THE NEGOTIATION OF STOCK IN FRANCE.

PART I.

THE PRESENT LAW OF NEGOTIATION.

A share of stock under French law is not fundamentally different from a share of stock under English or American law. It is an undivided but defined fraction of the capital of a business association, membership in which is transmissible without the consent of the other members of the association. If the associate is one of the original members, by his act of subscription, he surrenders both possession and ownership of this fraction to the association, which is recognized as an entity, existing apart from its members, as a legal person, une personne morale.1 Strictly speaking there remains in the associate only a right.2 This right is both to future and present benefits—(a) future, in that it is a right to reassume ownership and possession of a fraction of the capital upon a future dissolution of the association; (b) present, in that it is an existing right to participate in profits and in the councils of the association.3 If the associate is not an original shareholder he is a purchaser or some other form of assignee of the right.

The shareholder is provided with a certificate4 which is but a voucher or admission by the company that the former has duly fulfilled those conditions which confer upon him the attributes of a stockholder. But a certificate is not essential to stockholdership in its primitive conception.5 It became necessary as stock became negotiable.

To understand the transmission of shares under French law it is of the greatest importance to bear in mind that in strict legal analysis a share of stock is not a thing in possession. It

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1 Commercial Code, Article 34.
2 Id., Section 192.
3 Id., Sections 180-184.
5 Id., Section 601.
is an incorporeal right, in personam, of the nature of a chose in action. It was through the customs of merchants and capitalists rather than through the legislator that this incorporeal right became so closely identified with the certificate, which was but one evidence of it, that the right lost its character of a chose in action and assumed that of a chose in possession. As identification became more and more complete, property in a share of stock became more and more easily transmissible from person to person until finally the assimilation was perfect and a share of stock was henceforth treated as a chose in possession. The legislator but recognized, and all too vaguely defined this transformation. Had the law, in its conservatism clung to the fundamental conception of a share as an incorporeal right, the transmission of stock must have been effected by the laborious formalities of the Civil Code of the Common Law of France.

But French law has long sanctioned certain customs of merchants. In the Commercial Code, the legislator has put into universal application established commercial laws and customs and has the only recognized methods for the transmission of stock strictly in derogation of the general rules for the transmission of choses in action as laid down in the Civil Code. As the Commercial Code, in one aspect is a body of special law as contrasted with the common law embodied in the Civil Code, so the negotiation of stock is but the special mode of passing title to a certain kind of chose in action as contrasted with assignment (cession) which is the normal method sanctioned by the common law. Or, it may be said that negotiation is a commercial form of assignment.

I shall have occasion later to explain another department of the French law of contracts, closely allied to assignment, namely, delegation (délégation), as a source of the modern law of negotiation.

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* E. Thaller (supra), Section 605.
* Lyon-Caen & Renault (supra), Section 1.
* Lyon-Caen & Renault (supra), Section 178.
* It should be noted that the term "negotiation" in French law is used in a broader sense than in English and American law.
* See Part II.
Before examining, therefore, the law of the negotiation of stock under the Commercial Code, it will be well to make a short excursion into the field of the civil law of assignment of a *chose in action*.

Here must be distinguished the assignment which is binding (a) *inter partes* and (b) as to third parties.

(a) Assignment *inter partes*. As between the assignor and the assignee, the transfer of title to a *chose in action*, for a consideration, is effected by the simple agreement of the parties over the subject matter. The title has passed as between the parties though the contract of sale remains entirely unexecuted, the price unpaid and the instrument undelivered. From the moment that the intention of the two parties over the subject matter is expressed and consented to by both, the assignee is regarded as owner and upon him fall the future risks.

(b) Binding as to third parties. Clearly any system of law would be imperfect which permitted a contract, secret, verbal, and unexecuted, to transfer title as to the world. In French law the contract between the assignor and assignee, uncommunicated to the promisor of the *chose* assigned, has effected no result as to third parties. To effect a passage of title binding on them either one of two conditions must be fulfilled: (1) written notice of the assignment must be served upon the promisor of the *chose* assigned by a court officer; or (2), such promisor must, by a solemn written notarial act, recognize the assignment.

The French Commercial Code has recognized special methods of assignment which are called "negotiation." These are less cumbersome than those inherited from the Roman law which have just been briefly examined.

Negotiability is one of the inherent and fundamental qualities of stock. But a share does not become negotiable until after the definite organization of the company.

