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T H E  
BILLS OF EXCHANGE ACT, 1890:

BEING A

CODIFICATION OF THE LAW-MERCHANT RESPECTING

BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES,

WITH

EXPLANATORY NOTES AND ILLUSTRATIONS FROM

CANADIAN, ENGLISH, AND AMERICAN DECISIONS.

BY

THOMAS HODGINS, M.A.,

ONE OF HER MAJESTY'S COUNSEL.

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*“Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.”—CICERO.*

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## PREFACE.

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With the exception of a few statutory provisions, the law relating to Bills of Exchange, Cheques, and Promissory Notes, prior to the present Act, had been mainly promulgated through judicial decisions, recognizing and giving effect to the usages and customs of Bankers and Merchants.

These decisions must now be read as subordinate to the statutory rules prescribed by the Act. But where the cases illustrating the text are fairly applicable to the statute, they may be cited as the judicial argument upon which the legislative decision has been founded.

A comparison with the former statutes will show that in some instances alterations have been made in the law, especially as to the form under which a bill or note becomes payable generally, which may affect the mode of presentment for payment.

But the most important change is the introduction of the system of Crossed Cheques, which is recognized in English banking and mercantile communities as a protection to both bank and customer.

Other provisions have been introduced, which are referred to in the notes; and attention may be directed to the clause under which the French and German system of guaranteeing a bill or note, *pour Aval*,—recognized as law in Quebec,—may, or may not, when tested by the judicial process, become a useful addition to the general law-merchant in the other Provinces and territories.

As these negotiable securities are governed by similar laws in all commercial nations, the notes of cases have been taken from English and American authorities, as well as from decisions in the Ontario, Quebec, Nova Scotia, New Brunswick, and Manitoba Courts.

The annotations are intended to aid in a critical examination, as well as illustration, of the different sections of the Act.

No modern writer can properly deal with the Act without the aid of Judge Chalmers's "Digest of the law of Bills of Exchange, Promissory Notes, and Cheques." As draftsman and critic of the English Act,—of which our Act is almost entirely a transcript,—he has done good service to all the English-speaking communities which have availed themselves of his codification of the law.

T. H.

## TABLE OF CASES.

<i>Canadian Cases.</i>	Page.	Page.	
Adams v. Thomas .....	69	Beaudry v. Laflamme .....	253
Allison v. Central Bank .....	30	Beckett v. Cornish .....	182
Anderson v. Jennings .....	113	Beemer v. Oliver .....	88
Archer v. Lortie .....	261	Bell v. Manning .....	120
Armour v. Gates .....	67, 114	Bell v. Moffat .....	35, 94
Ash v. Great Western R. Co. ....	23	Bell v. Riddell .....	129
Auldjo v. McDougall .....	49, 102	Berton v. Central Bank .....	54
Baillie v. Dickson .....	181	Bettis v. Weller .....	36
Baldwin v. Hitchcock .....	75	Bidwell v. Stanton .....	196
Ball v. Gilson .....	257	Biggs v. Wood .....	260
Bank of British North America v. Elliott .....	145	Biroleau v. Deronin .....	254
Bank British North America v. Jones 174, 212	174, 212	Blackley v. McCabe .....	167
Bank British North America v. Ross 176, 182	176, 182	Blain v. Oliphant .....	128
Bank of Hamilton v. Harvey .....	52	Blake v. Walsh .....	115, 117
Bank of Hamilton v. Noye .....	23	Blinn v. Dixon .....	174
Bank of Michigan v. Gray .....	175	Booth v. Ridley .....	206
Bank of Montreal v. Bethune .....	42	Boulton v. Jones .....	254
Bank of Montreal v. Cameron .....	129	Boyes v. Joseph .....	159
Bank of Montreal v. DeLatre .....	67	Bradbury v. Doole .....	42, 186
Bank of Montreal v. Grover .....	174	Bradbury v. Oliver .....	74
Bank of Montreal v. Harrison .....	202	Bridgford v. Simmons .....	159
Bank of Montreal v. Langlois .....	138	Britton v. Fisher .....	142
Bank of Montreal v. Little .....	52	Brooke v. Arnold .....	142
Bank of Montreal v. Reynolds .....	120	Brown v. Howland .....	47
Bank of Montreal v. Scott .....	181	Brown v. Marsh .....	175
Bank of Montreal v. Smart .....	106	Browne v. Boulton .....	162
Bank of Montreal v. Thomas .....	69, 83, 192	Browne v. Commercial Bank .....	166
Bank of New Brunswick v. Knowles.	181	Buffalo Bank v. Truscott .....	236
Bank of New Brunswick v. Millican.	177	Burk's Case .....	115
Bank of Upper Canada v. Bartlett ..	207	Burke v. Elliott .....	182
Bank of Upper Canada v. Bloor .....	177	Burnham v. Peterborough .....	119
Bank of Upper Canada v. Cooley .....	182	Campbell v. McKinnon .....	217
Bank of Upper Canada v. Gwyne .....	137	Canadian Bank of Commerce v. Green	181
Bank of Upper Canada v. Jardine .....	211	Canadian Bank of Commerce v. Ross.	126
Bank of Upper Canada v. Jones .....	70	Canadian Bank of Commerce v. Woodward .....	116
Bank of Upper Canada v. Ockerman ..	211	Canadian Securities Co. v. Prentice.	143
Bank of Upper Canada v. Ruttan .....	137	Carruthers v. Ardagh .....	95
Bank of Upper Canada v. Sherwood ..	211	Cassidy v. Mansfield .....	174
Bank of Upper Canada v. Smith .....	173, 178	Cazet v. Kirk .....	36
Bank of Upper Canada v. Thomas .....	211	Central Bank, <i>Re</i> .....	52, 89, 115
Banque Jacques Cartier v. Strachan.	225	Chapman v. Bishop .....	176
Banque Nationale v. City Bank .....	241	Ching v. Jeffrey .....	142
Barber v. Morton .....	128	City Bank v. Cheney .....	107
		City Bank v. Hunter .....	187
		City Bank v. Lafleur .....	92
		City Bank v. Ley .....	187

TABLE OF CASES.

V.

Page.	Page.
City of Glasgow Bank v. Murdock. 101, 120	Gates v. Crook . . . . . 114
Clarihue v. Morris. . . . . 54	Geddes v. Rogers . . . . . 145
Cochrane v. Cail. . . . . 34	Gibb v. Morissette . . . . . 234
Comer v. Thompson . . . . . 115	Gilbert v. McAnnany . . . . . 90
Commercial Bank v. Brega . . . . . 269	Gillespie v. Cameron . . . . . 145
Commercial Bank v. Johnston. . 211, 260	Gillespie v. Marsh . . . . . 175
Commercial Bank v. Roblin. . . . . 137	Girvin v. Burke . . . . . 130
Commercial Bank v. Weller. . . . . 174	Gladstone v. Dew . . . . . 218
Connelly v. Woolrich. . . . . 235	Glassford v. McPaul . . . . . 115
Cooley v. Dominion Building Society. 90	Going v. Barwick . . . . . 36
Corporation of Belleville v. Fahey. . 92	Gooderham v. Hutchison . . . . . 114, 129
Corporation of Grantham v. Couture. 90	Gore Bank v. Craig . . . . . 169
Corporation of Perth v. McGregor. . 33	Gore Bank v. Crooks . . . . . 103, 108
Corse v. Corse. . . . . 235	Gore Bank v. Eaton. . . . . 255
Cosgrave v. Boyle . . . . . 151, 175, 177	Grant v. Winstanley . . . . . 142, 169
Cowan v. Turgeon . . . . . 187	Gray v. Worden . . . . . 36
Creighton v. Fretz . . . . . 258	Greatorex v. Score . . . . . 55
Crombie v. Overholtzer. . . . . 60	Greenwood v. Perry . . . . . 115, 120
Cross v. Currie . . . . . 126	Griffin v. Judson . . . . . 55, 201, 237
Crouse v. Park . . . . . 56, 201	Griffin v. Latimer. . . . . 197
Cullen v. Nickerson . . . . . 95	Griffin v. Phillips . . . . . 187
Cunard v. Tozer . . . . . 262	Gunn v. Macpherson. . . . . 120
Cunningham v. Lyster. . . . . 119	
Currier v. Ottawa Gas Co. . . . . 107	Hamilton v. Holeomb . . . . . 120
Cuviller v. Fraser . . . . . 205	Hamilton v. Phipps . . . . . 145
	Hammond v. Small . . . . . 89, 113
Dalton v. Lake . . . . . 111	Hanscome v. Cotton . . . . . 128, 197
Davis v. Dunn. . . . . 165	Hard v. Palmer . . . . . 145
Davis v. McSherry . . . . . 111	Harper v. Culbert . . . . . 209
Devanney v. Brownlee . . . . . 212	Harper v. Paterson. . . . . 33, 74
Dickenson v. Clemow . . . . . 114	Harris v. Perry . . . . . 161
Dorais v. Chalifoux . . . . . 254	Harris v. Schwob . . . . . 152
Dorwin v. Thompson. . . . . 217	Hay v. Burke . . . . . 177
Dougall v. Post . . . . . 126	Hayes v. Davis . . . . . 74
Dougall v. Reafisch . . . . . 137	Heathfield v. VanAllan. . . . . 104
Dougan v. Small. . . . . 142	Henry v. Little . . . . . 124
Dowling v. Eastwood. . . . . 106	Hill v. Francis . . . . . 74
Downs v. McNamara. . . . . 36	Hogg v. Marsh . . . . . 58
Driggs v. Waite . . . . . 161	Holcomb v. Hamilton . . . . . 120
Dwight v. Ellsworth . . . . . 124	Hope v. Caldwell . . . . . 232
	Hooker v. Leslie. . . . . 234
Eastwood v. Westley. . . . . 197	Houliston v. Parsons. . . . . 60
Elder v. Kelly. . . . . 138	Howard v. Godard. . . . . 30
Elliott v. Beech . . . . . 253	Howland v. Jennings . . . . . 56, 201
Evans v. Morley . . . . . 114, 125	Hurd v. Palmer . . . . . 201
Ewing v. Cameron . . . . . 237	Hunt v. Lee. . . . . 142
Fairman v. Maybee . . . . . 211	Ianson v. Paxton. . . . . 138, 210
Farrell v. Oshawa Manufacturing Co. 90	Irvine v. Canadian Bank of Com-
Federal Bank v. Northwood . . . . . 96	merce. . . . . 186
Fiskens v. Meehan . . . . . 137, 210	Irwin v. Freeman . . . . . 215
Fitch v. Kelly . . . . . 161, 218	
Fletcher v. Noble . . . . . 92	
Forward v. Thompson . . . . . 34, 166	Jack v. Jack . . . . . 119
Foster v. Bowes . . . . . 202	James, <i>Re</i> . . . . . 87, 92
Foster v. Geddes. . . . . 106	Jenkins v. McKenzie . . . . . 144, 205
Fox v. Soper . . . . . 137	Jones v. Ashcroft . . . . . 94
Fraser v. Armstrong . . . . . 206	Jones v. Wilson . . . . . 169

