).

\(r\) See ante, s. 355.

\(s\) See Schuster, p. 470.

\(t\) Literally, "That he himself delivers the goods which he is ordered to buy as seller, or takes over the goods which he is ordered to sell as buyer."
In such cases the commission merchant's duty of rendering an account as to the execution of the sale or purchase is restricted to that of proving to his principal that the price at which the sale or purchase was effected did not vary from the exchange or market price current at the time of such sale or purchase. The time of such sale or purchase is to be deemed to be that at which the commission merchant sent off to his principal the notification as to its execution.

If the notification as to the execution of a sale or purchase, which was to be effected according to the instructions in the business hours of the exchange or market, is not sent off till after the closing of the exchange or market, the price set down in account must not be less favourable to the principal than the price quoted at the closing of the exchange or market.

In the case of a sale or purchase to be effected at a specified price (e.g., the opening, middle, or closing price), the commission merchant is authorised and bound to set down such transaction in account at the price specified irrespective of that quoted at the time the notification was sent off.

In the case of the sale or purchase of securities or goods which have an officially quoted exchange or market price, if the commission merchant constitutes himself a principal in the transaction, it must be carried out at a price not less favourable than that quoted officially.

401. In respect of transactions in which the com-
mission merchant constitutes himself a principal, if by the exercise of greater diligence he could have effected them at a price more favourable to his principal than that fixed in the manner specified in sect. 400, the price entered in the account must be the most favourable one for the principal which was obtainable.

If the commission merchant before sending off the notification to his principal has, in consequence of the order given, effected a transaction with a third party upon the exchange or in the market, the price set down in account with his principal must be not less favourable to him than the price fixed upon the conclusion of such transaction (u).

402. The rules of sect. 400, paragraphs 2—5, and sect. 401 cannot be modified by agreement to the prejudice of the principal.

403. A commission merchant who constitutes himself buyer or seller to his principal, is entitled to the customary commission, and may claim all other charges customary in respect of transactions entered into on commission.

404. The rules of sect. 397 and sect. 398 apply also to transactions in which the commission merchant constitutes himself a principal.

(u) I.e., if the commission merchant sells his own goods or securities to his principal, but before sending off the notification covers himself by buying from a third party on the exchange or in the market, he must not charge his principal a price less favourable than that which he himself obtained from the third party.
405. If the commission merchant, in his notification as to the carrying out of the transaction, does not expressly state that he wishes to constitute himself a principal, such notification has the effect of a declaration that the transaction has been effected with a third party for the account of the principal.

Any agreement between principal and commission merchant to the effect that a declaration as to whether the transaction was effected by the commission merchant as principal or as an intermediary may be made later than on the day on which the notification as to the execution of the transaction was sent off is null and void.

If the principal revokes his order and the revocation reaches the commission merchant before he has sent off his notification of the execution of the order, the right to constitute himself a principal may no longer be exercised by the commission merchant.

406. The rules of the present part of this Code apply also to transactions other than those of the description specified in sect. 383 which a commission merchant in the course of his mercantile trade undertakes to enter upon in his own name upon the instructions of another, as well as to transactions undertaken in a similar manner by a mercantile trader who is not a commission merchant in the course of his mercantile trade.

For the purposes of the present part of this Code, orders for sale or purchase shall be deemed to include orders in respect of a non-fungible (v)

(v) See note on p. 186, ante.
moveable chattel, to be manufactured by the person undertaking so to do from his own material.

PART IV. FORWARDING AGENCY.

407. A forwarding agent is a person who in the regular course of his trade undertakes the forwarding of goods by the agency of carriers by land or sea in his own name but upon the instructions of another.

Upon all points not specifically dealt with by the present part of this Code, the rights and liabilities of a forwarding agent are regulated by the rules applying to commission merchants, and more particularly those of sects. 388—390 dealing with the receipt, safe-keeping and forwarding of goods.

408. The forwarding agent, in carrying out the forwarding of the goods and in particular in the selection of carriers by land or sea and sub-agents, must act with the diligence of a careful mercantile trader; he must protect the interests of the sender and carry out his instructions.

He may not charge the sender with a higher rate than that agreed upon between himself and the carrier.

409. The forwarding agent is entitled to claim his commission \((w)\) when the goods have been delivered to the carrier by land or sea for the purpose of being forwarded.

\((w)\) The forwarding agent is usually remunerated by a commission on the freight.
410. The forwarding agent has a right of pledge\(^{(x)}\) over the goods forwarded by way of security for freight paid for his own commission for outlay and for expenditure as well as for advances made on the goods, so long as he retains them in his possession, or more particularly can exercise a right of disposal over them by means of a bill of lading, carrier's or warehouse receipt.

411. A sub-agent employed by a forwarding agent may exercise the same rights as the principal forwarding agent and in particular his right of pledge.

If the principal agent's claim is satisfied by his sub-agent, the claim and right of pledge of the former pass to the latter. In the same way the claim and right of pledge of the carrier pass to the sub-agent upon his satisfying the carrier's claim.

412. The forwarding agent has authority, in the absence of any agreement to the contrary, to perform the forwarding himself.

If he makes use of this authority, he has at the same time the rights and obligations of a carrier, he may claim commission and such other charges as are regular in respect of forwarding transactions, as well as the usual freight or charge for carriage.

413. The rights and liabilities of a forwarding agent who has made an agreement with the sender of goods to charge a fixed rate for the forwarding thereof are those of a carrier exclusively. He

\(^{(x)}\) See ante, note to sect. 366, p. 176.
cannot claim a forwarding agent's commission in the absence of express stipulation.

If he effects the forwarding of the goods of any one principal in conjunction with those of other principals by means of a single contract entered into for the carriage of all such goods, the provisions of paragraph 1 apply, even if no agreement as to a fixed rate has been come to. In such a case the charge made must be for freight or carriage at a rate reasonable under the circumstances, but in no case higher than the ordinary rate which would have been chargeable had the goods been forwarded separately.

414. Claims against a forwarding agent in respect of the loss, deterioration, damage, or late delivery of goods become barred in one year. The period of prescription may be extended by agreement.

In the case of damage or deterioration such period runs from the expiration of the day upon which the goods were delivered, or in the case of loss or late delivery, from the day upon which they ought to have been delivered.

After the termination of the period of prescription the claims specified in paragraph 1 can only be set off against claims by the forwarding agent if notice of the loss, deterioration, damage, or late delivery was given or sent off before. The notice to the forwarding agent is equally good if an application has been made to take evidence of the facts judicially for the sake of preserving the evidence or
if the forwarding agent obtains such notice in the course of litigation arising out of such loss, deterioration, damage, or late delivery and carried on between the sender and the consignee, or some person subsequently acquiring the property in the goods.

These rules do not apply to loss, deterioration, damage, or late delivery wilfully caused by the forwarding agent.

415. The rules of the present part of this Code are applicable in the case of any mercantile trader who is not a forwarding agent within the definition given above, but who in the course of his trade undertakes the forwarding of goods upon the instructions of another in his own name by the agency of a carrier by land or sea.

PART V. THE BUSINESS OF WAREHOUSEMAN.

416. A warehouseman is a person who in the regular course of his trade undertakes the storage and custody of goods.

417. The rights and liabilities of a warehouseman in respect of the receipt, custody and insurance of goods are regulated by the rules of sects. 388—390, having application to commission merchants.

Should the goods be affected by a change of circumstances of such a kind as to cause apprehension of their depreciation, the warehouseman
must immediately notify the bailor thereof. Failure to do so renders him liable to pay compensation for any resulting damage.

418. A warehouseman must allow a bailor access to the warehoused goods at any time during business hours for the purposes of inspecting them, taking samples of them, or providing for their preservation.

419. In the case of the warehousing of fungible endeavors a warehouseman may not, in the absence of express permission, intermix them with other things of the same variety and quality.

Even where such permission is given, a warehouseman does not acquire any property in the goods. Out of the aggregate formed by the intermixture he may deliver to each individual bailor the portion to which he is entitled without obtaining the consent of the other parties entitled to a share in such aggregate.

If the goods are deposited in such a manner that the property therein passes to the warehouseman, and he is bound to redeliver goods of the same variety, quality and quantity, the rules of the present part of this Code have no application.

(x) See note on p. 186, ante.
(y) It is quite clear from sects. 447, 448 of the Civil Code that where goods belonging to different owners are inseparably intermixed, each of such owners takes an undivided share in the mixture, and the warehouseman acquires no rights of ownership whatsoever. The express statement to this effect in this paragraph is apparently inserted to avoid any misunderstanding which might arise from the warehouseman performing acts in respect of the goods which might otherwise appear only consistent with ownership.
420. The warehouseman is entitled to warehouse rent in accordance with agreement, or in default thereof in accordance with local custom, as well as to reimbursement for all outlays in respect of freight or duties or any other expenditure incurred in connection with the goods, in so far as he was entitled to consider such outlays as necessary under the circumstances.

In respect of such of the above-named claims of the warehouseman (hereinafter called warehousing charges) as arise out of payments made in cash, immediate repayment may be claimed. The remaining warehousing charges must be paid on the expiration of a period of three months after the bailment of the goods or, if the goods are withdrawn from the warehouse before the expiration of such a period, then at the date of the withdrawal thereof; if the goods are partially withdrawn, only a proportionate part of the warehouse charges are payable, unless the goods left in warehouse are insufficient to provide the warehouseman with security for the balance owing to him.

421. The warehouseman has a right of pledge (z) over the goods for the warehousing charges, so long as he retains possession of them, or more particularly can exercise a power of disposal over them by means of a bill of lading, carrier’s or warehouse receipt.

(z) See note to sect. 366, p. 176, ante.
422. The warehouseman cannot demand the removal of the goods by the bailor before the expiration of the period of bailment agreed upon, or in default of any agreement as to such period, then not before three months after the delivery. In the absence of any agreement as to the duration of the period of bailment, or in the case of the goods being retained by the warehouseman after the expiration of the agreed period, he can only demand their removal after giving one month’s previous notice.

A warehouseman may upon any cogent grounds demand the removal of the goods before the expiration of the period of bailment and without notice.