Before a company is definitely organized the capital stock

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11 Civil Code, Book III, Title VI, Chapter VIII, Articles 1689 to 1701.
13 Civil Code, Article 1690; Bandry-Lacantinerie (*supra*), Vol. II, Section 865.
14 Lyon-Caen & Renault, (*supra*), Section 250; See note 10.
must be subscribed in its entirety. When the capital does not exceed 200,000 francs the shares may not be of less than 25 francs face value; when it exceeds 200,000 francs the shares may not be of less than 100 francs face value.\(^\text{15}\)

A certain proportion of the capital must be paid in before the law recognizes the company as definitely organized. When the shares are of the face value of 25 to 100 francs a minimum payment of 25 francs per share is required; when they are of 100 francs or over a minimum payment of one-fourth their face value is required.\(^\text{16}\)

Other formalities having to do with publicity, appraisement of the capital subscribed in forms other than cash, and the appointment of the first board of directors, must be accomplished before the company is legally constituted and its shares negotiable.\(^\text{17}\)

Until that moment stock may more properly be called mere contracts of subscription and as such are of course governed by the law of assignment of the Civil Code.

But there is yet another limitation. When stock is issued upon subscriptions to the capital in other forms than in cash, as in land, buildings, patents, etc., the stock remains unnegotiable and undetachable from the stub in the stock books during the two years that follow the definite organization of the company.\(^\text{18}\) Such shares remain, of course, assignable under the Civil Code. The motive of this limitation was the desire to protect an innocent public from the rapid unloading of stock issued upon over-valued capital. During these two years the shares issued on over-valued capital have time to seek their true level of value and the loss tends to fall on those guilty of the fraud.

Under English and American Company law stock is classified into common and preferred shares. The differences existing between those two classes do not affect their negotiability. Under

\(^\text{15}\) Law of July 24, 1867, Article 1, as modified by the law of August 1, 1893, Article 1.

\(^\text{16}\) Id., Article 1, paragraph 2.

\(^\text{17}\) Id., Articles 1, 2, 3, 4 and 24.

\(^\text{18}\) Id., Article 3, paragraph 2; Lyon-Caen Renault (\textit{supra}). Sections 251, 252.

The law of July 9, 1902, makes an exception of companies which are formed by the consolidation of two or more companies which have been in existence more than two years. Montpellier, May 17, 1906, Pandectes Francais, 1906, 2, 193.
French Company law there exists another classification according to which three different kinds of stock are distinguished. This classification is not based upon differences in rights to dividends and participation in the capital upon a winding up of the company, but upon the manner of naming the beneficiary or owner of the stock. As in a pure negotiable instrument the manner of indicating the beneficiary goes to the very essence of its negotiability, so in French law the manner of transferring title to the share is profoundly affected by the manner of indicating the owner of it.

According to this classification French law distinguishes (1) nominative stock (action nominative), in which the name of the stockholder appears on the certificate and upon the stock register of the company; (2) stock "to order" (action à ordre) in which the name of the stockholder and the clause "to order" appear on the certificate and on the stock register of the company; (3) stock "to bearer" (action au porteur) in which no name appears on the certificate or the stock register but only the clause "Share to bearer" and a serial number.

As in the case of the assignment of a chose in action under the Civil Code, we must examine the transfer of title to stock from the point of view of the parties to the transaction and from that of third parties.

(a) Inter partes. In all classes of stock, in a sale, title passes by virtue of Art. 1138 of the Civil Code, simply by consent of the parties, in the absence of course of an express contrary intention. The contract of sale may remain unexecuted. As the Commercial Code only lays down the special rules for the negotiation of stock binding upon third parties, a fortiori, as between the parties the civil law rule survives.

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19 Lyon-Caen et Renault (supra), Section 199
20 Commercial Code, Article 36.
21 Commercial Code, Article 35.
22 See note 2, page 3; also Court of Cassation, April 23, 1907, Gazette des Palais for May 4, 1907.

For cases see those of June 29, 1885, reported in Dalloz, Recueil Periodique, 1886, 1, 425; May 23, 1887, reported in Dalloz, Recueil Periodique, 1888, 2, 73, and 1890, 1, 259; April 24, 1907, reported in Dalloz, Recueil Periodique, 1907, 1, 302.
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In transactions other than sale title passes, *inter partes*, according to the rules of the civil law governing the particular transaction. Thus in gifts *inter vivos*, and in the law of intestacy and of wills, the passage of title depends upon the rules laid down by the Civil Code in each of those particular classes of acts. A discussion of all those forms of alienation would take us too far afield into the realm of the civil law.