	Page.		Page.
Joseph v. Delisle.....	187	Mountcashel (Earl of) v. Grover ....	273
Judson v. Griffin.....	234	Munro v. Cox.....	48, 140
Kearney v. Kinch .....	60	Murray v. Miller.....	255
Kennedy v. Adams .....	75	Mutual Safety Insurance Co. v. Porter	34, 48, 78
Kerr v. Hereford .....	212	Macanlay v. McFarlane .....	166
Kerr v. Parsons.....	67, 108	Macdonald v. Whitfield.....	210, 235
Kerr v. Straat.....	142	Macfarlane v. Dewey.....	123
Ketchum v. Powell .....	207	Maclellan v. Davidson .....	132
Killogg v. Hyatt.....	111	McCarthy v. Phielps .....	168
Kingston Marine R. Co. v. Gunn ..	90	McCarthy v. Vine .....	66
Knapp v. Bank of Montreal.....	63	McCoy v. Dineen .....	254
Laine v. Clarke .....	218	McCunliffe v. Allen .....	182
Larkin v. Wiard.....	146	McDonald v. McArthur .....	169
La Roche v. Andres.....	57	McDonell v. Holgate .....	254
Larne v. Evanturel.....	99	McDonnell v. Lowry .....	168
Latham v. Norton .....	209	McDougall, <i>Re</i> .....	201
Latour v. Gauthier.....	199	McGillivray v. Keefer .....	111, 209
Lawson v. Landlaw .....	88	McGregor v. Bishop .....	207
Lawton v. Millidge .....	218	McGregor v. Daly .....	49
Lee v. Bank of British North America	52	McInnes v. Milton .....	71, 78
Leith v. Neill .....	181	McIntosh v. McLeod.....	113
Leslie v. Emmons .....	217	McIver v. McFarlane .....	168
Lock v. Reid .....	111	McKay v. Fee.....	56
Lovell v. Gibson.....	108	McKenzie v. Northrop .....	175
Low v. Owen .....	174	McKinnon v. Campbell.....	261
Lyman v. Dion .....	121, 207	McLean v. Garnier.....	93
Madden v. Cox .....	68	McLean v. Shields.....	39, 42, 74
Mair v. Jones .....	137	McLellan v. McLellan .....	167
Mair v. McLean .....	128	McLennan v. McLennan .....	43
Mander v. Royal Canadian Bank....	52	McLeod v. Carman.....	96, 99, 213
Martin v. Corporation of Hull.....	90	McMurray v. Talbot .....	94
Matthewson v. Brouse.....	211	McMurrich v. Powers.....	177, 182
Matthewson v. Carman .....	111, 187	McNab v. Wagstaff .....	208
Maulson v. Arrol .....	128	McPherson v. McMillan .....	42
Maynard Renaud .....	209	McQueen v. McQueen .....	54
Mellish v. Green.....	212	McRobbie v. Torrance .....	37, 166
Merchants' Bank v. Bell .....	175	Nassau v. O'Reilly.....	176
Merchants' Bank v. McNutt .....	177	Newhorn v. Lawrence .....	36
Merchants' Bank v. Stirling.....	43, 59, 79, 187	Niblock v. McGregor.....	209
Meredith v. Culver.....	217	North American Life Ins. Co. Case.	89
Merritt v. Lynch .....	199	Ockerman v. Blacklock.....	39
Merwin v. Gates.....	111	Ontario Bank v. Gibson .....	93
Meyer v. Hutchinson.....	234	O'Brien v. Ficht .....	86
Meyers v. Wilkins.....	254	Pacaud v. Corporation of Halifax	90
Migneault v. Malo .....	235	South.....	90
Miller v. Dandelin .....	203	Palmer v. Baker.....	182
Miller v. Thompson .....	111	Palmer v. Fahnstock .....	36
Mitchell v. English.....	210	Parker v. McCrea .....	211
Moffatt v. Rees .....	120	Paterson v. Howison .....	206
Molsous Bank v. Seymour.....	69, 83	Patterson v. Tapley .....	151, 174
Montgomery v. Boucher .....	201	Patton v. Melville .....	49
Moodie v. Rowatt .....	48	Peck v. Phippen.....	209
Morton v. Block's Cases .....	52		

Page.	Page.		
Peel v. Kingsmill . . . . .	214	Smith v. Richardson . . . . .	119
Peele v. Robinson . . . . .	67	Smith v. Smith . . . . .	108
Pengnet v. McKenzie . . . . .	175	Société de Construction du Canada v. Banque Nationale . . . . .	90
Perley v. Howard . . . . .	149	Spence v. Hector . . . . .	201
Perley v. Loney . . . . .	211	Steer v. Adams . . . . .	47, 93
Piers v. Hall . . . . .	94	Steinhoff v. Merchants Bank . . . . .	180
Poulton v. Dolmage . . . . .	110	Stevens v. Berry . . . . .	201
Pratt v. Drake . . . . .	101	Stewart v. Bowman . . . . .	235
Pratt v. McDougall . . . . .	200, 241	Story v. McKay . . . . .	234
Quebec Bank v. Miller . . . . .	70, 97	Strathy v. Nichols . . . . .	120
Reed v. Mercer . . . . .	168, 181	Street v. Walsh . . . . .	59
Reed v. Reed . . . . .	33, 48	St. Stephen's Branch R. Co. v. Black . . . . .	36
Regina v. Macdonald . . . . .	99	Swasiland v. Davidson . . . . .	130, 217
Reid v. Humphrey . . . . .	218	Tarratt v. Wilmot . . . . .	181
Reid v. McChesney . . . . .	105	Taylor v. Grier . . . . .	178
Rennie v. Jarvis . . . . .	142	Thomas v. Grace . . . . .	257
Richardson v. Daniels . . . . .	161	Thompson v. McDonald . . . . .	211
Richer v. Voyer . . . . .	24, 52	Thompson v. Sloan . . . . .	43
Rigney v. Van Zandt . . . . .	212	Thurgar v. Clarke . . . . .	76
Robertson v. Caldwell . . . . .	232	Topping v. Buffalo, &c., R. Co. . . . .	89
Robertson v. Glass . . . . .	104, 106	Torrance v. Bank of British North America . . . . .	69, 83
Robertson v. Hueback . . . . .	137	Township of Toronto v. McBride . . . . .	51
Robinson v. Bogle . . . . .	95	Truman v. Dixon . . . . .	86, 205
Ross v. Codd . . . . .	106	Uniacke v. Dickson . . . . .	235
Ross v. Dixie . . . . .	154, 197	Union Bank v. Farnsworth . . . . .	99
Ross v. Tyson . . . . .	117, 145	Union Bank v. McKilligan . . . . .	176
Ross v. Winans . . . . .	211	Union Bank v. Ontario Bank . . . . .	102
Rossin v. McCarty . . . . .	78	Vanlenuan v. Vandusen . . . . .	93
Rouleau v. Tourangeau . . . . .	159	Vaughan v. Ross . . . . .	177
Russell v. Crofton . . . . .	269	Venner v. Futvoye . . . . .	187
Russell v. Wells . . . . .	37	Vidal v. Ford . . . . .	69
Ryan v. Bank of Montreal . . . . .	194	Voyer v. Richer . . . . .	24, 52
Ryan v. McConnell . . . . .	117	Waddell v. Jaynes . . . . .	130
Ryan v. McKerral . . . . .	94, 211	Walker v. O'Reilly . . . . .	135
Samson v. Yager . . . . .	217	Walters v. Reiffenstein . . . . .	151
Sanford v. Ross . . . . .	71, 78	Waterous v. McLean . . . . .	217, 257
Saxton v. Stevenson . . . . .	37	West v. Bown . . . . .	52, 200
Shannon v. Hastings Mutual Ins. Co. . . . .	177	West v. MacInnes . . . . .	142
Shaw v. Boomer . . . . .	142	White v. Baker . . . . .	201
Shaw v. Salmon . . . . .	182	Whitman v. Parker . . . . .	111
Shepley v. Hurd . . . . .	145, 211	Whitney v. Wall . . . . .	207
Sherwood v. Bank of British North America . . . . .	212	Wilcocks v. Tinning . . . . .	47, 93
Shuter v. Dee . . . . .	145	Wiley v. Ledyard . . . . .	117
Sifton v. Anderson . . . . .	121	Williams v. Noxon . . . . .	50
Sifton v. McCabe . . . . .	162	Wilson v. Aitkin . . . . .	75, 202
Sinclair v. Robson . . . . .	168, 189	Wilson v. Brown . . . . .	191
Skilbeck v. Porter . . . . .	93	Wilson v. Gates . . . . .	257
Small v. Riddel . . . . .	205	Wilson v. Pringle . . . . .	173, 176
Smith v. Fralick . . . . .	120	Wismer v. Wismer . . . . .	84, 86, 113
Smith v. Hall . . . . .	187	Wood v. Brett . . . . .	211
Smith v. Harper . . . . .	205	Wood v. Ross . . . . .	125, 142
Smith v. Judson . . . . .	205		