423. The limitation of claims against a warehouseman in respect of the loss, deterioration, damage or late delivery of goods is regulated mutatis mutandis by the rules of sect. 414. In case of total loss the period of limitation runs from the expiration of the day upon which notice of such loss was given by the warehouseman to the bailor.

424. If the warehouseman issues a warehouse receipt which is transferable by indorsement, then, if he has taken over the goods, the delivery of such receipt to the person thereby entitled to claim possession of the goods has the same effect with regard to the acquisition of rights in the goods as the delivery of the goods themselves.
PART VI. THE BUSINESS OF CARRIAGE BY LAND.

425. A carrier by land is one who in the usual course of his trade undertakes to carry out the forwarding of goods by land (including the carriage of goods on rivers and other inland waters).

426. A carrier is entitled to demand the issue of a letter of advice by the sender. Such letter of advice must state:—

1. The place and date of the issue thereof.
2. The name and address of the carriers.
3. The name of the person to whom the goods are to be delivered (hereinafter called the consignee).
4. The place for delivery.
5. The description of the goods as regards their nature, quantity, and marks.
6. The description of the papers which must accompany them for purposes of customs and excise and of police examination.
7. The agreement as to the carriage payable, and in the case of payment thereof in advance an acknowledgment of such payment.
8. Any special arrangements which may have been come to between the parties interested as to other points.

(z) In the present part (Part VI.) the term “frachtführer,” literally “carrier by land,” has for purposes of brevity been rendered simply “carrier.”
E.g., the time within which delivery is to be made, the compensation to be payable in case of late delivery, and the payments upon the making of which delivery is conditional.

(9) The signature of the sender.

For this purpose a signature produced by any process of mechanical reduplication is sufficient.

The sender is liable to the carrier for the correctness and sufficiency of the information included in the letter of advice.

427. The sender is bound to deliver to the carrier the papers which, for the purposes of the customs, excise, and police regulations, must be presented to the proper authorities before the delivery of the goods to the consignee. He is liable to the carrier for any consequences resulting from the absence, insufficiency, or incorrectness of such papers, for which the carrier himself is not responsible.

428. If no agreement is made as to the time within which the carrier must complete the carriage of the goods, the time limits for the commencement and completion of the journey are to be regulated by local custom, or in default of any local custom are to be such as are reasonable according to the special circumstances.

If the beginning or continuation of the carriage of the goods is temporarily prevented by circumstances for which the sender is not responsible, he may rescind the contract; but he must in such case compensate the carrier if he is not in default for his
work and expense in respect of his preparations for the journey, the unloading of the goods, and any part of the journey already performed. The amount of such compensation is to be regulated by local custom, or in default of any such custom is to be determined according to what is reasonable under the circumstances.

429. The carrier is liable for damages resulting from loss or injury occurring to the goods in the period intervening between their receipt by the carrier and his delivery of them, or resulting from late delivery, unless such loss, injury, or lateness is due to circumstances which could not have been avoided by the diligence of a careful carrier.

A carrier is not liable for the loss or deterioration of valuables, works of art, money, or negotiable instruments, unless he was informed of their nature or value at the time they were entrusted to him.

430. In the case of compensation for total or partial loss payable by a carrier under the contract of carriage, the amount to be paid is the ordinary market value of the goods, or in the absence of any such value (a), then the ordinary value possessed by goods of the same description and quality at the place and time at which delivery ought to have been made, deducting therefrom the amount saved owing to the loss in customs duties, other expenses, and carriage.

(a) I.e., if the goods are of a kind which do not possess a regular market value, e.g., "carved oak sideboards."
In the case of injury to the goods, the amount payable is the difference between the selling value of the goods in their damaged condition and their ordinary market value (when undamaged), or the ordinary value which they would have had if undamaged at the time and place at which delivery ought to have been made, deducting the amount saved in customs duties and other expenses owing to the goods having been injured.

If the damage occurred owing to the wilful act, or owing to gross negligence of the carrier, the full damage suffered may be recovered.

431. A carrier is liable for the defaults of his employees or of other persons whom he makes use of in the course of the transport of the goods to the same extent as for his own defaults.

432. If a carrier in order to carry out the contract of carriage undertaken by himself hands over the goods to another carrier, he remains liable for the carrying out of such contract until the delivery of the goods to the consignee.

The carrier to whom the goods are handed over by the receipt of the original letter of advice becomes a party to the contract, and thereby directly takes over the obligation to carry out the transport according to the terms of the letter of advice.

If by reason of these rules one of the carriers concerned has been forced to pay damages, he has
a right of indemnity over against the carrier by whose default the damage was caused.

If it cannot be ascertained which carrier was responsible for the damages, each of the carriers concerned must contribute to the compensation payable pro rata of his share in the total amount of the carriage payable, provided that he is unable to prove that the damage did not happen while the goods were in his charge.

433. (b) The sender has power to give notice to the carrier to retain or return the goods, or to deliver them to a consignee other than the one named in the letter of advice. The extra cost incurred by such a proceeding must be repaid to the carrier.

The sender's right of disposal over the goods is extinguished if the letter of advice is delivered to the consignee after the goods have once arrived at the place of delivery or if proceedings under sect. 435 have been commenced by the consignee against the carrier. In such a case the carrier is bound to obey the instructions of the consignee alone, under pain of becoming liable to him in respect of the goods.

434. The consignee has authority as against the carrier, even before the arrival of the goods at the place of delivery, to take all necessary measures for the preservation of the goods, and for this purpose to give the carrier all necessary instructions.

(b) The provisions of this section do not apply in a case where a carrier's receipt has been issued. See post, sect. 447.
He can only require the carrier to deliver the goods before their arrival at the place of delivery if the carrier has the sender's permission to do so.

435. After the arrival of the goods at the place of delivery, the consignee is authorised to enforce the rights arising out of the contract of carriage, provided that he has performed his own obligations thereunder in his own name as against the carrier, irrespectively of whether in so doing he is acting on behalf of himself or another. In particular he has the right to demand that the letter of advice should be given up to him and that the goods should be delivered to him. The right is extinguished upon the receipt by the carrier of contrary instructions from the sender, given in a manner permissible under sect. 433.

436. The receipt of the goods and the letter of advice renders the consignee liable to make all payments due to the carrier in accordance with the letter of advice.

437. If the consignee cannot be found, or if he refuses to take delivery, or if delivery is prevented in any other manner, the carrier must immediately notify the sender thereof and obtain his directions.

If circumstances render this impracticable, or if the sender fails to send in his directions at the proper time or sends directions which cannot be carried out, the carrier has power to deposit the goods in a public warehouse or in some other safe manner. If the goods are perishable, and delay...
involves risk, he may also have the goods sold in accordance with sect. 373, paragraphs 2—4.

The carrier must, unless it is impracticable, inform the sender or consignee of such deposit or sale without delay; failure to do so renders him liable to pay damages.

438. The payment of the carriage and all other sums due in respect of the goods in conjunction with the acceptance thereof extinguishes all claims against the carrier arising out of the contract of carriage.

This rule does not apply if the damage or deterioration of the goods was certified by officially appointed experts prior to the acceptance thereof.

A claim in respect of the damage or deterioration of goods, not discoverable from their outward condition, may be made against the carrier even after their acceptance and the payment of the carriage, if the defect was caused during the period intervening between the receipt of the goods by the carrier and their delivery, and if the existence of the defect is certified by officially appointed experts immediately after the discovery thereof and not later at most than one week after the acceptance of the goods. If notice of the defect is given to the carrier immediately after the discovery thereof and within the period specified, it will be sufficient if the certification by experts is applied for immediately after that point of time at which, under ordinary circumstances, an answer from the carrier might have been expected to arrive.
The costs of a certification by officially appointed experts applied for by the consignees must be borne by the carrier if damage or deterioration is discovered, with respect to which the carrier is liable in damages.

The carrier cannot avail himself of these rules if the damage was caused by his own wilful act or by gross negligence.

439. The limitation of rights of action against a carrier in respect of loss, deterioration, damage or late delivery of goods is regulated *mutatis mutandis* by the rules of sect. 414, but this does not apply to the rights of action specified in sect. 432, paragraph 3.

440. The carrier has a right of pledge (b) over the goods to secure all claims which he may have arising out of the contract of carriage, and more particularly in respect of carriage and demurrage, the payment of duty and other outlays, as well as advances made on the security of the goods.

The right of pledge holds good as long as the carrier retains the goods in his possession or more particularly can exercise a right of disposal over them by means of a bill of lading, warehouse receipt, or carrier's receipt (c).

A right of pledge over the goods is retained even after the delivery, provided that the carrier enforces it judicially within three days of the delivery

(b) See note to sect. 386, p. 176, ante.
(c) See Schuster, pp. 460, 461.
and the goods still remain in the possession of the consignee.

Due warning in accordance with sect. 1234 \((d)\), paragraph 1, of the Civil Code, of the carrier’s intention to sell the object of his right of pledge as well as the notifications specified in sects. 1237 and 1241 of the Civil Code, must be given to the consignee. If the consignee cannot be found or refuses to accept the goods, the warning and notification must be given to the sender.

441. Unless otherwise provided by the letter of advice, the last carrier in possession of the goods must, when making delivery, collect the amounts owing to the preceding carriers, and the payments on the making of which delivery is conditional, and exercise on their behalf the rights which they possess, and more particularly their right of pledge \((dd)\). The right of pledge of the preceding carriers remains in existence till the extinction of the right of pledge of the last carrier.

If a carrier satisfies the claim of one of those preceding him, the rights of the latter in respect of payment and his right of pledge pass to the former.

In the same manner the rights of a forwarding agent in respect of payment and his right of pledge pass to the forwarding agent who succeeds him or to the carriers.

\((d)\) As to sects. 1234 and 1237 of the Civil Code, see Schuster, p. 472.

\((dd)\) See note, p. 167, ante.
442. A carrier who delivers goods without receiving payment and does not within three days enforce his right of pledge by judicial process, is liable to the preceding carriers or forwarding agents. He loses his right of indemnity over against the preceding carriers and forwarding agents and in the same manner they lose their right of indemnity against those preceding them. His claim against the consignee remains good.

443. If in respect of the same goods there is in existence more than one right of pledge based upon the provisions of sects. 397, 410, 421 and 440, which has arisen by reason of the despatch or forwarding of the goods, such rights rank in accordance with the time at which they arose, the later taking priority over the earlier.