(b) As to third parties.

(i) Nominative stock. This class of stock is issued in the name of the shareholder. A stub from which the certificate has been detached contains the same name and serial number, and forms a stock register which remains in the hands of the company. The concordance between the names and serial numbers as they appear on the stock register and on the certificates is continuous and perfect and constitutes a genealogy of each share.

The manner of negotiating nominative stock is by a transfer (*transfert*) on the books of the company.

According to Article 36 of the Commercial Code, “Property in a share may be established by inscription in the stock register of the company. In this case, assignment is effected by means of a transfer entered upon the stock registers and signed by the transferror or his agent.”

The act of transfer is necessary in order that the transferee may compel the company and third parties to recognize him as stockholder and to accord to him all the rights and privileges incident to stockholdership.
This is not a mere rule of convenience, an administrative
regulation adopted by the company. No mention of the require-
ment need be made in the articles of association. It is a substan-
tive rule of law as rigorous and imperative as the rules governing
the assignment of a chose in action under the Civil Code, of
which it is in derogation. The problem so long disputed in
American courts as to what act effects a passage of title to stock is
seen to be definitely settled in France. There, in the case of
nominate stock, save between the parties to a sale, title can not
pass without the intervention of the company.

It is generally accepted that the negotiation of nominative
stock by transfer is a commercial parallel to or a derivative of
the civil assignment of a chose in action. The signature of the
transferrer or his agent is regarded as the equivalent of the civil
law notice of the assignment given by the assignor to the
promisor of the chose assigned and the act of transfer by the
company as the equivalent of the solemn civil law acceptance
of the assignee as a new creditor.

Not all writers have adopted this view as I shall have oc-
casion later to explain.

The rôle which the company plays in the transfer is to
verify the identity of the parties and to ascertain their legal
capacity to perform the negotiation. It is answerable to the
parties injured if it proceeds to transfer when these legal
requisites are wanting.

In practice, of course, a stockholder desiring to negotiate
his nominative stock is not obliged to go with his purchaser to
the transfer office of the company and there make his declaration
of transfer. The company issues to each stockholder a blank
form of declaration of transfer to be filled in by the assignor and
similar form of acceptance to be filled in by the assignee. The
assignor turns over his certificates and signed declarations of
transfer to an agent de change or official broker, who performs

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31 Houpin, Vol. I, Section 66; Lyon-Caen & Renault, Traité de Droit
Commercial, Vol. II, Section 605.
32 See Part II.
33 Thaller (supra), Sections 601, 603 and 895-899.
34 Thaller (supra), Section 604.
the act of transfer for his client. The company accepts the signed declaration of the parties. From the agent de change it requires a guaranty of the identity and capacity of the parties, thus protecting itself by a cause of action against the agent de change in case it is later held responsible for a fraudulent transfer.\textsuperscript{35}

While the Commercial Code requires a transfer on the records of the company to effect an alienation of title binding upon it and the world, the decisions of the courts have not always been strict in their definition of what facts constitute such a transfer.

A transfer creates a presumption of title in favor of the transferee. But this presumption can be destroyed, as, by showing that the transferee is but the pledgee of the stock.\textsuperscript{36}

The courts have gone on the theory, therefore, that, if the presumption can be destroyed by facts dehors the inscription itself, an imperfect inscription can be perfected by proof dehors. Thus if the company permits the assignee to participate in a stockholders' meeting, though it has neglected to inscribe his name on the stock register, a transfer in fact has taken place. Any documentary proof of such a recognition in fact suffices.\textsuperscript{37}

The consequences of the rule requiring the intervention of the company in the form of a transfer are:

First. As between two successive purchasers of the same share of stock, that one will be preferred who first effects a transfer on the company's records.\textsuperscript{38}

Since to effect a transfer the vendor or his agent must sign the stock register, the vendee is clearly at the vendor's mercy if the latter neglects or refuses to effect the transfer. To remedy this the vendee may secure a judgment on his contract of sale and the judgment is regarded as fulfilling the function of a transfer.\textsuperscript{39}