	Page.		Page.
Woodside v. Toronto Street R. Co.	132	Barlow v. Broadhurst	37
Wordsworth v. McDougall	137	Barnard, <i>Re</i>	47, 68
Wright v. Cook	206	Barrington, <i>Re</i>	133
Young v. Fluke	56	Barrow v. Wadkin	262
		Bartrum v. Cuddy	208
		Bateman v. Joseph	181
		Bateman v. Mid-Wales R. Co.	89
		Baxendale v. Bennett	77
		Beardsley v. Baldwin	34, 58
		Beaven v. McDonnell	87
		Bechervaise v. Lewis	119
		Beck v. Robley	208
		Beeman v. Duck	100, 194
		Begbie v. Levy	60
		Belfast Banking Co. v. Doherty	91
		Bellamy v. Marjoribanks	242, 245, 246, 249
		Bennell v. Jarnell	50
		Bentinck v. Dorrien	81
		Berridge v. Fitzgerald	169
		Bethell, <i>Re</i>	59, 72, 79
		Beveridge v. Burgis	181
		Beverley's Case	87
		Bill v. Lord Ingestre	138
		Billing v. Devaux	26
		Birchfield v. Moore	218
		Bishop v. Chambers	217
		Bishop v. Chitty	191
		Bishop v. Heyward	144
		Blanckenhagen v. Blundell	48
		Blyth v. Birmingham	264
		Bobbett v. Pinkett	245
		Boddam v. Riley	201
		Boehm v. Campbell	43
		Boehm v. Gracias	155
		Bonar v. Mitchell	42
		Boraston's Case	57
		Bottomley v. Nuttall	158
		Boulton v. Stubbins	183
		Bowerbank v. Monterio	74
		Boyd v. Emerson	241
		Boys, <i>Re</i>	117
		Boyse, <i>Re</i>	37, 70, 167
		Bradlaugh v. DeRin	233
		Bradley v. Baylis	246
		Bramah v. Roberts	91
		Brandao v. Barnett	10
		Brill v. Cook	261
		Bristow v. Sequeville	230
		Bromage v. Lloyd	81, 83, 183
		Bromage v. Vaughan	174
		Brookes v. Elkins	253
		Brooks v. Mitchell	259
		Brough v. Perkins	63
		Brough v. Parkings	186
		Broughton v. Manchester Water-works	90
<i>English Cases.</i>			
Abrey v. Crux	29, 86		
Absolon v. Marks	136		
Aggs v. Nicholson	107		
Agra Bank, <i>Re</i>	152		
Ainsworth v. Walmsley	94		
Airey v. Farnsides	36		
Alcock v. Alcock	87		
Alderson v. Langdale	216		
Aldous v. Cornwall	218		
Alexander v. Birchfield	240		
Alexander v. McKenzie	103		
Alexander v. Thomas	38		
Allen v. Mawson	46		
Allen v. Edmundson	181		
Allen v. Kemble	233		
Allen v. Sea Fire and Life Ins. Co.	107		
Amner v. Clarke	43		
Ancona v. Marks	145		
Anderson v. Weston	60		
Anderton v. Beck	165		
Anon	36, 88, 237		
Anson v. Thomas	57		
Archer v. Bank of England	138		
Arnold v. Cheque Bank	146		
Ashpital v. Bryan	50		
Atkinson v. Hawdon	217		
Attenborough v. McKenzie	144		
Attorney-General v. Lichfield	267		
Attwood v. Griffin	218		
Attwood v. Munnings	102		
Awde v. Dixon	79		
Baines, <i>Re</i>	271		
Baines v. Wright	207		
Baker v. Jubber	71		
Baker v. Dening	35		
Baldwin v. Richardson	181		
Balfour v. Ernest	91		
Ballingalls v. Gloster	154		
Bank of Australia v. Breillat	27		
Bank of Ireland v. Beresford	120		
Bank of Ireland v. Evans Charities	100		
Bank of Van Dieman's Land v. Bank of Victoria	150, 258		
Banner v. Johnston	39		
Barclay v. Bailey	158		

	Page.		Page.
Brown v. Byers	91	Cooke v. Horn	55
Brown v. Davis	113	Cooper v. Earl Waldegrave	232
Brown v. DeWinton	252, 254, 255	Cooper v. Meyer	194, 195
Brown v. Haraden	62	Cory v. Davis	36
Brown v. Johnson	63	Cote, <i>Ex parte</i>	82
Browning v. Kinnear	181	Courtauld v. Sanders	107
Butt v. Pickard	218	Coward v. Hughes	112
Buckley, <i>Ex parte</i>	95, 258	Cowie v. Haswell	218
Buckley v. Jackson	140	Cowie v. Stirling	49
Burbidge v. Manners	141	Cox v. Troy	29
Butler v. Crips	44	Cramlington v. Evans	40
Butt v. Worrell	91	Cramley v. Hillary	190
Byron v. Thompson	218	Crears v. Hunter	115
		Crook v. Jadis	265
Callow v. Lawrence	141, 209	Crosse v. Smith	181
Camidge v. Allenby	254	Crossley v. Ham	170
Campbell v. Webster	188	Cunningham & Co., <i>Re</i>	89
Cannam v. Farmer	88	Carrie v. Misa	114
Carew v. Duckworth	183	Curtis v. Richards	253
Carlton v. Kennedy	55	Cutbush v. Cutbush	108
Carlos v. Fancourt	39, 58, 75, 262		
Carter v. White	71	Dailey v. DeFries	123
Carvick v. Vickery	136	Darbishire v. Parker	176, 177
Castle v. Burdett	64	Darlington and Stockton Banking Co. <i>Ex parte</i>	96
Castrique v. Bernabo	168	Davies v. Wilkinson	54
Castrique v. Buttigieg	66, 197, 232	Davis v. Jones	40
Caton v. Caton	35	Dawkes v. Earl Deloraine	39
Catteral v. Catteral, or Sweetman	236	Dawson v. Kearton	111
Caunt v. Thompson	162, 183	Dean v. Green	271
Chambers v. Miller	241	DeBerdt v. Atkinson	183
Champion v. Plummer	255	Decroix v. Meyer	74, 155
Chapman v. Hall	235	Defaur v. Oxenden	68
Charlton v. Lings	26, 88	De la Chanmette v. Bank of England	43
Charman, <i>Ex parte</i>	201	Dennis v. Morrice	183
Chartered Bank v. Dickson	143	Denny's Estate, <i>Re</i>	262
Chartered Mercantile Bank v. Dickson	258	Denton v. Peters	131
Cheale v. Kenward	31	Dickinson v. Valpy	90
Cheek v. Roper	151	Dixon v. Nuttall	57
Cheetham v. Butler	57	Dobree v. Eastwood	178
Childers v. Boulnois	253	Doe Watson v. Jefferson	153
Church v. Imperial Gas Light Co.	89	Downes v. Richardson	119
Clark v. Pigot	139	Drayton v. Dale	196, 263
Clarke, <i>Ex parte</i>	45	DuBouley v. DuBouley	94
Clarke v. Cook	26	Duncan v. North & South Wales Bank	193, 196, 197, 209
Clerk v. Blackstock	257	Dunlop v. Higgins	177
Clinch v. Smith	64	Dutch v. O'Leary	78
Clode v. Bayley	175		
Clubb v. Hudson	123	Eddison v. Collingridge	36
Clydesdale Bank v. McLean	243	Edie v. East India Company	53, 140
Colehan v. Cooke	37, 57	Edis v. Bury	47, 253
Collins v. Martin	117	Edmunds v. Bushell	95
Collis v. Emmett	37	Edwards, <i>Ex parte</i>	101
Commercial Bank of South Australia, <i>Re</i>	202	Elford v. Teed	160
Cook v. Lester	204	Ellis v. Thompson	79
Cook v. Long	110	Elsam v. Denny	208

	Page.		Page.
English v. Darley	207	Grant v. Vaughan	50, 53
Entick v. Cannington	269	Gray v. Johnston	243
Esdaile v. La Nauze	99, 100, 102	Gray v. Milner	47
Essett v. Tottenham	145	Greaves v. Ashlin	79
Evans v. Kymer	84	Greening, <i>Ex parte</i>	133
Ewart v. Latta	208	Griffin v. Weatherby	39, 132, 160, 191
Fairclough v. Pavia	139	Gurney v. Womersley	203
Faith v. Richmond	70	Guy v. Harris	253
Fallon, <i>Ex parte</i>	153	Hall v. Fuller	102
Fancourt v. Thorne	255	Hamilton v. Spottiswoode	33
Fanshawe v. Peet	76	Hanbury v. Lovett	218
Farquhar v. Southey	218	Hansard v. Robinson	191
Fayle v. Bird	75, 163, 191	Hardy v. Woodraffe	166
Feakley v. Fox	205	Harmer v. Steele	213
Fearn v. Filicia	104	Harpman v. Child	174
Ferris v. Bond	70, 257	Harrison v. Clifton	60
Fisher v. Calvert	39	Harrison v. Forth	125
Fisher v. Leslie	253	Harrison v. Ruscoe	173
Fitch v. Jones	218	Harrop v. Fisher	83, 133
Flight v. Maclean	44	Hartley v. Wilkinson	58
Flower v. Sadler	124	Harvey v. Martin	151, 153
Foley v. Hill	240	Hatch v. Searles	71, 123
Forbes v. Marshall	46	Haussoillier v. Hartsinck	37
Fordyce v. Bridges	85	Hawkes v. Saunders	114
Forster v. Mackreth	60	Hayward, <i>Ex parte</i>	29, 71, 78
Foster v. Dawber	127, 213	Hubbard v. Jackson	208, 209
Foster v. Jolly	86	Healey v. Storey	68
Foster v. Mackinnon	71, 79	Heathorn v. Darling	123
Frith v. Thrush	174, 176	Hebden v. Hartsink	158
Fry v. Hill	149	Hedley v. Bainbridge	96
Furnival v. Coombs	109	Heilbut v. Nevill	136
Furze v. Sharwood	94	Henderson v. Australian Steam Navigation Co.	89
Galway, (Lord) v. Matthews	95	Henman v. Dickinson	217
Gammon v. Schmoll	155, 191	Henry v. Lee	160
Gardiner v. Walsh	218, 256	Hewett v. Kaye	243
Garrard v. Lewis	56, 72	Hewett v. Loosemore	123
Geary v. Physic	33, 135	Hewitt v. Thompson	180
General Estates Co., <i>Re</i>	146	Heylyn v. Adamson	47
General South American Co., <i>Re</i>	202	Heywood v. Pickering	163
George v. Surrey	35	Hill v. Halford	37, 58
Geralopulo v. Wieler	223	Hill v. Roysds	160, 192, 243
Gibson v. Hunter	46	Hindhaugh v. Blakey	69
Gibson v. Minet	45, 50	Hine v. Alley	162
Gilbert v. Gignon	116	Hirschfield v. Smith	187, 218
Giles v. Bourne	40	Hirschman v. Budd	217
Gill v. Cubitt	123, 265	Hogarth v. Latham	72, 77, 97
Gillespie, <i>Re</i>	202	Hogarth v. Wherley	106
Goodman v. Harvey	83, 123, 170	Holbrow v. Wilkins	182
Goodwin v. Robarts	6, 9	Holdsworth v. Hunter	227
Goldsmith v. Bland	173	Hogan v. Healy	113
Gompertz v. Bartlett	203	Hogg v. Skeen	96
Gore v. Gibson	88	Holliday v. Atkinson	110
Goss v. Nelson	58	Holmes v. Jacques	49
Gosling v. Veley	270	Hooper v. Williams	44, 254
Goupy v. Harden	106	Hopely v. Dufresne	168