All of such rights take priority over any rights of pledge arising otherwise than by the forwarding of the goods which may be vested in commission merchants or warehousemen as well as any rights of pledge of forwarding agents or carriers to secure advances made.

444. A document (hereinafter called a carrier's receipt) stating his obligations with regard to delivery may be issued by a carrier.

445. The carrier's receipt must state:—

(1) The place and date of the issue thereof.
(2) The name and address of the carrier.
(3) The name of the sender.

(e) I.e., liable for any resulting loss of rights.
(4) The name of the person to whom or to whose order the goods are to be delivered; if the receipt is only made out to order, the sender is to be deemed such person.

(5) The place of delivery.

(6) The description of the goods as regards their nature, quantity, and marks.

(7) The agreement as to the rate of carriage, as to the charges upon payment of which delivery is to be conditional, and in case of payment of the carriage in advance an acknowledgment of such payment.

The receipt must be signed by the carrier.

The sender must upon request furnish the carrier with a copy of the carrier’s receipt signed by himself.

446. The carrier’s receipt is decisive as to the rights and liabilities existing as between the carrier and the consignee. Any terms of the contract of carriage not actually stated in the carrier’s receipt are inoperative as against the consignee, unless expressly referred to in the carrier’s receipt.

The rights and liabilities existing as between the carrier and the sender are, notwithstanding the issue of a carrier’s receipt, determined by the contract of carriage.

447. The person to whom the goods are made deliverable by the carrier’s receipt, or if such receipt
is made out to order, the indorsee, is the person authorised to receive the goods.

The person authorised to receive the goods has, even before their arrival at the place of delivery, the same rights relating to the disposal thereof as the sender has when no carrier's receipt is issued (f).

The carrier may not obey any directions of the sender to retain or return the goods, or deliver them to any person other than the person entitled by the carrier's receipt to receive them, unless such receipt is returned to him. Any breach of this rule renders him liable for the value of the goods to the lawful holder of the carrier's receipt.

448. A carrier is not bound to deliver the goods unless the carrier's receipt is returned to him with an acknowledgment of the delivery of the goods indorsed thereon.

449. In the case specified in sect. 432, paragraph 1, the liabilities of a carrier who takes over goods from another carrier upon the basis of a carrier's receipt are regulated by the terms of such receipt.

450. The delivery of a carrier's receipt to the person thereby entitled to receive the goods has, if the goods have been taken over by the carrier, the same effect as regards the acquisition of rights in respect of the goods as the delivery of the goods themselves.

(f) See ante, sect. 433, para. 1.
451. The rules of sects. 426—450 apply also in the case of a mercantile trader not being a regular carrier but who in the course of his business undertakes to carry out the forwarding of goods by land, river or other inland waters.

452. The rules of the present part of this Code have no application to the forwarding of goods by the postal authorities of the Empire or the Federal States. Such postal authorities are not mercantile traders within the meaning of this Code.


453. A railway (g) which carries on a public goods traffic may not refuse to receive goods for forwarding at any station adapted to goods traffic within the German Empire, provided that—

(1) The sender conforms to the conditions as to forwarding and other general regulations of the railway.

(2) The forwarding is not forbidden by any rule of law or otherwise upon public grounds.

(3) The goods are such as are permitted to be carried by the railway traffic regula-

(g) The railway has throughout this part (VII) of the Code been personified in the translation in the same way as it is in the original. Although this personification may at times render the English somewhat unusual, it was necessary in order not to depart too far from the original, and in order to avoid cumbrousness.
tions (h), or any rules published in accordance therewith, and are such as are possible to be carried in view of the nature and traffic of the lines concerned.

(4) The forwarding is possible by the usual machinery for the carriage of goods.

(5) The forwarding is not prevented by events which constitute vis major.

A railway is only obliged to receive goods for forwarding, if the forwarding can take place immediately. The liability to receive goods for temporary safe-keeping which cannot be forwarded immediately depends on the provisions of the railway traffic regulations.

The forwarding of goods is to be effected in the order of priority in which they were received for the purpose of forwarding, unless there are cogent grounds for making an exception to this rule by reason of the state of traffic on the railway or the public interest.

Any breach of these rules may be the foundation of a claim in respect of the resulting damage.

454. Where not expressly otherwise provided by the present part of this Code or by the railway traffic regulations, the rules of Book III., Part VI., of this Code apply to the case of railways carrying on a public goods traffic.

(h) These regulations are issued from time to time by the Imperial Chancellor with the consent of the Federal Council for the whole of the German Empire with the exception of Bavaria. In Bavaria they are issued by a particular Government Department.
455. It is the duty of a railway, at the request of the sender, to acknowledge the receipt of goods upon a duplicate of the letter of advice stating the date upon which they were received for the purpose of forwarding; the sender must produce the duplicate together with the original letter of advice.

In the case of the issue of a duplicate letter of advice, the sender can only exercise the powers specified in sect. 433 upon production of such duplicate. If the railway follows the instructions of the sender without demanding the production of the duplicate letter of advice, it becomes liable for any resulting damage to the consignee to whom such document has been handed over by the sender.

456. The railway is liable for damage caused by any loss or deterioration of the goods occurring during the period between the acceptance of the goods for the purpose of forwarding them and the delivery thereof, unless such damage was caused—

(1) By the default of the person entitled to dispose of the goods, or by any directions received from such person and not given by reason of any default on the part of the railway; or
(2) By *vis major*; or
(3) By some defect in the packing of the goods not discoverable from their external appearance; or
(4) By the nature of the goods themselves
CARRIAGE BY RAILWAYS.

By spontaneous deterioration (i), shrinkage, or ordinary leakage.

The rules laid down in sect. 429, paragraph 2, apply.

457. If by reason of a contract of carriage a railway becomes liable to pay compensation for the total or partial loss of goods, such compensation is to be assessed according to the ordinary mercantile value of the goods, or in default of any such value, then the ordinary value fetched by goods of the same description and quality at the place of consignment at the time of their receipt by the railway for the purpose of forwarding in addition to the amount of the expense already incurred in respect of duties, other charges, and carriage.

In the case of the deterioration of the goods the amount to be paid is the amount by which the value assessed in the method specified in paragraph 1 has been diminished.

If the damage was caused by the wilful act or gross negligence of the railway, compensation may be claimed for the full amount of damage suffered.

458. The railway is responsible for the acts of its employees, and for other persons of whose services it avails itself, in executing a contract of carriage.

459. A railway is not liable:

(1) In respect of damage to goods incurred

(i) By “inneren verderb,” the phrase here translated “spontaneous deterioration,” is meant any process engendered by the goods themselves by which they are damaged, e.g., spontaneous combustion.
owing to their being forwarded in open trucks in accordance with the conditions of the company's tariffs or the special terms of the letter of advice.

(2) In respect of damage resulting from the failure to pack, or the improper packing of goods the nature of which makes proper packing necessary in order to prevent loss or injury during the transport, but which, as shown by a declaration of the sender written on the letter of advice, were handed over for transport unpacked, or packed in a defective manner.

(3) In respect of damage resulting to goods from risks connected with the loading and unloading or defective loading of goods the loading and unloading of which, in accordance with the conditions of the railway's tariff or the terms of the letter of advice, are undertaken by the sender or the consignee.

(4) In respect of damage arising out of certain risks (e.g., breakage, rust, spontaneous deterioration, unusual leakage, evaporation, or disintegration) to goods the nature of which makes them peculiarly liable to such risks.

(5) In respect of damage resulting from injury

(k) See note to sect. 456.
to living animals arising out of the special risks incident to the carriage thereof:

(6) In respect of damage to goods (including animals), caused by some risk which is sought to be avoided by a provision contained in the railway traffic regulations, the tariff of the railway or the letter of advice according to which such goods must be accompanied during the journey by some person placed in charge thereof.

If any damage which has occurred to goods might under the circumstances have been caused by any of the risks specified in paragraph 1 of this section, such damage shall be presumed to have been so caused.

The railway cannot avail itself of the rules of this section if the damage in question was caused by its own default.

460. In the case of goods which by their nature regularly undergo a reduction of weight in the course of the transport, no liability in respect of loss of weight is incurred by the railway up to the limit laid down in the railway traffic regulations.

Such limit will, in the case of several parcels forwarded under the same letter of advice, be determined separately in respect of each of such parcels if the weight of the individual parcels is
shown separately in the letter of advice or can be otherwise determined.

Such limitation as to liability does not apply if, under the circumstances, the loss cannot be deemed to have been caused by the nature of the goods, or if the limit which it is sought to apply is inapplicable, having regard to the nature of the goods or the other circumstances of the case.

In the case of a total loss no deduction from the amount payable in damages is allowed on the ground of loss of weight (l).

461. Railways may by a special arrangement (hereinafter called a special tariff) name a limit beyond which they will not be liable for the loss of or injury to goods forwarded provided that such special tariff is published, that a reduction is made on the ordinary rates of carriage for the entire forwarding, and that the same limit of liability remains in force during the entire transport of the goods. Such a limitation of liability is inoperative in the case of damage caused by wilful default or gross negligence on the part of the railway.

462. The extent to which the liability of a railway in respect of the loss or deterioration of valuables, works of art, money and negotiable instruments can be limited by the fixing of a maximum amount by the railway is determined by the railway traffic regulations. The rule laid

(l) E.g., the railway company is not allowed to say, "True, we have lost 6 tons of your sawdust, but in any case 1 cwt. would have leaked away: so we will only pay you compensation for 5 tons 19 cwts."
down in sect. 461, paragraph 2, applies *mutatis mutandis*.

463. If the amount of the interest involved in the punctual delivery of goods is stated in a declaration made in accordance with the provisions of the railway traffic regulations and included in the letter of advice, luggage receipt or way-bill, in the event of the loss of or injury to the goods, damages over and above those assessed in the manner specified in sect. 457, paragraphs 1 and 2, may be claimed for the additional loss suffered up to the amount stated in the declaration.

If the railway’s liability is limited to a maximum amount in accordance with the rules of sect. 461 or sect. 462, the amount stated in the declaration of the interest involved in punctual delivery must not exceed such maximum amount.