\textsuperscript{35} Decree of October 7, 1800, Article 76, paragraph 3; Thaller (supra), Section 603, paragraph 3.
\textsuperscript{36} Affaire Rapp, August 8, 1873, Dalloz, Recueil Périodique, 1874, 2, 201.
\textsuperscript{37} Affaire Copin, Paris, December 5, 1882, Dalloz, Recueil Périodique, 1884, 2, 78; Tribunal Civil, Seine, June 23, 1886, Gazette des Tribunaux for June 30, 1886; Affaire Mer, July 12, 1887, Dalloz, R. P., 1887, 1, 469.
\textsuperscript{38} Brussels, December 7, 1885, Journal des Tribunaux, December 24, 1885, and Jan. 31, 1886.
\textsuperscript{39} Lyon-Caen et Renault, Traité e Droit Commercial, Vol. II, Section 605.
Second. The company is acting within its rights when it refuses to recognize as stockholders anyone whose name is not inscribed as such on its books, even though the claimant be possessor of a certificate of stock.\footnote{Lyon-Caen et Renault, Traité de Droit Commercial, Vol. II, Section 605.}

Third. Upon distribution of the capital on dissolution of the company those only participate who are inscribed upon the books as stockholders.\footnote{Lyon-Caen et Renault, Manuel de Droit Commercial, Section 201.}

Fourth. It might naturally be supposed to follow that in the matter of dividends a like rule would obtain. Such, however, is not the case in actual practice. Dividends are, in general, payable to the bearer of a certificate of nominative stock without any formality of identification.\footnote{Lyon-Caen et Renault (\textit{supra}), Section 201; Thaller (\textit{supra}), Section 604.}

Fifth. It is against the actual holders, named on the books, that the company naturally proceeds to recover a call for the unpaid balance of the capital. Old stockholders who have alienated their shares are also held, but against those a prescriptive period of two years runs from the date of alienation.\footnote{Article 3 of the law of August 1, 1867, modified by the law of August 1, 1893. The prescriptive period under the Civil Code would be thirty years.} The transferror of stock who has paid the assessment but not yet effected a transfer may recover back the sum paid from his purchaser under the rule that as between the parties title passes by simple consent of the parties over the subject matter.\footnote{Affaire Vangeois, March 3, 1886, Dalloz, Recueil Périodique, 1887, 1, 32. See also note 3, page 8.} This rule requires, however, that the subject matter be clearly designated, so that in its application to the sale of stock an agreement to sell so many shares without identifying them in a precise manner would not serve to pass title.\footnote{Decree of October 7, 1890, Article 46; Tribunal de la Seine, March 13, 1900.}

A certificate of nominative stock is partly marked off into small sections, serially numbered. Upon presentation of the certificate and payment of the dividend, a stamp is placed in the appropriate square according to the number of the dividend, which becomes proof of payment.
(2) Stock "to order" (action à ordre). This class of stock is rarely met with and is of very minor importance. Historically it is probably an intermediate step between nominative stock and the stock "to bearer" (action au porteur). Stock to order is negotiated by an indorsement indicating the assignee. The indorsement takes the place of the formality of a transfer by the company.

(3) Stock "to bearer" (action au porteur). Article 35 of the Commercial Code provides:

"A share of stock may be issued in the form of a certificate to bearer. In this case assignment takes place by delivery of the certificate."

A share of stock to bearer does not contain the mention of the name of the owner but simply the phrase "share to bearer" (action au porteur). It resembles in this a bill of exchange made payable simply to bearer. On the company's stock records there is no longer a concordance of names such as exists in the case of nominative stock, but only a concordance of serial numbers. The company is perforce obliged to recognize the bearer of the certificate. The nominative share, still recognized as a chose in action, an incorporeal right, intransmissible by simple delivery, has in the form "to bearer" been liberated from its fetters. The identification of the right and the certificate is complete. The rights of the shareholder are now inseparable from the certificate and can only be exercised by producing the instrument itself. These shares pass from hand to hand by simple delivery (tradition). Thousands of such transactions take place daily without the company's having any knowledge of its consequently ever changing membership. The company

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46 In this country on account of laws requiring corporations to keep stock registers it is not possible without special enactment for a company to issue stock to bearer or stock warrants. In England the Companies Act of 1867 authorizes stock warrants when the shares are fully paid up. Machen, Modern Law of Corporations, Vol. I, Section 882, and notes.

47 Under the French Commercial Code a bill of exchange must be to order and can not be to bearer, Article 110.

48 Lyon-Caen & Renault (supra Manuel), Sections 200, 201.

49 Stock to bearer is by far the most numerous class of stock met with in France. The Decree of May 22, 1888, Article 47, regulating the constitution of the exchanges, forbids the negotiation or exchange on the bourse of any but stock to bearer, except in the particular cases where the law or the
only learns who are its members when, armed with their certificates, they claim their right to participate in an advertised meeting of stockholders. Dividends are paid without formality of identification upon presentation of a coupon detached from the certificate and bearing a serial number.\(^{30}\)

A share "to bearer" is no longer regarded as a mere right, a *chose in action*. It is treated as a corporeal *chose in possession* and from this fact flow consequences of supreme importance.