Page.	Page.		
Hopkins v. Ware . . . . .	166	Lindus v. Melrose . . . . .	108
Hopkinson v. Forster . . . . .	192	Little v. Slackford . . . . .	33
Howe v. Bowes . . . . .	192	Liverpool Borough Bank v. Walker. . . . .	109
Horne v. Redfean . . . . .	36	Llewellyn v. Winckworth . . . . .	103
Horne v. Ronquette . . . . .	233	Lloyd v. Ashby . . . . .	70
Hunter v. Jeffrey . . . . .	45	Lloyd v. Sigourney . . . . .	140
Ingham v. Primrose . . . . .	215	London Banking Co. v. Groom . . . . .	142
International Pulp Co. . . . .	42	London and North Western Bank v. Wentworth . . . . .	194
Ireland v. Guess . . . . .	90	London & S. W. Bank v. Wentworth . . . . .	80
Israel v. Israel . . . . .	253	Long v. Moore . . . . .	217
Jackson v. Hudson . . . . .	94	Lord v. Hall . . . . .	103
Jacobs v. Hart . . . . .	218	Lowe v. Peskett . . . . .	146
Janson v. Thomas . . . . .	57	Lowther v. Carlton . . . . .	125
Jenney v. Herle . . . . .	40	Lucas v. Growning . . . . .	154
Jones v. Gordon . . . . .	113, 123, 266	Lucas v. Williams . . . . .	109
Jones v. Jackson . . . . .	107	Lumley v. Palmer . . . . .	68
Jones v. Smith . . . . .	125	Lynch, <i>Ex parte</i> . . . . .	91
Josselyn v. Lacier . . . . .	39	Lysaght v. Bryant . . . . .	82
Julian v. Scholbrooke . . . . .	75	Mahony v. Ashlin . . . . .	42
Jury v. Barker . . . . .	36	Mahony v. East Holyford Mining Co. . . . .	92
Kearney v. West Granada, &c., Co. . . . .	227	Malcomson v. Malcomson . . . . .	47
Keene v. Beard . . . . .	94, 192	Malpas v. Clements . . . . .	255
Kershaw v. Cox . . . . .	218	Marseilles R. & L. C., <i>Re</i> . . . . .	232
Kilkenny, &c., R. Co. v. Fielden . . . . .	42	Marston v. Allen . . . . .	30
King v. Burrell . . . . .	165	Martin v. Boure . . . . .	6, 33
King v. Hoare . . . . .	256	Martin v. Chantry . . . . .	37, 253
King v. Zimmerman . . . . .	225	Marzetti v. Williams . . . . .	241
Kirk v. Blurton . . . . .	96	Mason v. Ramsay . . . . .	70
Knell v. Williams . . . . .	218	Master v. Miller . . . . .	217
Knight v. Clements . . . . .	217	Masters v. Baretto . . . . .	262
Lacon v. Hooper . . . . .	64	Matthews v. Bloxsome . . . . .	72
Lambert, <i>Ex parte</i> . . . . .	113	Matthiessen v. London and County Bank . . . . .	246, 250
Lampert's Case . . . . .	52	Maxwell v. Brain . . . . .	174
Law v. Parnell . . . . .	29, 145	May v. Chapman . . . . .	125
Laws v. Rand . . . . .	241	Mead v. Young . . . . .	49, 98
Leach v. Buchanan . . . . .	100	Megginson v. Harper . . . . .	49
Leach v. Hewitt . . . . .	183	Melanotte v. Teasdale . . . . .	253
Leadbitter v. Farrow . . . . .	102, 106	Mellish v. Rawson . . . . .	143
Leaf v. Gibbs . . . . .	93, 136, 256	Mellish v. Simeon . . . . .	233
Lebel v. Tucker . . . . .	43, 92, 233	Mendez v. Carreroon . . . . .	188
Lee v. Newsom . . . . .	126	Messenger v. Southey . . . . .	173
Leeds Bank v. Walker . . . . .	216, 217, 254	Mesure v. Britten . . . . .	60
Leeds Banking Co., <i>Re</i> . . . . .	176	Metcalfe v. Richardson . . . . .	173
Leftley v. Mills . . . . .	160, 188	Midland R. Co. v. Ambergate, &c. R. Co. . . . .	26
Legge v. Thorpe . . . . .	183	Miers v. Brown . . . . .	167
Leonard v. Wilson . . . . .	97	Millard v. Duke of Argyle . . . . .	204
Lester v. Garland . . . . .	63	Miller v. Biddle . . . . .	55
Leverson v. Lane . . . . .	96	Miller v. Race . . . . .	83
Levy v. Pyne . . . . .	76	Miller v. Thomson . . . . .	44
Lewis v. McKee . . . . .	65	Miln v. Prest . . . . .	74
Lickbarrow v. Mason . . . . .	11, 23, 100	Moffatt v. Edwards . . . . .	258
Lindo v. Unsworth . . . . .	179	Moline, <i>Ex parte</i> . . . . .	189
Lindus v. Bradwell . . . . .	70, 103	Molton v. Camroux . . . . .	87

	Page.		Page
Montagne v. Perkins	72	Perring v. Hone	217
Moore v. Ulster Banking Co	52	Peruvian R. Co. v. Thames Marine Ins. Co	89
More v. Manning	53, 139	Peto v. Reynolds	47
Morgan v. Davison	158	Phillips v. im-Thurn	50, 65, 220
Morgan v. Griffith	86	Philliskirk v. Pluckwell	111
Morgan v. La Riviere	199	Philpot v. Bryant	162, 211
Morley v. Culverwell	204	Philpott v. St. George's Hospital	85
Morris v. Lee	111, 252, 254	Phipps v. Tanner	56
Mullick v. Radakissen	143, 148, 149, 191	Phipson v. Kneller	182
Munroe v. Bordier	115	Pillans v. VanMicrop	68
Murray v. East India Company	49	Pinard v. Klockmann	227
McCall v. Taylor	35	Plimley v. Westley	53
McIntosh v. Heydon	158	Polhill v. Walter	103
McKenzie v. British Linen Co	99, 101	Pooley v. Driver	95
Mackereth v. Glasgow, &c., R. Co.	42	Porrier v. Morris	116
Maclae v. Sutherland	256	Potts v. Bell	88
Macleod v. Snee	39	Prideaux v. Criddle	163
McLean v. Clydesdale Banking Co.	33	Prescott v. Flynn	103
McNeillie v. Acton	108	Pretty v. Solly	85
McPherson v. Wright	188	Price v. Neal	194
Nelson v. Bridport	232	Prince v. Oriental Bank Corporation	215
Nicholson v. Revill	215, 217	Provincial Bank of Ireland v. Dunne	121
North of Scotland Banking Co. v. Behn	266	Pym v. Campbell	84, 86
Novilli v. Rossi	215	Quilter v. Mapleson	273
Odell v. Cormack Bros	96	Raffey v. Greenwell	57
O'Keefe v. Dunn	170	Ralli v. Dennistoun	207
O'Loghlin, <i>Ex parte</i>	270	Ralphael v. Bank of England, S3, 143,	253
Oridge v. Sherborne	54, 63	Redmayne v. Burton	82
Oriental Financial Corporation v. Overend	118	Redpath v. Allan	130
Orr Ewing, <i>Re.</i>	42	Regina v. Beard	98, 99
Orr v. Maginnis	187, 188	Regina v. Dyer	63
Orr v. Union Bank of Scotland	101	Regina v. Epps	98
Outhwaite v. Lantley	217	Regina v. Justices of Middlesex	153
Overend, Gurney & Co., <i>Re.</i>	113, 119, 223	Regina v. Mallow Union	270
Overend v. Oriental Financial Cor- poration	86	Regina v. Nevill	123
Owen v. Von Uster	70, 76	Regina v. Pearce	26
Palmer v. Pratt	37, 58	Regina v. Rogers	98
Parker v. Gordon	160	Regina v. Tuke	98
Parminster v. Symons	33	Regina v. Wilson	98
Partridge v. Bank of England	272	Regina v. Winterbottom	98
Pasmore v. North	60	Rew v. Pettet	109
Patience v. Townley	165	Rex v. Atkinson	98
Paul v. Joel	173	Rex v. Bolland	98
Peacock v. Purcell	158	Rex v. Boulton	95
Pearson v. Garrett	34, 58	Rex v. Dunn	98
Pease v. Pemberthy	191	Rex v. Forbes	99
Petit v. Benson	75	Rex v. Hals	98
Penkivil v. Connell	107	Rex v. Harte	98
Penny v. Innes	132, 137	Rex v. Justices of Cumberland	63
Penrose v. Martyr	107	Rex v. Lambton	132
		Rex v. Marshall	98
		Rex v. Peacock	98
		Rex v. Randall	34
		Rex v. Teague	98