464. In the case of damage or deterioration not discoverable from the outward appearance of the goods, upon their receipt by the consignee no claim under sect. 438, paragraph 3, may be made against the railway, unless within one week of such receipt an application is made either to the Court for an examination by experts or in writing to the railway for an investigation to be conducted by the railway itself in accordance with the railway traffic regulations for the purpose of establishing the existence of the defect discovered.

The railway cannot avail itself of this rule in the case of damage occasioned by its own wilful default or gross negligence.
465. A railway is not liable for the loss of passenger’s luggage handed in to it for carriage to a particular station unless such luggage is claimed at such station within eight days after the arrival of the train for carriage by which it was handed in.

The extent to which the railway company can limit its liability to pay damages for the loss or injury to luggage entrusted to it for carriage by naming a maximum amount for which it accepts liability is controlled by the railway traffic regulations.

In respect of damage occasioned by wilful default or gross negligence on the part of the railway, no such limitation is operative. In respect of the loss of or injury to passenger’s luggage not entrusted to it for carriage, and of objects left in railway carriages (m), the railway is not liable unless in default.

466. The railway is liable for damage arising out of late delivery, unless such lateness arose from an event which it neither caused nor could have prevented.

Such damage is not recoverable to an extent in excess of the amount stated in the declaration of the amount involved in punctual delivery made in the letter of advice, luggage receipt, or way-bill, in accordance with the railway regulations, and in default of any such declaration the amount of the carriage chargeable. In the case of passenger’s

(m) Literally, "in rolling stock which has been sent off."
luggage another limit may be fixed in accordance with the railway traffic regulations in place of the amount of the carriage.

The extent to which compensation may be claimed for damage in the absence of proof thereof is controlled by the railway regulations.

Compensation is recoverable for the full amount of damage suffered if the failure to deliver at the proper time was caused by wilful default or by gross negligence on the part of the railway.

467. If objects, the carriage of which is prohibited or only undertaken under special conditions, are handed in to the railway under a false or inaccurate description, or if the sender fails to observe the precautionary rules in force with reference to such objects, the railway is divested of any liability arising out of the contract of carriage.

468. A railway may, if the place named for delivery in the letter of advice is one not situated upon its line, stipulate to be liable as carriers only as far as the station nearest to the place of delivery, and to undertake the liability of forwarding agents in respect of the further carriage of the goods.

469. If the forwarding of goods is effected upon the terms of the same letter of advice by several successive railways in a manner similar to that specified in sect. 432, paragraph 2, claims arising out of the contract of carriage can only be enforced by action against the railway which originally received the goods, or the last railway to take them
over together with the letter of advice, or the railway upon the line of which the damage occurred; provided always, that nothing contained in this paragraph affects the right of the railways concerned to claim indemnity *inter se.*

The plaintiff may elect to sue which he likes of the above specified railways; but such right of election is extinguished by the issue of the writ.

Claims arising out of a contract of carriage may be raised by way of counterclaim or set-off against a railway other than one of those specified, if the claim in respect of which such railway is suing is based upon the same contract of carriage.

*470.* Claims by a railway for additional payments in respect of insufficient charges for carriage or dues, as well as claims against a railway for reimbursement in respect of excessive charges, provided that they are based upon a mistaken application of the tariff or calculation of the amount due, become barred after the lapse of one year from the date upon which payment was made.

The barring of claims for the repayment of such excessive charges, as well as of claims of the description specified in sect. 439, sentence 1, is suspended (yy) by the making of a written demand in respect of such claim to the railway. If such demand is answered by a refusal, the period of limitation begins to run again from the date upon which the railway company makes known its intention by writing to the claimant and returns him any docu-

( yy) As to the suspension of prescription, see Schuster, p. 132.
ments which may have accompanied such demand as evidence. Further applications to the railway company or the superior authorities have no suspensive effect upon the barring of such claims.

471. The obligations of railways arising out of sect. 432, paragraphs 1 and 2, sects. 438, 439, 453, 455—470, cannot be avoided or limited either by means of the railway traffic regulations or by contract.

Agreements seeking to override this rule are null and void, as also are agreements at variance with the rules of the railway traffic regulations.

472. The rules as to the carriage of passengers upon railways are contained in the railway traffic regulations.

473. In the case of a railway undertaking carrying on a public traffic, to which the railway regulations do not apply (e.g., a light railway), for the purposes of sects. 453, 459, 460, 462—466, the traffic regulations of such railway undertaking are to be substituted for the railway traffic regulations (z).

The rules of sect. 453 apply to such an undertaking only if it is prohibited from refusing to undertake the forwarding of goods upon its line.

(z) I.e., the general Railway Traffic Regulations, see note on p. 217.

Note.—The fourth and last book of the Commercial Code, which relates exclusively to Maritime Trade, and of which a translation has already been published (Wendt: The Maritime Code) has not been included in this volume.
APPENDIX A.

THE CUSTODY OF NEGOTIABLE INSTRUMENTS ACT (1896).

(Gesetz betreffend die Pflichten der Kaufleute bei der Aufbewahrung fremder Wertpapiere.) (a).

A mercantile trader who in the course of his trade receives shares, mining shares, provisional certificates (b), talons (c), bonds made out to bearer or transferable by indorsement, or any other replaceable (d) negotiable instruments, with the exception of bank-notes and paper money, either for safe keeping or by way of pledge, the same not being contained in any locked receptacle, has the following obligations:—

1. To keep such negotiable instruments separate from his own property and that of third parties, and recognizably marked as the property of each depositor or pledgor.

2. To keep a book in the manner directed by mercantile law (e), in which the negotiable instruments of each depositor or pledgor are entered with refer-

(a) Literally, "Act relating to the obligations of mercantile traders with regard to the safe keeping of negotiable instruments in their possession which are the property of others."

(b) See p. 72.

(c) See p. 102, note.

(d) By a replaceable (vertretbar) negotiable instrument is meant one belonging to a class composed entirely of other instruments of the same nominal value, and with the same rights attached thereto.

ence to the class of instrument to which they belong, their nominal value, numbers or other distinguishing marks. The entry may also be made by means of a reference to lists kept in addition to the book. No entry need be made if the negotiable instruments are returned to the depositor or pledgor before the entry could be effected in the regular course of business.

The rights and obligation (if any) of the bailee or pledgee to make dispositions or carry out administrative acts connected with the negotiable instruments in the interests of the depositor or pledgor are not affected by the rule above stated under head 1.

2. Any declaration on the part of the depositor or pledgor authorising the bailee or pledgee in place of negotiable instruments of the description specified in sect. 1 which have been deposited or pledged with him, to return other negotiable instruments of the same description or to dispose of negotiable instruments deposited with him for his own benefit is, unless the depositor or pledgor carries on a banker's or money-changer's business in the regular course of his trade, only valid if made expressly and in writing with reference to a particular transaction.

If the bailee or pledgee has authority in place of the negotiable instruments of the description specified in sect. 1 which have been deposited with or pledged to him to return other negotiable instruments of the same description, the provisions of sect. 1 do not apply.

3. A commission merchant (Art. 360, 378 (f) of the Commercial Code) on executing an order to purchase negotiable instruments of the description specified in sect. 1 must within three days send his principal a list of the instruments

\[(f) \text{ i.e., Arts. 360, 378 of the old Commercial Code now replaced by sects. 383, 406 respectively of the Commercial Code (1897) translated in this volume.}\]
purchased, specifying the class of instrument to which they belong, their nominal value, numbers, and other distinguishing marks. If the commission merchant has named the seller in his notification as to the execution of the commission, the period of three days runs from the delivery of the instruments, in all other cases from the expiration of such time after the notification of the execution of the commission has been sent off, as may be necessary in order to enable the commission merchant to obtain delivery of the instruments in the ordinary course of business without culpable delay.

4. If the commission merchant is in morâ (g) with respect to the obligations imposed on him by sect. 3, and if he does not within three days comply with a demand from his principal to carry out his unperformed obligations, the principal has the right to repudiate the transaction as not entered upon for his account, and to claim damages for breach of contract.

The demand made by the principal has no effect if he does not, within three days after the expiration of the period of grace allowed after the making thereof, make a declaration to the commission merchant that he intends to make use of his rights under para. 1 of this section.

5. A commission merchant, upon the execution of an order to exchange negotiable instruments of the description specified in sect. 1, or to exercise on behalf of his principal any right to obtain delivery of any such negotiable instruments, must within two weeks after the receipt of the new instruments send his principal a list of such instruments containing the information specified in sect. 3, para. 1, unless before the expiration of this period he has delivered them to his principal.

6. A commission merchant who does not fulfil his obligations under sect. 5, loses his right to claim commission on

(g) See p. 183, note.
the execution of the order (Commercial Code, Art. 371, para. 2) (h).

7. With the despatch of the list of instruments, the property in the instruments therein designated passes to the principal, in so far as the commission merchant has a right to dispose of them, provided always that the rules of the civil law in accordance with which the property passes at an earlier moment remain unaffected hereby.

With reference to negotiable instruments in his keeping, the property in which has passed to his principal, the commission merchant is subject to the obligations of a bailee specified in sect. 1.

8. A mercantile trader who, in the course of his mercantile trade, delivers to a third party negotiable instruments of the description specified in sect. 1, which are the property of another, for the purpose of safe keeping, sale, or exchange, or in order to obtain delivery of other negotiable instruments or of interest- or dividend-warrants, must inform such third party that such negotiable instruments are the property of another. In the same manner, in the event of his passing on to a third party an order for the purchase of negotiable instruments, he must inform such third party that the purchase is being made for the account of another (i).

A third party who has received such information cannot exercise a right of pledge or lien over the negotiable instruments delivered to him or purchased by him, except to secure claims against the person who gave him the order, which have arisen with reference to such negotiable instruments.

9. Any mercantile trader who disposes of negotiable instruments of the description specified in sect. 1, which have been delivered to him for safe keeping or by way of pledge,

(h) I.e., Art. 371, para 2, of the old Commercial Code, now replaced by sect. 396, para. 1, of the Commercial Code (1897), which is translated in this volume.

(i) I.e., on another’s behalf; for the account of another merely as between such other and the mercantile trader, not as between the mercantile trader and the third party.
APPENDIX A.

or which he has received as commission-merchant on behalf of his principal, for his own benefit or that of another in an unlawful manner other than that specified in sect. 246 of the Penal Code, is punishable with imprisonment for a period not exceeding one year, and with a fine not exceeding M. 3,000, or one of those punishments.