First. As between two purchasers of the same share to bearer, he who has possession of the certificate is preferred even though he be the second purchaser, provided of course, that he is innocent of the first sale.\(^{51}\)

Second. A share to bearer is a proper subject of a present gift by delivery whereas a nominative share, being a *chose in action*, is not.\(^{52}\)

Third. An innocent holder for value is protected in his ownership. The Civil Code which declares that possession of personal property is proof of title whenever the possessor came by the property, in good faith and for a consideration, applies to shares of stock to bearer.\(^{53}\) Some exceptions have been enacted, intended to create a system of protection for those who have lost or have had their certificates stolen. However, the basis of the civil rule remains in force.\(^{54}\)

An innocent purchaser is protected because it is impossible for him to ascertain whether the assignment is fraudulent or

\(^{30}\) Lyon-Caen & Renault (*supra* Manuel), Section 201; Thaller (*supra*), Section 605.

\(^{31}\) Civil Code, Article 1141.

\(^{32}\) Under the Civil Code, Articles 931, 932, title passes in a gift *inter vivos* by delivery or by written declaration of gift with a like acceptance on the donee's part. Gift by delivery is only applicable to corporeal personal property. Hence nominative stock requires a written declaration and acceptance. Bandry-Lacantinerie (*supra*), Vol. III, Section 939.

\(^{33}\) Civil Code, Articles 2279 and 2280, except personally lost or stolen, against which, however, a short prescriptive period of three years runs. Thus the innocent purchaser of lost or stolen shares *to bearer* is not protected as he would be under English law. Thaller (*supra*), Sections 900-901.

\(^{34}\) Lyon-Caen & Renault (*supra* Manuel), Section 203 *et seq.*; Thaller (*supra*), Section 902 *et seq.*; Laws of June 15, 1872, and February 8, 1902.
not. Upon the stock exchange, the *agents de change* act as intermediaries. The parties to the assignment are not permitted by law to come face to face or even to borrow each other's names. The certificate itself, as a general rule, contains no indication of a fraudulent assignment. It follows of necessity that as the assignee has no means of informing himself of the *bona fides* of the assignment, its fraudulent nature should not defeat his rights.\(^5\)

As the company fills a passive rôle in the assignment it is protected if it recognizes in good faith the bearer of the certificate.

Fourth. There is another consequence of the extreme mobility of the share to bearer which profoundly affects its character and indirectly that of nominative stock.

When stock is issued to bearer the company can not know who its stockholders are. This condition gave rise in the past to difficult problems when the capital had not been fully paid in and a call was made for the balance. How long must a share of stock remain nominative so that the company may by its stock register know to whom to turn for payment of the balance owing on the share? When may stock be "to bearer"?

The statement of the question suggests the answer. Until the subscription has been wholly paid up, the share must remain nominative. It may then be converted into stock to bearer at the pleasure of the owner. After various laws, now granting almost complete liberty in the issue of stock to bearer, thereby destroying all guaranty that the capital subscribed could be called in if needed, now reacting towards an unwarranted strictness in holding former stockholders responsible for thirty years after they had negotiated their shares, the law finally fixed the rule in the sense indicated above.\(^\text{6}\)

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Dividend coupons are equally negotiable. Tribunal Correctionnel de la Seine, January 30, 1894: Civil Code, Article 1240.

\(^6\) Up to the law of July 17, 1856, the silence of the law gave complete liberty in the issuing of stock to bearer. The articles of association alone restrained the company. The law of that date provided that stock remain nominative until completely paid up. Those who had assigned their shares remained liable during a prescriptive period of thirty years. The law of
THE NEGOTIATION OF STOCK OF FOREIGN CORPORATIONS.

Two problems should be kept perfectly distinct, namely, that of the introduction of foreign companies into France there to carry on business, and that of the introduction of foreign securities into France for the purpose of negotiating them either upon the bourse or exchange or upon the marché libre, or unofficial market.