	Page.		Page.
Rex v. Wilkes	46	Smith v. Union Bank	245
Reynolds v. Peto	47	Smith v. Vertue	74
Rhodes v. Morse	225	Snaith v. Mingay	43
Richards v. Richards	58	Société General v. Metropolitan Bank	227
Richdale, <i>Ex parte</i>	243	Solarte v. Palmer	173
Rickford v. Ridge	159, 163, 173	Sowerby v. Butcher	67
Robarts v. Tucker	157, 161	Sproat v. Matthews	39, 74, 75
Roberts, <i>Ex parte</i>	117, 133	Stagg v. Elliott	103
Roberts v. Bethell	60, 68, 79, 149	Startup v. Macdonald	79
Roberts v. Peake	34	State Insurance Co., <i>Re</i>	234
Robertson v. Kensington	74, 138	Stebbing v. Spicer	94
Robins v. May	58	Steele v. Harmer	91
Robinson v. Bland	125	Steele v. McKinlay	68, 69
Rogers v. Hadley	84	Stephens v. Reynolds	95
Rogerson v. Ladbroke	243, 244	Stevens v. Hill	39
Rolin v. Steward	241	Stevens v. Lloyd	218
Rothschild v. Currie	236	Stewart v. Gelot	231
Rouquette v. Overman	165, 196, 233	Stocken v. Conlin	177
Rowe v. Young	155	Stone v. Metcalf	262
Ruckmaboye v. Lulloobhoy	135	Stott v. Fairlamb	74
Ruff v. Webb	33	Straker v. Graham	152
Russell v. Hankey	205	Stringfield v. Lanezzari	241
Russell v. Lee	91	Suffell v. Bank of England	217
Russell v. Phillips	26, 70, 76	Sutton, <i>Ex parte</i>	103
Russell v. Powell	37	Swan v. Cox	74
		Swan, <i>Ex parte</i>	217, 224
Salomons v. Stavely	187	Swan v. North British Australian Co.	77, 79, 80, 165, 265
Samuel v. Green	81	Tassel v. Lewis	205
Sanderson v. Bowes	260	Tatam v. Haslar	129, 266
Saul v. Jones	167	Tatlock v. Harris	46
Saunderson v. Jackson	35	Taylor v. Croker	92
Saunderson v. Piper	55, 56	Temple v. Pullen	79
Scard v. Jackson	78	Tennant v. Crawford	254
Schneider v. Norris	35	Thackray v. Blackett	170, 174
Schroeder v. Central Bank	192	Thomas, <i>Ex parte</i>	133
Selby v. Eden	163	Thompson v. Clubley	120
Serle v. Norton	191	Thompson v. Giles	117
Sharp v. Bailey	183	Thompson v. Lack	273
Shelton v. Braithwaite	177	Thompson v. Universal Salvage Co.	90
Shelton v. James	34	Tidmarsh v. Grover	217
Shephard v. Payne	270	Toder v. Sansam	88
Shultz v. Astley	71	Tootell, <i>Ex parte</i>	38
Shuttleworth, <i>Ex parte</i>	133	Touret v. Cripps	35
Shuttleworth v. Stephens	46	Triggs v. Newenham	158
Sibree v. Tripp	38	Trimble v. Hill	236
Siggers v. Lewis	168	Trimmer v. Oddie	81
Simmons v. Taylor	245	Truman v. Hurst	179
Sloman v. Cox	217	Tunno v. Lague	182
Smallpage's & Brandon's Cases	32, 232	Turner v. Leach	169, 183
Smith v. Abbott	74	Turner v. Samson	63
Smith v. Bellamy	50	Tutton v. Darke	117
Smith v. Clay	153	Twogood, <i>Ex parte</i>	123
Smith v. Kendall	51		
Smith v. Mundy	81		
Smith v. New South Wales Bank	151		
Smith v. Smith	253		

	Page.		Page.
Vagliano v. Bank of England . . .	46, 50, 99, 100, 167, 194	Yates, <i>Ex parte</i> . . . . .	218
Vance v. Lowther . . . . .	217	Yates v. Dalton . . . . .	96
VanderDonckt v. Thellusson . . . .	260	Yates v. Nash . . . . .	48, 49
Vaughan v. Fuller . . . . .	168	Yorkshire Banking Co v. Beatson . .	95
Vincent v. Horlock . . . . .	139	Young v. Glover . . . . .	132
		Young v. Grote . . . . .	217
Wackerbath, <i>Ex parte</i> . . . . .	188		
Waithman v. Elsee . . . . .	253	—	
Walker v. Atwood . . . . .	75	<i>American Cases.</i>	
Walker v. McDonald . . . . .	139	Alabama, &c., Co. v. Brainard . . .	109, 136
Walmsley v. Child . . . . .	225	Amy v. Supervisors . . . . .	165
Walter v. Hastings . . . . .	217	Armstrong v. Thurston . . . . .	161
Walton v. Mascall . . . . .	190, 261	Arnold v. Dresser . . . . .	162
Ward v. Evans . . . . .	159	Austin v. Miller . . . . .	270
Ware v. Lord Egmond . . . . .	125		
Warrington v. Early . . . . .	218	Bacon v. Bicknell . . . . .	257
Watson v. Evans . . . . .	49	Bacon v. Burnham . . . . .	137
Watson v. Kightley . . . . .	40	Baldwin v. Farnsworth . . . . .	162
Webb v. Fairmane . . . . .	63	Ballard v. Greenbush . . . . .	214
Wegersloffe v. Keene . . . . .	75	Bayou Sara v. Harper . . . . .	115
West London Commercial Bank v. Kitson . . . . .	104	Bank of Commonwealth v. Curry . .	78
Whatley v. Tricker . . . . .	213	Bank of Rochester v. Harris . . . .	242
Wheatley v. Williams . . . . .	253	Bank of Tennessee v. Burk . . . . .	89
Whistler v. Forster . . . . .	122, 125,	Bank of Toronto v. Hunter . . . . .	119
White v. North . . . . .	253	Bank of United States v. Davis . . .	137
Whitfield v. Lord Despencer . . . .	163	Bank of Utica v. DeMott . . . . .	180
Whitlock v. Underwood . . . . .	57	Bank of Washington v. Triplett . .	72, 151
Whitmore v. Wilks . . . . .	217	Barclay v. Weaver . . . . .	182
Wiggen v. Roberts . . . . .	158	Barker v. Mechanics Insurance Co . .	109
Wilde v. Sheridan . . . . .	81	Barker v. McKay . . . . .	186
Wilkes v. Jacks . . . . .	183	Bayerque v. San Francisco . . . . .	40
Wilkins v. Jadis . . . . .	158	Beardsley v. Hill . . . . .	56
Wilkinson v. Britton . . . . .	63, 154	Beckwith v. Union Bank . . . . .	243
Wilkinson v. Johnson . . . . .	214	Beede v. Real Estate Bank . . . . .	214
Wilkinson v. Lutwidge . . . . .	68	Benedict v. Cowden . . . . .	217
Wilkinson v. Payne . . . . .	113	Bellows v. Folsom . . . . .	82
Wilkinson v. Unwin . . . . .	144	Biesenthall v. Williams . . . . .	33
Willans v. Ayers . . . . .	44, 202	Bingham v. Kimball . . . . .	111
Williams v. Bailey . . . . .	124	Blake v. McMillan . . . . .	151
Williams v. East India Company . .	77	Blodgett v. Jackson . . . . .	50
Williams v. Germaine . . . . .	72, 181,	Blout v. Proctor . . . . .	124
Williams v. Smith . . . . .	176	Boiles v. Sterns . . . . .	70, 137
Williams v. Waring . . . . .	161	Bond v. Brotherson . . . . .	218
Williamson v. Watts . . . . .	91	Bouldin v. Page . . . . .	175
Willis v. Barrett . . . . .	48, 70	Booth v. Wallace . . . . .	56
Wilson, <i>Ex parte</i> . . . . .	211	Brackitt v. Mountford . . . . .	218
Wilson v. Thornbury . . . . .	99	Brenzer v. Wightman . . . . .	53
Witham v. Lee . . . . .	124	Brockway v. Allen . . . . .	109
Wood v. Mytton . . . . .	44	Brooke v. Edson . . . . .	30
Woodcock v. Houldsworth . . . . .	178	Brown v. Butchers and Drivers Bank	35
Woodward v. Pell . . . . .	144	Brown v. Gilman . . . . .	253
Worley v. Harrison . . . . .	58	Brown v. Jones . . . . .	218
Worrall v. Halford . . . . .	108	Brown v. Spofford . . . . .	252
Wynne v. Jackson . . . . .	231	Brown v. Torkington . . . . .	124
		Buckner v. Curry . . . . .	207