Any person wilfully acting in a manner contrary to the provisions of sect. 8 for his own benefit or that of another is liable to a similar punishment.

If the person so acting is a dependant of the aggrieved person (as defined by sect. 52, para. 2, of the Penal Code), proceedings can only be taken against him upon the application of such aggrieved person. Such application, if made, may be withdrawn. Sect. 247, paras. 2 and 3 of the Penal Code apply mutatis mutandis.

10. A mercantile trader, who has suspended payment or been adjudicated bankrupt is punishable with imprisonment for a period not exceeding two years—

(1) If he has committed a wilful breach of the rules of sect. 1, heads 1 or 2, whereby any person is prejudiced in respect of his rights to have the negotiable instruments entrusted by him to such mercantile trader for safe keeping, kept separate from the insolvent estate; or

(2) If being a commission-merchant, he has committed a wilful breach of the rules of sects. 3 or 5, whereby any person has been prejudiced in respect of his rights to have the negotiable instruments, purchased, taken in exchange, or received on his behalf by such commission-merchant, kept separate from the insolvent estate.

11. A mercantile trader, who has suspended payment or been adjudicated bankrupt is punishable with penal servitude if, with knowledge of his insolvency or of the fact that his liabilities exceed his assets, he has unlawfully appropriated to his own use negotiable instruments which are the property of another, and which in the course of his trade
he has received into his custody as bailee, pledgee, or commission-merchant.

In the presence of extenuating circumstances, the punishment is imprisonment for a period of not less than three months.

12. The penal rule of sect. 9 is applicable in the case of directors of a share company, or any registered association, managers of a private limited company, and liquidators of a mercantile partnership or any registered association who have been guilty of the acts thereby penalized in respect of negotiable instruments in the possession of the company or association, or delivered by it to a third party.

The above-mentioned persons, in the event of the company or association suspending payment or being adjudicated bankrupt, are punishable—

1. In accordance with sect. 10, if they have committed a wilful breach of the rules of sects. 1, 2, 3 or 5, whereby any person has been prejudiced in respect of his rights to have the negotiable instruments entrusted by him to the company or association for safe keeping, or purchased, taken in exchange, or received by the company or association on his behalf, kept separate from the insolvent estate.

2. In accordance with sect. 11 if, with knowledge of the insolvency of the company or association or the fact that its liabilities exceed its assets, they have unlawfully appropriated to their own use negotiable instruments which are the property of another, and which the company or association received as bailees, pledgees or commission-merchants.

13. This Act has no application to those classes of mercantile traders who, in accordance with Art. 10 of the Commercial Code (k), are unaffected by the rules as to mercantile books contained in such Code.

(k) I.e., Art. 10 of the old Commercial Code, now replaced by sect. 4 of the Commercial Code of 1897, which is translated in this volume.
PART I.

FORMATION OF THE COMPANY.

1. Private limited companies may be formed in accordance with the provisions of this Act for any purpose legally permissible.

2. The memorandum of association must be executed by declaration before a judicial officer or a notary. It must be signed by all the members.

   Signing by power of attorney is only permissible if the instrument creating the power of attorney was executed in a declaration made before or authenticated by a judicial officer or a notary.

3. The memorandum of association must state—

   1. The trade name and principal place of business of the company.
   2. The object of the undertaking conducted by it.
   3. The amount of its capital.
   4. The amount to be paid by each member as his contribution to the capital (hereinafter called his contribution).
If the duration of the undertaking is limited to a fixed period, or if other duties towards the company in addition to the payment of their contributions are to be imposed upon the members, the provisions as to these matters must also be included in the memorandum of association.

4. The trade name of the company must either bear reference to the object of the undertaking, or must include the names of the members, or at any rate the name of one of the members with an addition appended thereto signifying the existence of a company. The names of persons other than the members may not be included in the trade name, provided always that the right to retain the trade name of any business taken over by the company in accordance with the provisions of sect. 22 of the Commercial Code is not hereby excluded.

The trade name must in all cases have appended thereto the designation "Limited" (a).

5. The amount of the capital of the company must be at least M. 20,000, and that of the contribution of each member at least M. 500.

The amount of capital which may be subscribed by members upon the formation of the company is limited to a single contribution.

The contributions of individual members may, by agreement, differ in amount from one another, but all must be for an amount of marks divisible by one hundred. The aggregate amount of the contributions must be identical with the amount of the capital.

If contributions to capital are to be made by any member otherwise than in cash, or if the consideration due from the company for property purchased by it is to be set off against an amount due to it in respect of a contribution, the name of the member concerned and the description of the property contributed by the member or purchased

(a) I.e., the words "mit beschränkter haftung." The German equivalent of the English limited company (in the ordinary sense of the word) is aktiengesellschaft, or share-company.
by the company, as well as the value at which it was assessed for the purpose of the contribution or the price to be paid for its purchase, must be stated in the memorandum of association.

6. The company must have one or more managers. Either members or other persons may be appointed as managers. The appointment is to be made either in the memorandum of association or in accordance with the provisions of Part III. of this Act. If the memorandum of association contains a provision to the effect that all the members are to have the right to act as managers, only such persons as were members of the company at the time this provision was made shall be held to be the appointed managers.

7. The company must apply to the Court of the district in which its principal place of business is situated for registration in the Mercantile Register. The application may not be made until an amount has been paid up in respect of each contribution to be made not otherwise than in cash, equal to at least one fourth part thereof, and in no case less than M.250.

8. Annexed to the application must be—

1. The memorandum of association, and in the case specified in sect. 2, para. 2, the instruments conferring a power of attorney upon any holders of a power of attorney who signed the memorandum of association or authenticated copies of these documents.

2. The documents from which the managers derive their authority, where not appointed by the memorandum of association.

3. A list of the members, showing the name, first-names, description, and place of residence of each of them, and the amount of their respective contributions, such list to be signed by all
the persons co-operating in the making of the application.

4. In a case where the undertaking requires license by the State in order to be carried on, the document conferring such license.

The application must contain an assurance that the payments in respect of the contributions specified in sect. 7, para. 2, have been effected, and that such part of the contributions as has already been made is at the uncontrolled disposal of the managers.

The managers must furnish the Court with specimens of their signatures for its retention.

9. The persons making the application are jointly and severally liable to the company for the correctness of the information supplied by them as to the payments that have been made in respect of contributions (sect. 7, para. 2).

Compromises or releases of the company's claims to compensation arising under para. 1 of this section are inoperative in so far as such compensation is necessary in order to satisfy the creditors of the company. This provision does not apply to compositions made by the person liable in case of insolvency for the purpose of preventing or cancelling an adjudication of bankruptcy.

Claims arising by virtue of the above provisions become barred in five years from the date of the entry of the company in the Mercantile Register.

10. The entry in the Mercantile Register must include the trade name and principal place of business of the company, the object of the undertaking, the amount of the capital, and the date of the execution of the memorandum of association, and the names of the managers.

Any special provisions which may be contained in the memorandum of association as to the duration of the company or as to powers of agency of the managers or liquidators must also be included in the entry.
APPENDIX B.

The announcement publicly notifying the entry must state, besides the contents of the entry, any arrangements of the description specified in sect. 5, para. 4, which may have been made, and any provisions which may be contained by the memorandum of association as to the form in which public announcements are to be made by the company.

11. Before the entry of its principal place of business in the Mercantile Register, the company has no existence as such.

Persons trading in the name of the company before the making of such entry are jointly and severally liable.

12. The provisions of sect. 8, paras. 1 and 2, do not apply to the application for entry in the Mercantile Register of a Court in the district of which a company's branch establishment is situated. Such an application must have annexed to it a copy of the memorandum of association and a list of members authenticated by the Court of the district in which the principal establishment is situated.

The entry must contain the information specified in sect. 10, paras. 1 and 2. The announcement publicly notifying the entry must state also the provisions specified in sect. 10, para. 3, but not any arrangements which may have been made of the description specified in sect. 5, para. 4, unless the entry is made within the first two years after the entry in the Mercantile Register of the principal place of business of the company.

PART II.

RIGHTS AND LIABILITIES OF THE COMPANY AND ITS MEMBERS.

13. A private limited company has rights and liabilities as such; it can acquire the ownership of and other real rights over immovables, and can sue and be sued.

The property of the company only is available to meet the claims of the company's creditors.
A private limited company shall be deemed to be a mercantile association within the meaning of the Commercial Code.

14. The amount of the share of individual members in the business is determined by the amount of their contributions.

15. A member's share is transmissible by alienation *inter vivos* and by succession on death.

If a member acquires the shares of other members in addition to his own, the shares acquired remain separate and independent.

The assignment of his share by a member must be effected by a declaration made before a judicial officer or notary.

Any agreement giving rise to an obligation on the part of a member to make such an assignment must be made in the same manner. But such an agreement, if not made, may be rendered valid by means of an assignment executed in the manner prescribed by the foregoing paragraph.

Additional conditions for the assignment of an interest in the business may be imposed by the memorandum of association; the possibility of such assignments may more particularly be made dependent upon the consent of the company being obtained.

16. In the case of the alienation of a member's share only such person shall be deemed to be the transferee as shall be named as such in a notification to the company, proof of the transfer being duly given.

Any transactions between the transferor and the company affecting the rights and liabilities of the company which are entered upon prior to such notification shall be operative as against the transferee.

The transferee, as well as the transferor, is liable to the company for any payments due to be made at the time of the notification in respect of the share transferred.
17. The transfer of a part of a member's share is not permissible without the consent of the company.

Such consent requires to be made in the written form (b); it must specify the name of the transferee and the amount of each of the new shares created out of the original contribution:

Provided always that the memorandum of association may dispense with the necessity of obtaining the consent of the company for the transfer of part of a share from one member to another, or for the division of a deceased partner's share among his heirs.

The provisions of sect. 5, paras. 1 and 3, as to the amount of the contributions apply mutatis mutandis upon the division of a member's share.

A simultaneous transfer of more than one part of a member's share to the same transferee shall not be permissible.

Except in the case of alienation inter vivos, or in the case of transmission upon death, no division of a member's share may take place; it may be prohibited even in these cases by the memorandum of association.