With the former of these questions we have nothing to do in this article. The latter problem narrows down to an examination of the conditions requisite to the listing of foreign securities on the bourse and its consequence upon the law of negotiation. For stock which is not listed is not and clearly in practice could not be regulated. Such negotiation takes place without the intervention of an agent de change. The parties must deal directly with each other or through the intermediary of an unofficial broker. Negotiation is governed in that case by the laws of the country in which the security was issued.\(^7\)

With listed stock the situation is different. The negotiation of such stock forms part of the monopoly accorded by the government to the agents de change.\(^8\) No unofficial broker can deal in listed stock without himself having recourse to an agent de change as intermediary. Through the agents de change the government has a direct means of control over the negotiation of listed foreign securities. It thus subjects them to the same threefold tax imposed upon French securities, i.e., a stamp tax on their value, a negotiation tax and a tax on their revenue.\(^9\)

When foreign securities are listed on the French Bourses, their negotiation is no longer governed by the laws of the country of their origin but by the laws and regulations that govern the negotiation of French listed securities. The two sorts are placed upon an equal footing.

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\(^{7}\) Law of May 25, 1872, Article 3, and of April 13, 1898; Decree of June 22, 1898; Thaller (supra), 780; Lyon-Caen et Renault, Traité de Droit Commercial, Vol. II, Section 1148.  

\(^{8}\) Thales (supra), Section 779; Lyon-Caen et Renault, Traité de Droit Commercial, Vol. II, Section 1149.  

\(^{9}\) Commercial Code, Article 76.
It remains briefly to examine the laws governing the listing in France of foreign securities.

The Chambre Syndicate des agents de change, or governing body of the exchange admits or refuses admission to all classes of foreign securities. The syndicate is required by law to be furnished with:

(1) All articles of association, charters and other documents in pursuance of which the security demanding admission was issued in its country of origin.

(2) A certified statement by the consul of the country of origin that such documents are in conformity with the laws of his country, that the security is listed there if an exchange exists and if not listed the fact that there is no exchange.

(3) The approval of the French Minister of Finance of an agent who shall be responsible for the payment of the Treasury taxes.

The syndicate is at liberty to require any other information it may deem necessary.

The face value of the shares and the proportion of capital required to be paid in is the same in regard to foreign shares of stock as to French shares.

The Minister of Finance reserves at all times the right to prohibit the introduction of any particular foreign security upon the French exchange.

The law further requires to be published in a bulletin issued as a supplement to the "Journal Official" the name of the company, the law and nationality under which it was organized, its principal place of doing business, its object, its duration, its capital, a copy of the last balance, the character and amount of bonds issued and the amount and character of the subscriptions.

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"Decree of February 6, 1880, Article 1.
"Decree of August 10, 1896, modifying Decree of February 6, 1880, Article 2.
"Decree of February 6, 1880, Article 3.
"Decree of December 1, 1893, Article 1, modifying Decree of February 6, 1880, Article 4.
"Decree of February 6, 1880, Article 5.
"Called the "Bulletin des Annonces Légales Obligations." Previous to the Decree of February 3, 1912, it was called "Bulletin Annexe au Journal Officiel de la République Française."
to capital other than in cash. Besides this very wise provision of publicity a translation into French of the entire articles of association is required. This is regarded as a most onerous and unnecessary precaution since it only repeats in longer form the announcements just enumerated.68

PART II.

A THEORY OF THE ORIGIN OF THE LAW OF NEGOTIATION.

In the first part of this article 67 the statement was made that the negotiation of stock was generally regarded as simply a commercial form of assignment. Certainly a natural reason for this view is that the Commercial Code employs the term ‘assignment.’ However, this opinion is not shared by all authors. In Germany the belief obtains that a negotiable instrument is a unique commercial contract, not to be explained by any analogy to civil processes; that it is a unilateral engagement to pay or to do under any and all circumstances; that it is an abstract agreement quite independent of the transaction out of which it grew; that its form is its life.

French jurisconsults have also been searching for the underlying principle of negotiation. It does not seem out of place here to give a brief sketch of the theory of Professor Edmund Thaller, a most original and constructive thinker on commercial law.68

Professor Thaller sees in the negotiation of a chose in action not a specialized or commercialized form of assignment, nor a unique class of contract having no parentage save in commercial customs but rather an application of the civil law doctrine of delegation (déléigation).