	Page.		Page.
Burtch v. Dent .....	207	Gantt v. Jones .....	175
Bullock v. Agburn .....	112	Gardiner v. Cleveland .....	197
Burns v. Rowland .....	83	Gavin v. Burton .....	91
Canfield v. Ives .....	81	Granite R. Co. v. Bacon .....	218
Caril v. Brown .....	143	Griffin v. Rice .....	243
Carlton v. Brooks .....	37	Gillilan v. Myers .....	29
Carmichael v. Pennsylvania Bank ..	188	Golding's Petition .....	91
Carter v. McClintock .....	82	Gordon v. Rundlett .....	37
Caruth v. Thompson .....	30	Gough v. Staats .....	242
Chadsey v. McCreery .....	67	Groves v. Brown .....	206
Chester v. Dorr .....	119	Gookin v. Richardson .....	133
Clark v. Sigourney .....	83, 133	Hall v. Howard .....	112
Closson v. Stearns .....	30	Haskell v. Cornish .....	109
Clute v. Small .....	218	Harden v. Wright .....	112
Colson v. Arnot .....	123	Harris v. Clark .....	162
Commercial Bank v. Routh .....	227	Heast v. Sybert .....	112
Connor v. Routh .....	58	Henry v. Jones .....	158
Cook v. Satterlee .....	33	Herring v. Woodhull .....	132
Corcoran v. Hodges .....	198	Hodges v. Winton .....	132
Costello v. Crowell .....	255	Holmes v. Sinclair .....	257
Cowperthwaite v. Sheffield .....	39	Hopkirk v. Page .....	179
Cox v. Hodge .....	207	Hoyt v. Seeley .....	242
Craft v. State Bank .....	159	Inghram v. Gibbs .....	227
Cribbs v. Adams .....	188	Jackson v. Young .....	268
Crutchfield v. Easton .....	135	Jerome v. Stebbins .....	159
Curtis v. Brooks .....	205	Johns v. Harrison .....	79
Dana v. San Francisco .....	40	Johnson v. Smith .....	102
Dana v. Sawyer .....	158	Kennedy v. Murdick .....	124
Daniel v. Kyle .....	241	Keyes v. Fenstermaker .....	159
Dart v. Sherwood .....	257	King v. Holmes .....	152, 161
Day v. Cutler .....	125	Kingsbury v. Ellis .....	124
Dean v. DeLezardi .....	40	Kinne v. Ford .....	29
Denegre v. Hiriart .....	174	Kilgour v. Buckley .....	53
Dickerson v. Burk .....	257	Kitchen v. Place .....	218
Douglas v. Wilkeson .....	34	Knowles v. Hill .....	201
Dumont v. Williamson .....	66	Kobler v. Montgomery .....	159
Dyer v. Township of Covington ...	40	Konig v. Bayard .....	65
Dykers v. Leather Manufacturers Bank .....	243	Kountz v. Hart .....	218
Earle v. Page .....	130	Lansing v. Gaine .....	30
Ellis v. Dunham .....	149	Latham v. Jones .....	140
Evans v. Steel .....	40	Lehman v. Jones .....	166
Ewing v. Burnett .....	262	Leonard v. Mason .....	33
Farmers Bank, <i>Re</i> .....	244	Lewis v. Schenk .....	216
Ferris v. Saxton .....	163	Lieber v. Goodrich .....	36
Field v. Nickerson .....	159	Lowe v. Blisse .....	55
Fisk v. Eldridge .....	67	Lowery v. Stewart .....	48
Fort v. Meacher .....	194	Lumbermans Bank v. Pratt .....	97
Foster v. Fuller .....	109	Lyon v. Marshall .....	49
Foster v. Hill .....	197	Massachusetts Bank v. Oliver ..	151, 175
Franklin v. March .....	253	Matthews v. Redwine .....	34
Freeman v. Boynton .....	159	Maples v. Wightman .....	91
Fritsch v. Heislen .....	60		

	Page.		Page.
Mechanics Bank v. Lynn	162	Reid v. Morrison	166
Miek v. Howard	136	Rice v. Gove	35
Miller v. Hackley	227	Rice v. Ragland	33
Minturn v. Fisher	182	Roberts v. Mason	166
Mitchell v. Byrne	82	Robertson v. Vogle	180
Mitchell v. DeGrand	72	Rockingham Bank v. Claggett	207
Morton v. Naylor	39	Russell v. Whipple	253
Most v. Hicks	107		
Muldrow v. Caldwell	255	Sayles v. Sim	257
Musselman v. Oakes	48	Schneider v. Irving Bank	243
		Scott v. Depeyster	264
McArthur v. McLeod	113	Seaver v. Lincoln	159
McBean v. Morrison	35	Seymour v. Leyman	133
McCoy v. Gilmore	253	Shader v. Batchelor	40
Mc'roillis v. How	91	Shed v. Brett	162
McRae v. Russell	124	Smith v. Applegate	124
		Smith v. Kittridge	112
Nance v. Lary	77	Smith v. Smith	56
Nash v. Harrington	179	Smith v. Whiting	136
Nash v. Russell	112	Spear v. Pratt	69
National Bank v. Millard	242	State v. McLean	268
Newson v. Tighen	124	Stoutenberg v. Lybrand	125
New Orleans Canal Co. v. Bry	179	Sublett v. McKinney	210
New York Contracting Co. v. Selina Bank	183	Sullivan v. Collins	112
Nichols v. Frothingham	58	Sussex Bank v. Baldwin	188
Nightingale v. Barneg	111	Swasey v. Vanderheyden	91
Nightingale v. Withington	92	Swift v. Tyson	20
		Swope v. Ross	197
Orear v. McDonald	150	Taylor v. Davidson	161, 162
Ormsby v. Kendall	109	Thayer v. Brackett	159
Osgood v. Parsons	48	Tousey v. Taw	111
Otis v. Harrison	124	Toothaker v. Cornwall	176
		Tuten v. Ryan	97
Palmer v. Stephens	257		
Palmer v. Whitney	179	United States v. Hardyman	272
Pardee v. Lindley	29	United States Trust Co. v. United States Fire Ins. Co.	268
Parsons v. Armor	83, 237		
Pemigewasset Bank v. Rogers	124	Washington Mutual Ins. Co. v. Miller	54
People v. Allen	268	Weatherby v. Choate	112
People v. Cook	268	Wells v. New York Central R. Co.	265
Persons v. McKibben	132	Wheeler v. Webster	69
Philadelphia Bank v. Newkirk	36	Wheeler v. Wheeler	136
Pine River Bank v. Hodsdon	115	White v. Heylman	112
Prescott v. Ward	115	Wiggins v. Vaught	34
Price v. Sharp	214	Williams v. Nichols	112
		Willoughby v. Moulton	35
Quin v. Sterne	35	Wilson v. Senier	179
		Wogan v. Thompson	175
Raiganel v. Ayliff	40	Wood v. McMeans	180
Raymond v. Sellick	115	Woodford v. Dorwin	59
Read v. McNulty	37	Worden v. Dodge	39
Reed v. Roark	33, 218		

# INTRODUCTION

TO THE

## LAW OF BILLS OF EXCHANGE.

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The little document, known under the names of a "Bill of Exchange," or a "Promissory Note," whether issued by a banker as a draft or a bank note, or by merchants and others, as a credit security, and which, cosmopolitan in its nationality, has permeated the commerce of the world, and gathered around it a code of universal mercantile law, has been thus described: "A bill of exchange is commonly drawn on a small piece of paper and comprised in two or three lines, and is so noble and excellent, that it is beyond or exceeding any specialty or bond in its punctuality and precise payment; for if once accepted, it must be paid when due, otherwise the acceptor loses his credit."<sup>1</sup>

A bill of exchange.

The negotiable securities called bills of exchange, promissory notes, bank notes, cheques, and other paper-money securities which partake of their characteristics, are the only species of contract, technically classed by the law under the title of *choses in action*, which ordinarily carry with them, by transfer, a clear and indefeasible title. They may be said to possess three qualities or characteristics, which distinguish them from all other contracts or chattel rights in property of the species known as *choses in action*.

Qualities of bills and notes.

1. The title. If any chattel, which can be identified, is stolen from its owner, no purchaser, however innocent or ignorant of the theft, can acquire a title to it against the

1. Indefeasible in title.

<sup>1</sup> Beawes, *Lex Mercatoria* 561.

true owner. And such owner can claim it at any time, and at any place, if he is able satisfactorily to identify it and establish his original ownership. But if a negotiable bill or note, drawn or indorsed so as to be payable to bearer, be stolen, and transferred by the thief to a third person who is innocent and ignorant of the theft, and who gives value for it to the thief, such person becomes, by his purchase, a *bona fide* holder for value without notice. He is, as the new Act designates him, "a holder in due course," and acquires an absolute and indefeasable title to the bill or note, and can claim the payment of it from all the prior parties, who may be legally liable to him according to their several contracts.

2. Certain  
in amount

2. The amount. If a bond, or other *chose in action*, is transferred to a *bona fide* holder, it carries with it all its equities and defects of title; and the assignee or holder steps into the shoes of his assignor, and is subject to the contingency of its amount being reduced by set-off or counter-claim, or agreements qualifying its value, between the original parties. No transfer by a thief can give a title to it, or in any way defeat the right or title of the original holder, or any successive holders, of such bond or *chose in action*. But a bill or note guarantees the right to the whole amount secured by its face, and is subject to no deduction or set-off, at the instance of the original or intervening parties, in the hands of a holder in due course, who has *bona fide* acquired it for value before maturity. It is like a bank note, a circulating instrument of credit, and part of the commercial currency of the country, and has all the rights of negotiability which, for the public interest and convenience, attach to an ordinary bank note.

3. True in  
considera-  
tion.

3. The consideration. By the usage of merchants, the value stated on a bill or note, is the true consideration, and is conclusively presumed by law to be so; and in the hands of a holder in due course, no evidence is allowable that, at



the time the bill or note was signed and delivered, or at any time subsequently, there was a total or partial failure of the consideration stated as the "value received," or that its face value was to be reduced on some qualifying contingency. And this absolute and indefeasible protection and security, as to the consideration for the bill or note, is available in the hands of a banker discounting and holding it as a security for advances, as it is in the hands of an absolute owner of the bill or note, who holds it by the title of a holder in due course. All defects of title, and all equities attaching to the bill or note between the immediate and remote parties, who are legally such, perish with its *bona fide* transfer for value to "a holder in due course."

The origin and history of Bills of Exchange, like the origin and history of many other commercial contracts, are subjects involved in no small obscurity. The exchange of goods for goods, or what is called barter trade, appears to have existed in all nations from the earliest period of their formation into communities, apparently from the very necessities of their trading intercourse with each other.