18. If an undivided share is held by several persons as joint owners, they can only exercise their rights in respect thereof in co-operation with one another.

They are jointly and severally liable to the company for any payments to be made in respect thereof.

Acts-in-the-law to be performed by the company as against the owners of the share, in the absence of a common representative appointed to represent all the joint owners, may be sufficiently performed if executed as against one only of the joint owners. In the case of several heirs of a deceased member this provision only applies in respect of acts-in-the-law executed after the expiration of one month from the vesting of the inheritance.

19. The payments to be made in respect of contributions shall be determined in proportion to the amount of the contributions.

(b) See Schuster, p. 91.
Except in the case of a reduction of capital, a member may neither be released from nor allowed to defer the payment of his contribution. No right of set-off may be exercised by a member in respect of such payment; in the same manner, no right of lien may be exercised over property constituting a contribution to be made otherwise than in cash in respect of claims not connected with such property.

A payment by a member in respect of a contribution, which is made otherwise than in cash, or which is set off against the purchase price payable by the company for property acquired by it, releases such member from liability only in so far as it is made or set off in the performance of an agreement made in the manner specified in sect. 5, para. 4.

20. Any member failing to make a payment due in respect of his contribution at the proper time, is bound by law to pay interest in respect of the delay.

21. In the case of payments not made at the proper time a fresh demand may be sent to the defaulting member, calling upon him to make the required payment within a specified period under penalty of the forfeiture of the share in respect of which payment has to be made. Such demand must be made by registered letter. The period allowed for payment must be at least one month.

Upon the expiration of such period without payment having been made, the member's share, and such payments as he may have made in respect thereof, are to be declared to be forfeited for the benefit of the company. Such declaration is to be made by registered letter.

The member whose share has been forfeited remains liable to the company for the amount due thereon and for any subsequent amounts which may become payable in respect thereof.

22. If a member's share is forfeited by reason of failure to pay an amount due in respect of his contribution, his
last predecessor in title and all former predecessors whose ownership of the share was notified to the company are liable to the company for such amount.

A predecessor in title is only liable if payment is unobtainable from his successor; such payment shall, in the absence of evidence to the contrary, be deemed to be unobtainable, if it has not been made after the expiration of one month from the date at which demand therefor was made to the successor, and notice of such demand given to the predecessor:

Provided always that the predecessor's liability is limited to calls payable in respect of the contribution in question within a period of five years, running from the day upon which the transfer of the share was notified to the company.

Against payment of the amount in arrear the predecessor acquires the property in the share forfeited by the defaulting member.

23. If the amount in arrears cannot be obtained from the predecessors in title, the company may sell the share by public auction. Any other method of sale is only permissible with the consent of the member whose share has been forfeited.

24. If the amount of a contribution cannot be obtained either from the persons liable or by means of a sale of the share, the remaining members must make good the deficiency in capital by contributing in proportion to the amounts of their shares. Amounts not to be obtained in this way from individual members must be made good by the remaining members in the proportion specified (c).

25. Members may not be released from the legal consequences of the provisions of sects. 21—24.

(c) I.e., specified in the preceding paragraph.
26. The memorandum of association may provide that it is within the power of the members to pass a resolution sanctioning further calls for payments to be made on members' shares over and above the amount of their contributions (hereinafter called additional calls).

The payment of additional calls must be made in a ratio proportionate to members' shares.

The memorandum of association may limit the members' liability in respect of additional calls to a specified amount proportionate to their shares.

27. If the members' liability in respect of additional calls is not limited to a specified amount, every member who has paid up the full amount of his contribution has the right to free himself from liability to pay an additional call by a declaration placing his share at the disposal of the company for the purpose of meeting such call within a month from the making thereof. In the same manner, if within the prescribed period the member neither avails himself of the above specified right nor makes the required payment, the company may declare to him by registered letter that it will consider his share as placed at the company's disposal.

The company must, within a month after the making of such declaration, either by the member or by itself, have the share sold by public auction. Any other method of sale is only permissible with the consent of the member. The member is entitled to any surplus remaining after the payment of the costs of the sale and the amount of the additional call.

If payment of the company's claim cannot be obtained by a sale, the share becomes the property of the company, and may be sold by it for its own account.

The memorandum of association may limit the application of the foregoing provisions to cases where the amount owing on an additional call is in excess of a specified amount.

28. If the liability of members in respect of additional calls is limited to a specified amount, in the absence of any
provision to the contrary contained in the memorandum of association, the rules of sects. 21—23 applying to the failure to make payments in respect of contributions at the proper time apply mutatis mutandis to the failure to make payments in respect of additional calls. In the case specified in sect. 27, para. 4, the same rule applies also where the liability on additional calls is unlimited, provided that the amount of the additional calls does not exceed that specified in the memorandum of association.

The memorandum of association may provide that additional calls as to the payment of which the rules of sects. 21—23 apply are permissible even before the members' original contributions have been fully called up.

29. The members are, in the absence of any provision to the contrary contained in the memorandum of association, entitled to the net profits as shown by the annual balance sheet.

The division of profits shall be made in a ratio proportionate to the shares. Other methods for such division may be specified by the memorandum of association.

30. Such property of the company as must necessarily be retained in order to keep its capital intact must not be paid out to the members.

Additional calls which have been paid may, if they are not necessary in order to cover a loss of capital, be repaid to the members. Such repayment may not be effected before the expiration of a period of three months from the date upon which notice of the resolution sanctioning it was given in the public newspapers designated for the making of announcements by the company in the memorandum of association, or in default thereof by the public newspapers designated for the publication of entries in the Mercantile Register. In the case specified in sect. 28, para. 2, the repayment of additional calls is not permissible. Additional calls which have been repaid shall be deemed never to have been paid.
31. Payments made in breach of the rules of sect. 30 must be made good to the company.

If they were received in good faith, repayment can only be demanded in so far as it is necessary for the satisfaction of the company’s creditors.

If such repayment cannot be obtained from the person to whom the original payment was made, the amount of such payment must be made good by the remaining members in a ratio proportionate to the amount of their shares in so far as this may be necessary in order to satisfy the claims of the company’s creditors. Amounts which are unobtainable from individual members must be made good by the remaining members in the ratio above specified.

Persons may not be released from their liability to make payments arising under the above rules.

The claims of the company become barred in five years from the expiration of the day upon which the payment, which it is sought to make good by means of such claims, was made. The above rule does not apply if the persons liable have been guilty of reckless conduct.

In the case specified in para. 3 the managers who were guilty of any default in respect of the making of the payment in question are jointly and severally liable to compensate the members for the sums paid by them in order to make good such payment.

32. Except in the circumstances specified in sect. 31, para. 1, members are in no case liable to repay amounts received by them in good faith as their share in the profits.

33. Shares in the company, the contributions in respect of which have not been fully paid up, may not be acquired by the company.

They may not be acquired by the company, even if the contributions have been fully paid up, unless the company possesses property over and above the amount of its capital, out of which the purchase price can be paid.
34. The cancellation (amortisation) of shares may only be effected if expressly permitted by the memorandum of association.

Except with the consent of the owner of the share, it can only take place if the provisions of the memorandum of association making it permissible were in existence prior to the acquisition of the share by its owner.

The rule stated in sect. 30, para. 1, remains unaffected hereby.

PART III.

POWERS OF AGENCY AND MANAGEMENT.

35. In all judicial and extra-judicial transactions the managers shall act on behalf of the company.

The managers must effect declarations and sign on behalf of the company in the manner specified in the memorandum of association. Such declarations and signatures must, in the absence of anything appearing to the contrary, be effected by the managers collectively. If a declaration has to be made as against the company it shall be made sufficiently if made to one of the managers.

The signature must be effected in some manner by which the managers signing append their own signatures to that of the trade name of the company.

36. The company acquires rights and incurs liabilities by reason of the transactions entered upon on its behalf by the managers, irrespective of whether such transactions were entered upon expressly in the name of the company or whether the circumstances show that it was the intention of the parties concerned that they should be entered upon on behalf of the company.

37. The managers are liable to the company for the observance of the limitations imposed upon the scope of their authority to act on behalf of the company by the
memorandum of association or the resolutions of the members, provided that the memorandum of association permits such limitations to be imposed by resolution.

Any limitation of the power of the managers to act on behalf of the company is not legally operative as against third parties. This applies more particularly to limitations seeking to restrict the exercise of such power to particular transactions or kinds of transactions, or to prohibit its use, except under specified circumstances during a specified period, or at particular places, or to make the consent of the members or of some body representing the company a condition precedent to the exercise thereof.

38. The appointment of the managers may be revoked at any time, without prejudice to any right to compensation which they may have in accordance with an existing contract.

The memorandum of association may restrict the power to revoke such appointments to occasions where there are cogent grounds for such revocation. As cogent grounds are to be regarded more particularly any gross neglect of duty or incapacity to conduct business in a proper manner.

39. Any change of managers as well as any change in a manager's power of agency is to be notified for entry in the Mercantile Register.

Annexed to the notification must be a copy of the documents relating to the appointment of the new managers or the change in the powers of agency of the previously existing ones. This rule does not apply to the notification to be made to the Court in charge of the Register in which a branch establishment is entered.

The managers must supply the Court with specimens of their signatures for its retention.

40. Every year, in the month of January, the managers must file with the Court in charge of the Mercantile Register
a list of members, signed by them, and showing the name, first-name, description, and place of residence of each member as well as the respective amounts of their contributions. If no change has occurred since the filing of the last list either with regard to the identity of the members or their respective interests in the company, a declaration to that effect will suffice.

41. It is the duty of the managers to see that the books of the company are kept in a proper manner.

Within the first three months of the business year they must draw up a balance-sheet for the last business year, together with a profit and loss account.

The time for the drawing up of such documents may be extended by the memorandum of association to six months, and in the case of companies whose business consists in operations conducted in countries situated beyond the seas, to nine months.

In the case of companies, the object of which is the carrying on of a banking business, the balance-sheet must be published within the prescribed period in the public newspapers specified in sect. 30, para. 2. The notice effecting the publication must be filed with the Court in charge of the Mercantile Register.