66 Law of January 30, 1907, Article 3.
67 Page 701.
68 Monsieur Edmond Thaller is Professor of Commercial Law at the Law School of the University of Paris. His theory of the origin of the law of negotiation of choses in action is fully set forth in a series of contributions, entitled: “De la nature juridique du titre de crédit,” and made to the “Annales de Droit Commercial, étranger et international” for 1906-1907, which are published in collected form by Rosseau (1907), 14 Rue Soufflot, Paris. I have attempted to sketch that part of his argument which deals with stock: i. e. Chaps. III, IX, X and XI.
The triple characteristics of a negotiable instrument, in whatever form it may assume, bill of exchange, promissory note, cheque or share of stock are: (a) rapidity of circulation, (b) the appearance of an autonomous right free from hidden defects, (c) the incorporation of the right with the instrument which becomes indispensable to the exercise of the right.

These qualities are incompatible with the assignment of a contract right. Between the assignment and the negotiation of a contract right lies an impassable gulf, namely, the emancipation of the instrument from the transaction out of which it arose, the investing of it with a fresh life with every transfer. Like a body thrown out by centrifugal force, it flies forth from its originating impulse, but unfettered and answering to new laws. In assignment there is but a single obligation between two beings arising out of and following given facts and unable to produce results save by reference to these facts. Hence as long as it exists, the contract assigned must, to use Professor Thaller's metaphor, be bathed in the waters of its source.

Strictly speaking, in an assignment of a contract, what passes is not the contract itself but simply power to exercise the right arising out of the contract. Both debtor and creditor are fundamentally unalterable. On both sides the personality of the parties is of the essence of the contract. The assignee continues to act on the basis of the original contract and is obliged to respect it in every detail.

Until the idea arose that one could procure another to represent one in one's right, a contract was strictly inalienable. From the idea of procuration or the simple substitution of another to one's right, soon arose the belief that a veritable assignment had taken place. Thus it came about that a creditor might receive payment of the debt from the hands of an appointed representative before the latter had collected it from the debtor. This method of anticipation had all the appearance of a sale of the

* In Roman law, before it was recognized that one could sue for another, the only method of transferring a contract right was by novation. The "formulary system" recognized the right of procuration and from then on there was a continuous development until the idea of assignment was disengaged. Gide, Droit Romain, pp. 728-734.
contract. It none the less remained a procuration. The so-called assignee remained no more than the representative of the original creditor and bound by every defense which the debtor had against the original creditor.

During the Middle Ages the immutability of a contract right dominated mediæval law. To represent another in justice required special authority of the being, which was not granted without the payment of a heavy tax, to escape which many tricks were resorted to. Thus there existed stipulations *tibi vel cui ordinaveris* and *tibi vel exhibent has litteras*, which were precursors to our modern clauses to *order* and to *bearer*.

But the rebirth of the Roman law in the 16th century drove out these means which reappeared a century later in the great colonizing companies of England and Holland and in the French Rentes de l'Hotel de Ville.

It is plain that assignment thus viewed is not suited for commercial traffic. The assignee's right is affected by invisible defects in the instrument. What was required was a *renewal of the debt in the transferee's favor by means of a participation by the debtor in the act of alienation*. Only thus could the transferee inform himself of the strength and weakness of his newly acquired right. The act of renewal became the foundation of the transferee's right.

The problem to be solved, therefore, before a contract right could become negotiable was threefold:

(a) To procure a purification of the right upon transfer to a new creditor.

(b) To establish this concession in advance in favor of all future transferees of the right.

(c) To subject the transferee's enjoyment of the right to the possession of the instrument evidencing it and to make that instrument the sole channel through which the right might flow.

This problem was not solved, says Profesor Thaller, by resort to the tricks of mediæval law aimed to avoid a tax on

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procuration but by the Roman law doctrine of delegation (délégation) which forms part of the civil law of obligations.

What is delegation in the law of contracts? It is a method of alienating a contract right, closely allied to novation.\(^7\)

As in novation, three persons figure in delegation. For clearness and convenience let us suppose some simple examples. Example 1. A debt is already due A by B. But A owes a debt due to X. Under these circumstances when B tenders payment to A the latter orders B to pay X instead and X accepts the tender in payment of A’s debt to him. This is called a delegation of payment because A has delegated X to receive the payment in his place. This can become a delegation of contract. Example 2. Suppose neither the debt which B owes A nor the debt which A owes X are yet due. Suppose further for the sake of simplicity that both debts are of the same sum and will be due on the same day. A orders B to pay X instead of himself. Two operations are concentrated into one. From the standpoint of B, a new creditor X has been delegated, while from the standpoint of X, a new debtor B has been delegated.

There are two other variants of delegation. (Example 3.) Thus B may not be A’s debtor yet may for some motive be willing to pay A’s debt to X; or (Example 4.) A may not be X’s debtor and yet order B who is A’s debtor to pay X in place of himself.