Origin and history of bills and notes.

The original traffic by barter becoming troublesome, soon led to the invention of money, in the shape of coins of the most valuable metals, which, for the convenience of foreign trade, were of an easy carriage, by being less bulky than goods. Ultimately the ingenuity of man and the necessities of commerce, substituted letters of remittances and exchanges by bills, to save the expense, risk, and trouble, which the transport of money from one kingdom to another occasioned.

Barter.

Money and Coins.

Exchanges by bills substituted.

The Jews banished from France in the reigns of Philip Augustus and Peter le Long, are supposed by some to have been the original inventors of exchanges; whilst others with greater appearance of probability, assign the contrivance to the Gibelins, on their being expelled from Italy by the factions of the Guelphs; though the motives given for

Inventors of bills of exchange.

Regulated  
by values of  
coins.

both are the same, viz., their endeavours to withdraw their absconded effects, with the secrecy necessary to prevent their confiscation, to those countries which they had chosen, or where they had been compelled to reside; and for this purpose they gave bills on their private friends, to foreign merchants, for the sums agreed on, which were regulated by the different values of the coins exchanged. As many of these bills came back unpaid, it gave birth to the charge of re-exchange, said to have been first begun by the Jews and Lombards; and these after different modifications, fixed it into a branch of mercantile business.<sup>2</sup>

These exchanges by bills were soon extended for the easier conducting of mercantile affairs, and at the same time to prevent the exportation of their current coin; and were found so beneficial and advantageous to trading communities as to induce several sovereigns to make laws and regulations concerning them.

Tables of *par*  
value of  
foreign coins.

Edward III., under an "Act for Tables of Exchange," passed in 1335, caused certain tables to be set up at Dover and other parts of the realm, declaring the value of the sundry species of coins current in the countries trading with his subjects, and the rate of allowance merchants were to pay to be accommodated with remittances. Other statutes relating to foreign trade may be seen in many of the laws of his reign. These tables and exchanges were subject to the direction of the King's Mint-Master, who made them *par pro pari*, or value for value, with a reasonable allowance to those who were appointed to intervene as exchangers for their trouble; and many Acts have been passed in succeeding reigns concerning them.

Allowance  
forexchange.

Whether  
bills of  
exchange  
were known  
to the  
ancients.

It has been supposed by some writers, that Bills of Exchange were known to the nations of antiquity, and especially to the Romans.<sup>3</sup> But there is great reason to

<sup>2</sup> Beawes, *Lex Mercatoria*, 559-560.

<sup>3</sup> Mr. Justice Byles in the preface to his work on Bills of Exchange, says that "there is no vestige of the existence of bills of exchange among

doubt, whether the use of them, in the form and manner, and for the purposes, to which they are now applied, was known to antiquity. The nearest approach seems to be the custom, which prevailed at Rome, where one paid money to another at Rome to be repaid by the other at another place, as, for an example, at Athens. This contract is repeatedly alluded to by writers. And in the Pandects, the like contract is supposed to be referred to in certain passages. But it may be doubtful, whether the contract here spoken of, is that of our modern bill of exchange. It may be said more nearly to resemble a contract for the exchange of moneys in different places, or a mandate to advance money, to be repaid in another place. Certain it is, that the peculiar distinguishing quality of bills of exchange in modern times, their negotiable character, does not appear to have been known to the ancients, or to have found its way into the general transactions of their commercial intercourse.<sup>4</sup>

Some uncertainty rests upon the point when Bills of Exchange were first introduced into England; but there is reason to believe, that they were there known as early as A.D. 1307; since Edward I. in that year ordered certain moneys, collected in England for the Pope, not to be remitted to him in coin or bullion, but by way of exchange: *per viam cambii*.<sup>5</sup>

When bills were first introduced into England.

A. D. 1307.

the ancients; and the precise period of their introduction is somewhat controverted." And in *Chitty on Bills of Exchange*, it is stated: "By the Roman law, a person lending money to a merchant who navigated the seas, was under the necessity of sending one of his slaves to receive of his debtor the sum lent, when the debtor arrived at his destined port; which would certainly have been unnecessary if commerce, through the medium of bills of exchange, had been in use with them."

<sup>4</sup> *Story on Bills of Exchange*, s. 6.

<sup>5</sup> 2 Rymer's *Fœdera*, 1042. This form of exchange was called *cambio commune* (mutual exchange) and "was constituted by the several kings, who, having received money in England would remit by exchange the like sums to be paid in another kingdom, according to the regulation of the above mentioned tables:" Beawes, *Lex Mercatoria*, 560.

It is stated in a law tract that Promissory Notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. <sup>6</sup> Indeed as early as the statute of 3 A. D. 1379. Rich. II. c. 3 (1379), Bills of Exchange were referred to as letters of exchange (*lettere d'echange*); and the liege people of the kingdom were prohibited, without the king's license, from sending gold, silver, or other treasure, out of the realm by such *letteres*, for the benefit of aliens residing in foreign countries. But the general use of such letters of exchange must have been limited. According to Mr. Justice Story, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of custom."

Founded on  
practice of  
merchants.

With the development of English Commerce, the use of these most convenient instruments of commercial traffic would necessarily increase; yet, until about the reign of Elizabeth (1602),<sup>7</sup> the practice of making these bills negotiable by indorsement, had not been generally known; and the earlier bills are found to have been made payable to a man and his assigns, though in some instances to bearer.

A. D. 1602.

Usurious  
exchange.

The causes of this want of use are various. Prior to the reign of Henry VII., usurious lenders, who desired to take more interest than the law allowed, required the merchants who had to procure loans from them, to do so through bills called *cambio sicco* (dry exchange), or *cambio fictitio* (fictitious exchange), by which extra charges, under the pretence of exchange and re-exchange, were exacted.

Law against  
dry ex-  
change.

These two last methods of raising money from the necessitous, were prohibited by an Act of Parliament in 1487, by 3 Henry VII., c. 5; but on account of the base moneys coined

<sup>6</sup> "Specimen of a Digest of the law of Bills of Exchange," cited by Cockburn, C. J., in *Goodwin v. Roberts*, L. R. 10 Ex. 347.

<sup>7</sup> The first case on bills of exchange (a foreign bill) to be found in the law reports is *Martin v. Boure* (44 Eliz. 1602), Cro. Jac. 6.

by Henry VIII. at the siege of Boulogne, exchanges were discontinued, and the aforesaid pressures and abuses became again current in the reign of Edward VI., which occasioned all exchanges to be prohibited for a short time; but this being found of great inconvenience and detriment to trade, it was again restored; though almost quite neglected, and the illegal part of it was connived at during the succeeding reign.<sup>8</sup>

Another cause may be said to have existed in France, where there was an Ordinance of Louis XI. (1462), which permitted persons of all nations to give, take, and remit their money by Bills of Exchange, in the business of merchandize, to or from other countries, *except the nation of England.*

French prohibition.  
A. D. 1462.

But about the commencement of the seventeenth century the practice of making bills payable to order, took its rise. Some writers on bills of exchange state that the first known mention of the indorsement of these instruments occurs in 1607. Others have assigned it to a later date, namely 1620. From its obvious convenience in the transfer of bills, this practice speedily came into general use; and, as part of the general custom of merchants, received the sanction of the Courts. At the first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.<sup>9</sup>

Bills payable to order.

A. D. 1607.

A. D. 1620.

Extended to inland and foreign bills.

In the meantime, Promissory Notes had also come into use, differing herein from Bills of Exchange in that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer; but when the practice of making bills

Origin of promissory notes.

<sup>8</sup> Beawes, *Lex Mercatoria*, 561.

<sup>9</sup> *Chitty on Bills*, 5th ed., p. 13.

Transferable  
by indorse-  
ment.

of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some years the Courts of law, after some conflict of decision, at last acted upon the usage of merchants with reference to promissory notes, as they had previously done with reference to bills of exchange.

Origin of  
banking.

The practice of drawing cheques may be said to have originated with the London Goldsmiths, who were the first English bankers. Prior to the middle of the 17th century, their trade was restricted to the purchase and sale of foreign coin; but they then extended it the holding and lending of money. Up to that time, the merchants of London had been accustomed to deposit their money for safe-keeping in the Mint; but Charles I., in 1640, took possession of £200,000 thus lodged, which at once put a stop to the practice. The Goldsmiths being then the only traders in gold and silver, and having strong boxes, became the custodians of money, and ultimately extended their business as borrowers and lenders on securities. The deposited moneys were repaid by cash notes or as their customers required; and when the customer wished to make a payment to another, he would write a note to his goldsmith, or banker, simply requesting him to pay the amount required to the person named as the bearer of the note. This new business of the goldsmith gave rise to a novel form of mercantile paper; and these "cash notes," or notes of request

Goldsmith's  
notes.

soon became current, and were for many years known as "goldsmith's notes;" and although, as in the case of promissory notes, they were at first held to be non-negotiable (*Nicholson v. Sedgwick*, 1 Ld. Raym. 181), they speedily became negotiable as current mercantile securities, or inland bills, or "cash notes," but subject to the same conditions as to prompt presentation for payment, as ordinary bills of

exchange payable on demand (*Moore v. Warren*, 1 Stra. 415). These goldsmith's or cash notes are said to have been the origin of the modern "cheque," an instrument which in legal language is an inland bill of exchange drawn on a banker, payable on demand to the bearer, or to the order of a person named. The cheque on a bank is therefore subject in general to the rules which regulate the right and liabilities of parties to bills of exchange; but it is also subject to certain usages of banks peculiar to cheques, which have sprung up and been recognized in legal decisions.

Cheque.

The *Lex Mercatoria*, or law-merchant, is sometimes spoken of as a fixed body of law, forming part of the common law, and as if it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law-merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and bankers in the different departments of trade, ratified by the decisions of Courts of Law, which, upon such usages of merchants being proved before them, have adopted them and declared them to be settled law, with a view to the interests of trade and the public convenience. In thus legalizing mercantile usage, the Courts have proceeded on the well-known principle of law that, with reference to transactions in the different departments of trade, it may be assumed that the parties have dealt with one another on the footing of some custom or usage, prevailing generally in that particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it.<sup>1</sup> "When a general usage has been judicially ascertained and established," says Lord Campbell, "it

Origin of the law-merchant.