42. In respect of the drawing up of the balance-sheet the rules of sect. 40 of the Commercial Code apply, with the following modifications:—

1. Plant and other property intended not for re-sale, but to be permanently employed in the business, may at highest be valued at its purchase-price or cost of production, but may be valued at this price without regard to the fact that its intrinsic value may be smaller, provided that a sufficient sum is written off to cover wear and tear, or provided that a sum corresponding in amount thereto has been placed to the credit of a renovation fund.

2. The costs of organisation and administration must not be set down as assets on the balance-sheet.

3. The right of the company to make additional calls
may only be set down among the assets on the balance-sheet provided that resolutions to make such calls have already been passed, and provided that the members have not the right to free themselves from the liability to make payments in respect thereof by putting their shares at the company's disposal; if the amount due to the company in respect of additional calls is set down among the assets of the company, a corresponding amount must be set down as capital among the liabilities.

4. The amount of the capital as stated in the memorandum of association must be set down among the liabilities.

The same rule applies to every reserve fund or renovation fund and to the aggregate amount paid upon additional calls, unless such amount has been applied in a manner justifying the cancellation of the entry which would otherwise have had to be made among the liabilities.

5. The profit or loss appearing upon the balancing of the collective assets and liabilities must be expressly stated at the foot of the balance-sheet.

43. The managers must apply the diligence of careful business men to the conduct of the business.

Managers violating their obligations are jointly and severally liable to the company for any damage resulting therefrom to the company.

They are more particularly liable to pay compensation in respect of payments made contrary to the provisions of sect. 30 out of money which it is necessary for the company to retain in order to prevent the capital sinking below the requisite amount or in respect of transactions by which the company purchases shares in itself in breach of the rules of sect. 33. The rules of sect. 9, para. 2, apply mutatis mutandis to claims for compensation. In so far as such compensation is necessary in order to satisfy the company's creditors, the managers' liability is not extinguished by the
fact that they acted in accordance with a resolution of the members.

Claims based upon the foregoing provisions become barred in five years.

44. The rules affecting the managers affect persons appointed to act as their substitutes.

45. The nature of the rights appertaining to the members with reference to the affairs of the company, and more particularly the conduct of its business, as well as the mode of exercise of such rights, are in the absence of statutory provisions to the contrary regulated by the memorandum of association.

In default of any special provisions contained in the memorandum of association, the rules of sects. 46—51 apply

46. Resolutions of the members are necessary in respect of the following matters:—

1. The passing of the annual balance-sheet and the division of the net profits shown thereby.
2. The making of calls in respect of contributions.
3. The repayment of additional calls.
4. The division and cancellation of shares.
5. The appointment and removal of managers and the granting of their discharge.
6. The passing of regulations for investigating and super- vising the management.
7. The conferring of powers of procuration and mercantile agency upon persons intended to conduct the whole of the company’s business.
8. The enforcement of the company’s claims for compensation arising out of the promotion or the management of the business against any of the managers or members, as well as the appointment of representatives to act on behalf of the company in litigation to be conducted against the managers.
47. Resolutions requiring to be passed by the members with respect to measures affecting the affairs of the company must be passed by a majority of the votes given.

The holding of a share confers one vote for every hundred marks which it represents.

Instruments authorising voting by proxy require the written form.

A member has no right to vote on behalf either of himself or another at the passing of a resolution conferring upon him a discharge or a release from any obligation, or at the passing of a resolution for the performance of some act in the law as against himself or for the institution or settlement of litigation against himself.

48. Resolutions shall be passed at members’ meetings.

No meeting is required for the passing of a resolution if all the members declare their consent thereto in writing or give their consent to the votes being given in writing.

49. Members’ meetings shall be summoned by the managers.

They must be summoned whenever the company’s interests seem to demand it, as well as upon the occasions where it is expressly prescribed that they should be summoned.

They must more particularly be summoned whenever a loss equal to half the capital of the company is shown upon the annual or any interim balance-sheet.

50. A number of members the aggregate amount of whose shares is not less than a tenth of the company’s capital, have a right to demand the summoning of a meeting upon stating the purpose for which and the ground upon which they wish it to be summoned.

Under the same circumstances, members have the right to demand that a particular matter should be placed on the agenda for a meeting.

A number of members holding shares of the amount specified in para. 1 can, if their demand for the summoning of
a meeting is not complied with, or in the absence of any persons to whom such demand can be addressed, themselves, upon stating the circumstances, effect the summoning of the meeting desired, or the placing of the required matter upon the agenda. Whether the costs incurred thereby are to be borne by the company or not is a matter for the resolution of the meeting summoned.

51. The summoning of the meeting is to be effected by notices sent by registered letter to the members requesting their presence at least one week before the date of the meeting.

The purpose for which the meeting is summoned must in every case be stated on the notice.

If the meeting has not been summoned in the regular manner, resolutions can only be passed thereat if all the members are present.

The same rule applies to resolutions, notice as to the subject-matter of which has not been given at least three days before the meeting in the manner prescribed for the summoning of the meeting.

52. If the memorandum of association provides for the appointment of a board of supervision, the rules of sect. 243, paras. 1, 2 and 4, sects. 244—8, and sect. 249, paras. 1 and 2, of the Commercial Code, which deal with the board of supervision of share companies, apply mutatis mutandis in the absence of any contrary provision contained in the memorandum of association.

Claims for compensation against members of the board of supervision arising out of any breach of their obligations, become barred in five years.
PART IV.

CHANGES IN THE MEMORANDUM OF ASSOCIATION.

53. A change in the memorandum of association can only be effected by a resolution passed by the members.

Such resolution must be authenticated by a judicial officer or notary, and requires a majority composed of at least three-fourths of the votes given. Other requirements, in addition, may be imposed by the memorandum of association.

A resolution in favour of any addition to the obligations of the members imposed by the memorandum of association can only be passed with the consent of all the members concerned.

54. A change in the memorandum of association must be notified for entry in the Mercantile Register.

If the change does not concern any of the matters specified in sect. 10, paras. 1 and 2, it is sufficient if reference is made in the notification to the documents concerning the changes which have been filed with the Court. Public notice must be given of the change if it concerns any of the matters concerning which public notification is directed by sect. 10, para. 3, and sect. 12.

No change becomes legally operative till it has been entered in the Mercantile Register in which the principal place of business of the company is entered.

55. If an increase of capital has been sanctioned by resolution, the subscription for each fresh contribution must be executed by means of a declaration either drawn up or authenticated by a judicial officer or notary.

The new shares may be allotted by the company either to existing members or to other persons, who, by signing the declarations by which they acquire their shares, become members of the company. In the last case, besides the
amount of the contribution to be paid, any other obligations imposed upon the persons so becoming members by the memorandum of association must appear upon the document specified in para. 1.

If a person who is already a member of the company subscribes for a contribution forming part of the new capital, he acquires an additional share.

The provisions of sect. 5, paras. 1 and 3, as to the amount of the contributions as well as the rule stated in sect. 5, para. 2, as to the non-permissibility of the subscription for more than one contribution, apply also with respect to the contributions forming part of the new capital.

56. If any contribution to the new capital is made otherwise than by the payment of money, or is set off against the purchase price payable by the company for any property acquired by it, the name of the person making the contribution in the above-specified manner, or selling the property in question to the company, the nature of the contribution made or property purchased, and the price at which such contribution is valued or at which such property is purchased, must be fixed by the resolution for the increase of the capital, and stated in the declaration specified in sect. 55, para. 1.

The rule stated in sect. 19, para. 3, applies mutatis mutandis.

57. Application must be made for the entry in the Mercantile Register of the resolution for the increase of capital, as soon as the fresh capital has been provided by subscriptions for contributions.

The rule stated in sect. 7, para. 2, as to the payments to be effected before the making of the application, and that stated in sect. 8, para. 2, as to the assurance to be contained in the application apply mutatis mutandis

Annexed to the application must be—

1. The declaration specified in sect. 55, para. 1, or authenticated copies thereof.
2. A list of persons subscribing the fresh contributions, signed by the persons making the application, and showing the amount of each of such contributions.

The provisions of sect. 9 apply mutatis mutandis to the responsibility of the persons making the application for the correctness of the information given by them.

58. A reduction of the capital can only be made under due observance of the following rules:—

1. The resolution for the reduction must be notified by the managers by means of an advertisement inserted on three separate occasions in the newspapers specified in sect. 30, para. 2; such advertisement must contain a request to the creditors of the company to give notice of their claims; a special request must be sent to creditors whose names appear in the books of the company, or are otherwise known.

2. Creditors who give notice of their claims, and do not consent to the reduction of capital, must be satisfied in respect of such claims or must receive security in respect thereof.

3. The application for the registration of the reduction in the Mercantile Register shall not be made before the expiration of one year from the date upon which the request was made for the third time to the creditors in the public newspapers.

4. The application must have annexed to it the advertisement notifying the resolution; at the same time the managers must give an assurance that the creditors who have presented themselves and have not consented to the reduction have received satisfaction or security.

The rule stated in sect. 5, para. 1, as to the minimum amount of the capital is not affected hereby. If the reduction is made for the purpose of the repayment of contri-
butions or of giving a release in respect of amounts payable upon contributions, then the amount of the contributions remaining after the reduction has been effected must not be less than the amount specified in sect. 5, paras. 1 and 3.

59. The provisions of sect. 57, paras. 2 and 3, head No. 1, and sect. 58, para. 1, head No. 4, do not apply to applications to be made to the Mercantile Registry controlled by a Court in the district of which a company possesses a branch establishment.

PART V.

THE DISSOLUTION AND ANNULMENT OF A COMPANY.

60. A private limited company is dissolved—

1. By expiration of the period specified for its duration in the memorandum of association.

2. By resolution of the members; such resolution must, in the absence of anything appearing to the contrary in the memorandum of association, be supported by a majority embracing at least three-fourths of the votes given.

3. By an order of the Court or by the decision of the administrative Court or authority in the cases specified in sects. 61 and 62.

4. By an adjudication of bankruptcy; if the proceedings are subsequently annulled by the acceptance of a compulsory composition, or revoked upon the application of the bankrupt company, a resolution may be passed for the continuation of the company.

Further grounds for dissolution may be specified in the memorandum of association.

61. The company may be dissolved by order of the Court, if the object for which it was formed becomes unattainable.
able, or in the presence of other cogent grounds connected with the affairs of the company.