Examples 3 and 4 illustrate the fundamental difference between delegation and novation. In a novation a new promise arises out of the extinguishment of an old promise. If the old promise is not obliterated there is no novation. But in the two last examples there is no new promise. In Example 3, B makes A a gift by paying A’s debt for him; in Example 4, A makes a gift of his right to X. So the distinguishing mark of a delegation is that the old contract is not necessarily extinguished. In Example 2, which is the most important for our purposes, A remains bound by his debt to X who now has an added right.

\(^7\)Digests of Justinian. De novationibus et delegationibus, 46, 2; Girard, Droit Romain, pp. 607-608; French Civil Code, Article 1271 et seq.; Bandry-Lacantinerie, Précis de Droit Civil, Vol. II, Section 330 et seq.; Gide, “Etude sur la novation et le transport des créances en Droit Romain,” 1870; Hubert, Essai d’une théorie juridique de la délégation en droit français, 1899.
against B. A does not surrender his right against B until the latter has paid X.

Where lies the importance of delegation as an explanation of negotiation? In the double fact that in transferring the right to a new owner the debtor intervenes and obligates himself afresh towards the new creditor and in that the old right is not of necessity extinguished. The delegated creditor’s rights do not flow from the original contract as in an assignment but directly out of the new promise made in his behalf by the debtor.

At this point a new distinction must be made. For instance, B may promise X to pay him what B owed A, or on the other hand he may promise X to pay him a sum certain. The former is known as qualified delegation and is employed by Professor Thaller to explain the negotiation of stock. The latter is known as pure delegation. In it Professor Thaller sees an explanation of the negotiation of a bill of exchange.

Let us apply qualified delegation to the negotiation of a share of nominative stock. Suppose A is stockholder in the B company and desires to transfer his shares to X. A signifies his intention to the B company by signing the stock register and delegating X as the transferee. The B company upon A’s delegation issues a fresh certificate to X. In doing so it has promised to accord to X all the rights which it had been bound to accord to A.

But nominative stock thus transferred on the books of the company is not thereby purged of all defects in the hands of the new owner. The delegation has been a qualified one. Those defects persist which are inherent in the share itself and which do not attach simply to the person of the transferrer. If the subscription has not been wholly paid up, the transferee becomes equally liable on the share because the defect is inherent in the share itself. Or the contract of subscription may be tainted by fraud. The defect would not vanish by transfer. The B company has not done more than renew to X its old obligation to A. If a share having no inherent defects is transferred by C who fraudulently represents himself as the true owner A and the company act upon his representations, the innocent transferee
cannot be deprived of his stock because the identity and capacity of the transferror did not enter into the new contract between the company and the transferee.

The company upon issuing nominative stock is understood to make a continuous offer to accept as a new stockholder any one delegated to it by the old stockholders.

Thus, in the nominative share two of the three problems upon whose solution depended the complete negotiability of a contract right, have been successfully solved without departing from the realm of the civil law of obligations. By the intervention of the company in the transfer, the new owner's rights are purged of all save defects inherent in the share itself. The company by adopting the mode of transmission of its shares has conceded in advance its readiness to accept as a new member any one who may be delegated to it.

There remains but one step to be taken, namely, the identification of the right with the certificate. This step was taken when stock was made "to bearer."

It will be remembered that a share to bearer contains no name and that the company is obliged to recognize the holder of the certificate, who, if he is a purchaser in good faith, can not be dispossessed except under the rules of the Civil Code.\(^7\)

The fact that the company does not actively intervene at each alienation of its shares is not destructive of Professor Thaller's theory. The company recognizes the delegated party as a new stockholder when the latter presents his certificate. By issuing stock to bearer the company is understood to make the concession in advance. Possession of the certificate therefore becomes the sole insignia of title in the eyes of the world.

It is probable from the point of view of legal history that the certificate "to bearer" grew out of the certificate "to order.\(^7\)\(^3\) In the certificate to order the delegation is not a silent one, a delegation in fact, as in the share to bearer. The company

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\(^7\) Articles 2279 and 2280. See note 53 in Part I of this article. In the case of lost or stolen goods the true owner can not recover them from the innocent purchaser without offering to reimburse him and not at all after the three years' prescription has run.

\(^7\) Brunner (supra).
recognizes the party delegated by means of an endorsement signifying the name of the transferee. No formal transfer on the books of the company is required. In point of negotiability it stands midway between the nominative share and the share to bearer.

Paris, France. Layton B. Register.