The action demanding dissolution must be brought against the company. It can only be brought by a number of members, the aggregate amount of whose shares represent at least a tenth part of the capital.

Exclusive jurisdiction for the hearing of such action is vested in the provincial Court of the district in which the company's principal place of business is situated.

62. If the public welfare is endangered by a company, by reason of its members passing illegal resolutions or knowingly allowing illegal transactions to be entered upon, such company may be dissolved without any claim for compensation arising out of such dissolution.

The procedure in such case and the jurisdiction of the authorities concerned is regulated by the rules in force in the State concerned as to contentious administrative proceedings. Where under the law of such State no administrative procedure exists, dissolution can only be brought about by order of the Court upon the application of the higher administrative authority. In such a case the provincial Court of the district in which the principal place of business of the company is situated has exclusive jurisdiction.

63. Bankruptcy proceedings may be commenced against a company in the event of its liabilities exceeding its assets, as well as in the event of its insolvency.

The rules as to bankruptcy proceedings against a share company contained in sect. 207, para. 2, and sect. 208 of the Bankruptcy Act, apply also mutatis mutandis to the case of a private limited company.

64. The managers must apply for an adjudication of bankruptcy as soon as the company becomes insolvent or its liabilities are shown to exceed its assets by the annual or by an interim balance-sheet.
APPENDIX B.

The managers are liable to indemnify the company in respect of all payments made by them from this time on. The provisions of sect. 43, paras. 3 and 4, apply mutatis mutandis to the company's claims to indemnity arising out of such liability.

65. The dissolution of the company must, unless it is occasioned by bankruptcy, be notified for entry in the Mercantile Register. A similar rule applies to the renewed carrying-on of the company in the cases specified in sect. 60, para. 1, head No. 4.

Notice of the dissolution must be given by the liquidators by means of an advertisement inserted on three separate occasions in the public newspapers specified in sect. 30, para. 2, requesting the company's creditors to send in their claims.

66. Unless the dissolution is occasioned by bankruptcy, the liquidation is carried out by the managers, except where entrusted to other persons by the memorandum of association or by resolution of the members.

Upon the application of a number of members whose aggregate contributions constitute at least a tenth part of the capital, the appointment of the liquidators may in the presence of cogent grounds be effected by the Court (sect. 7, para. 1).

Liquidators may be removed by the Courts under the same circumstances as those under which they may be appointed. If not nominated by the Court, they may be removed before the expiration of the period for which they were appointed by resolution of the members.

67. The names of the first liquidators must be notified by the managers for entry in the Mercantile Register; any change in the composition of their number, as well as any alteration in their powers of agency, must be notified by the liquidators themselves.
Annexed to the notification must be a copy of the documents dealing with the appointment of the liquidators or the change in the composition of their number; this rule does not apply to the notification to be made to the Court in charge of the Mercantile Register in which a branch establishment is registered.

The entry of the judicial appointment or removal from office of liquidators is effected by the Court propria inotu.

The liquidators must provide the Court with specimens of their signatures for its retention.

68. The liquidators must execute declarations and sign on behalf of the company in the form specified on their appointment. In default of any such specified form, declarations of signatures must be effected by the liquidators collectively.

If any such form is specified it must be notified, together with the appointment of the liquidators, for entry in Mercantile Register.

The signature must be effected in some manner by which the liquidators' own names are appended to the former trade-name of the company, which is now to be used with some indication that the company is in liquidation.

69. Until the termination of the liquidation the legal position of the company and its members is regulated irrespective of the dissolution of the company by the rules of Parts II. and III. of this Act, where not rendered inapplicable by the provisions of the present part (Part V.), or the nature of liquidation proceedings.

The company is to retain the same legal domicile as it had at the time of its dissolution until the distribution of its assets has been completed.

70. The liquidators must terminate pending transactions, perform the obligations of the dissolved company, call in debts due to the company, and convert the remaining property of the company into cash; they must act on behalf of the company in all judicial and extra-judicial
transactions; in order to terminate pending transactions they may enter upon fresh transactions.

71. The liquidators are to have the rights and liabilities of managers arising out of sects. 36, 37, 41 (para. 1), 43 (paras. 1, 2 and 4), 49 (paras. 1 and 2), and 64. They must prepare a balance-sheet immediately at the commencement of the liquidation, and thenceforth annually.

72. The property of the company is to be distributed among the members in a ratio proportionate to the amount of their shares, in the absence of any provision of the memorandum of association substituting some other ratio therefor.

73. The distribution may not be commenced before all the company’s debts have been paid off, or before security has been given therefor, and in any case not before the expiration of one year from the date upon which the request to the creditors specified in sect. 65, para. 2, has been inserted for the third time in the public newspapers.

If no claim is sent in by a creditor known to be such by the liquidators, the amount owing to him must be deposited with a public authority for the benefit of such creditor if there is a right to make such a deposit. If a liability on the part of the company cannot be immediately performed, or is disputed, the assets may not be distributed until security has been given to the creditor in respect of such liability.

Liquidators violating the rules of this section are liable to pay compensation in respect of the amounts paid out in the course of the wrongful distribution. The provisions of sect. 43, paras. 3 and 4, apply mutatis mutandis to claims for such compensation.

74. At the close of the liquidation the books and papers of the company are to be given to one of the members or to some other person for retention during a period of ten
years. Such member or other person will, unless otherwise provided by the memorandum of association or a resolution of the members, be nominated by the Court (sect. 7, para. 1).

The members and their successors in title have a right to inspect the books and papers. The company's creditors may be authorised to inspect them by the Court (sect. 7, para. 1).

75. If the memorandum of association does not contain the provisions rendered essential by sect. 3, para. 1, or if one of these provisions is null and void, every member, every manager, and, if there is a board of supervision, every member thereof may, by taking out a writ, apply to have the company declared to be annulled.

The rules of sects. 272 and 273 of the Commercial Code apply *mutatis mutandis*.

76. Any defect in the provisions of the memorandum of association as to the trade-name or, place of business of the company, or the object of the undertaking may be remedied by a unanimous vote of the members.

77. If the annulment of a company has been entered in the Mercantile Register, the winding-up of its affairs is regulated *mutatis mutandis* by the provisions applying upon dissolution.

The validity of transactions entered upon with third parties in the name of the company is not affected by the annulment of the company.

Members must make any payments which they have undertaken to make, in so far as may be necessary in order to enable the company to perform the obligations it has entered into.
PART VI.

Final Rules.

78. The applications directed by this Act to be made to the Court in charge of the Mercantile Register must be effected by the managers or liquidators; those provided for in sect. 7, para. 1, sect. 12, para. 1, sect. 57, para. 1, sect. 58, para. 1, head No. 3, and sect. 80, para. 5, must be effected by the managers collectively.

79. The penalties provided for by sect. 14 of the Commercial Code are not to be inflicted for failure to comply with the regulations as to notifications to be made to the Court in charge of the Mercantile Register contained in sects. 7, 54, 57 (para. 1), 58 (para. 1, head No. 3), 80 (para. 5), when the Court concerned is that of the district in which the company's principal place of business is situated.

80. If a share company is dissolved for the purpose of conversion into a private limited company, the liquidation thereof may be dispensed with, if the following rules with reference to the formation of the new company are complied with.

The amount of the capital of the new company may not be less than that of the old company.

An opportunity must be given to the shareholders of the old company by public announcement, or in some other appropriate manner, of acquiring a share in the new company in exchange for such part of the assets of the old company as they are entitled to by reason of their shares. The aggregate amount of the shares in the dissolved company held by persons thus acquiring a share in the new company must represent at least three-fourths of the capital of the dissolved company.

The part of the assets of the dissolved company to which shareholders are entitled by reason of each of their
shares must be calculated on the basis of a balance-sheet to be placed before a general meeting for its approval. The resolution granting such approval requires a majority embracing at least three-fourths of the capital represented at such general meeting.

Application for the entry of the new company in the Mercantile Register must be made not later than within one month of the dissolution of the share company. The entry may only be made upon proof that the above-stated rules have been complied with.

81. In the case specified in sect. 80, upon the entry of the new company in the Mercantile Register the property in the assets of the dissolved company passes by operation of law to the new company.

Every shareholder who has not acquired a share in the new company may demand from the new company the payment of a sum corresponding to the value of the portion of the assets of the dissolved company to which he was entitled.

Immediately after the entry of the new company in the Mercantile Register, notice in accordance with the provisions of sect. 297 of the Commercial Code must be sent by the managers of the new company to the creditors of the dissolved company, requesting such creditors to apply to them. The claims of creditors who do so apply, and who do not consent to the conversion, must be satisfied or security must be given therefor. The managers are severally and jointly responsible to the creditors of the dissolved company for the due observance of the above rules.

82. The following persons are punishable by imprisonment for a period not exceeding one year, and simultaneously by fines of an amount not exceeding M. 5,000:

1. Managers and members of a private company who, in connection with the entry of the company in the Mercantile Register, and managers who, in
connection with the entry of an increase in capital, knowingly give false information to the Court (sect. 7, para. 1) as to the payment of the contributions.

2. Managers of a private limited company who, in order to effect the registration of a reduction of capital, knowingly give to the Court (sect. 7, para. 1) a false assurance as to the satisfaction of the company’s creditors or the security given to them.

3. Managers, liquidators, or members of a board of supervision or similar body in a private limited company who, in a public communication, knowingly misrepresent or conceal the state of the company’s affairs.

Sentence of loss of honorary civic functions may be passed on such persons simultaneously.

In the presence of extenuating circumstances only a fine may be imposed.

83. The penal regulations of sects. 239—241 of the Bankruptcy Act apply to the managers of a private company which has suspended payment or which has been adjudicated bankrupt, if they have dealt in the manner there penalised.

84. The managers or liquidators of a private company are punishable by imprisonment for a period of not less than three months, and simultaneously by a fine of an amount not exceeding M. 1,000, if, contrary to the rules of sect. 64 and sect. 71, para. 1, no application for an adjudication of bankruptcy is made.

In the presence of extenuating circumstances only a fine may be imposed.

No punishment may be inflicted upon any person who can prove that he was not responsible for the omission to apply for an adjudication of bankruptcy.
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