Usage of merchants ratified by the Courts.

And so engrafted into the common law.

<sup>1</sup> *Per* Cockburn, C.J., in *Goodwin v. Roberts*, L. R. 10 Ex. 346.

becomes a part of the law-merchant, which the Courts of justice are bound to know and recognize." <sup>2</sup>

Custom of  
modern  
bankers.

The universality of a usage voluntarily adopted between buyers and sellers, is conclusive proof of its being in accordance with public convenience. An illustration of the efficacy of usage is to be found in the modern English banking system. It is a matter of history that, with the exception of the Bank of England, the system of banking has undergone an entire change. Formerly the banker issued his own notes in return for the money of the customer deposited with him. Now the customer is given credit in account, and may draw upon the bank, by what is now called a cheque, payable to bearer or order. Upon this state of things the general course of dealing between banks and their customers has ingrafted usages previously unknown; and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee of a bill of exchange, although in possession of the funds of the drawer, is not bound to accept, unless by his own agreement or consent, the bank, if it has funds of the drawer, is bound to pay cash on presentation of a customer's cheque, payable on demand. Even the admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a bank; and money deposited with a bank is not only money lent, but the bank is bound to repay it, when called for by the cheque or draft of its customer. Besides this peculiar custom, other customs and usages have grown up between banks and their customers, and between banks themselves, by which they become bound, and to which the Courts have given the sanction of law. Bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which, without it, would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision, that the right to pass the

Modern  
mercantile  
usage.

<sup>2</sup> *Brandao v. Barnett*, 12 C. & F. 805.



property in goods by the assignment of bills of lading is derived.<sup>3</sup>

The history of the *Lex Mercatoria* also illustrates the controlling effect of mercantile usage in the assignment of bills and notes from one person to another. In the early days of the common law, great judges declared that the assignment or transfer of *choses in action* was unlawful, because they "would be the occasion of multiplying contentions and suits, and be great oppressions of the people," (10 Co. R. 48); and they interdicted such assignments as having a taint of maintenance. But prior to such declaration of the common law, merchants had established the usage of transferring bills of exchange (which were also *choses in action*), from hand to hand by delivery, or by the simple writing of a name on the bill, which assigned at once the right of action, and gave an unwritten contract of guarantee to the holder of the bill, in silent disregard of both the judicial declaration of the common law, and the legislative prohibition of the Statute of Frauds. The rights of property and the contract liabilities thus established by the custom of merchants, respecting this class of *choses in action*, and the necessity of recognizing bills and notes as part of the negotiable currency of the community, silently incorporated these usages and customs into the common law, as part of the *Lex Mercatoria*, and compelled the harshness of the common law to give way to the more common-sense usages of merchants. But it was not until 1872, that many of the rules of the *Lex Mercatoria* were extended to other classes of *choses in action*, by the Ontario Act, 35 Victoria, chapter 12, (now R. S. O. 1887, c. 122 ss. 6-13.)

Privilege of bills and notes as *choses in action*.

Another illustration of how mercantile usage has displaced the common law, may be shown in the practice of the courts, by which a bill of exchange or promissory note, though classed by the common law as a "simple contract,"

Privilege of bills and notes as specialties.

<sup>3</sup> *Lickbarrow v. Mason*, 2 East 70.

bears on its face the proof of its value in money. No such privilege is allowed to ordinary simple contracts, for the money or other valuable consideration given for them is not presumed, but must be proved. But the specialty, or more formal, contracts under seal, carry with them the internal evidence of their being made for valuable consideration. Thus by the controlling force of the usage of merchants, the legal privilege of specialty contracts has been conceded by the Courts to bills and notes, for the better facilities of trade and finance, and for the further reason that these negotiable securities have become part of the recognized currency of the country in commercial and financial transactions.

Judiciary  
mode of law-  
making.

This process of law-making has been termed legislation by the judiciary mode, to distinguish it from the ordinary legislative process by which the general laws of a nation are enacted. And as this judicial law has been, from time to time, formed by judges under the eyes of the sovereign legislature, or has been acquiesced in by its recognition in various statutes, it thereby becomes law by the acquiescence and authority of the sovereign government.

Austin on  
customary  
law.

Referring to the mode by which a law is derived from custom or usage, Austin says: "Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies, (or in the observance of which a custom consists), derives the whole of its obligatory force from these concurring sentiments, which are styled Public Opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rule morally sanctioned, or a rule of positive or actual morality. It is properly *jus moribus constitutum*; its only source, or its authors, are those who observe it spontaneously, or without compulsion by the state."

Judiciary  
law.

"Law, styled customary then, is not to be considered a distinct kind of law. It is nothing but judiciary law

founded on an anterior custom. As merely customary law (in the loose and improper sense of the term 'law'), or rather as merely positive morality, it comes immediately from the subject members of the community, by whom it was observed spontaneously, or without compulsion by the state. But as positive law, it comes immediately from the sovereign, through subordinate judges, who transmute the moral and imperfect custom into legal and perfect rules." <sup>4</sup>

It was not without a struggle that the merchants succeeded in compelling the Judges to recognize these customs and usages. Lord Holt, C. J., was, as his reporter states, *totis viribus*, against some customs of merchants which he said "proceeded from obstinacy and opinion-ativness." And in refusing to hold that a promissory note payable to bearer was valid, he said: "It amounted to setting up a new specialty, unknown to the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall." And in another case he denounced, "the noise and cry that such is the usage of Lombard street, as if a contrary opinion would blow up Lombard street."<sup>5</sup> The matter was finally settled by Parliament, in favor of the contention of the merchants, by the Act 3 & 4 Anne, c. 9.

Contest  
between the  
merchants  
and the  
Courts.

But the merchants ultimately became the victors in the struggle to engraft their usages and customs on the common law, mainly through the great assistance of Lord Mansfield, who has been justly styled "the founder of the commercial law of this country," (2 East 73); and judges have had to concede that the custom of merchants is now part of the common law, and that the courts will take notice of it *ex officio*.

<sup>4</sup> 2 Austin's Jurisprudence, 553 and 555. On a prior page (p. 548), he distinguishes these processes as "law established in the legislative manner," and "law introduced and obtaining *obliquely*," or "law established or introduced in the way of *judicial* legislation." But elsewhere he combats the use of the term "judge-made law."

<sup>5</sup> See 2 Lord Raymond's Reports pp. 758 and 930.

English, or  
banking,  
theory.

French, or  
mercantile,  
theory.

English, a  
flexible  
system.

French, a  
trade  
system.

French and  
English  
systems  
compared.

The results of this formation of the law by custom are instructive; for this law of trade usage and custom now controls all negotiable instruments alike, whether they are the contracts of traders or non-traders. The English usage may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A Bill of Exchange in its origin was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France, a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavors to stamp it out. A comparison of some of the main points of divergence between English and French law will show how these two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyn's Digest). In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order, becomes payable to bearer when indorsed in blank. In France an

indorsement in blank merely operates as a procuration. An indorsement to operate as a negotiation must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonored at maturity; the holder in the meantime is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in case of an inland bill, notice of dishonor alone being sufficient. In France every dishonored bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community; but this is a problem which is beyond the province of a lawyer to attempt to solve.<sup>6</sup> The French system, in great measure, pervades many of the other continental systems.

A more extended view of the rules of the law-merchant respecting Bills of Exchange is contained in the Report of the International Commission, appointed at the Hague in 1875, on the assimilation of the laws and practices of nations respecting Bills of Exchange. The Commission, which was composed of the representatives from several continental nations, classified the rules of the European and American systems under the following heads :

Report of International Commission.  
A D. 1875.

### 1. *Capacity of parties to a Bill of Exchange :*

*Disability of minors.* All the different systems concur in principle; but the period of majority differs in different States. The tendency of nearly all the present systems being to adopt the age of twenty-one years as the period of majority. The Spanish law, however, still maintains the period of twenty-five years.

Capacity of parties.

<sup>6</sup> Chalmers, *Digest of the Law of Bills of Exchange*, p. xlv.

A liability incurred by an infant is, under nearly all the systems, voidable, not void.

Married women come under the same disabilities as infants, namely, that the contract on their part is voidable; but the French Code de Commerce, Art. 113; the Italian Code, Art. 199; and the Spanish Code, Art. 434, empower women to contract, but not by means of a bill of exchange.

The laws of England, and of the United States, concur in rendering the contract as against a woman absolutely void. (But these laws have been varied since the above was written.)

### 2. *The form of a Bill of Exchange:*

Form of a  
bill of  
exchange

The law of the German Empire, Art. 4, s. 1; the laws of Hungary, Austria, and Russia; the Code of Zurich; and the laws of Sweden and Norway and Denmark, make it obligatory to insert on the face of the instrument the words *Bill of Exchange*: "*Wechsel; Lettre de Change.*"

The Code de Commerce (France), and the systems based upon the same; the Belgian law, 20th May, 1872; the laws of England, and of the United States, do not make this obligatory.

### 3. *The consideration or value for a Bill (Valeur):*

Consideration  
for a  
bill.

The codes of Germany, Austria, Hungary, Russia, Belgium, Art 1, 1872; the laws of England and the United States; those of Russia, Poland, and Denmark, do not require that the word "Value" (*Valeur*), or any equivalent expression, should be stated on the face of the bill itself, nor in any subsequent indorsement.

The French Code de Commerce, Art. 110 on the contrary; those of Spain, Art. 429; Italy, Art. 196; Portugal, Art. 321; Brazil, Art. 354; and the systems based on these codes, render it obligatory that the term *Valeur reçue*, be stated.

4. *Bills payable to bearer :*

The Laws of England, of the United States, and of Denmark, permit the issuing of a bill of exchange payable to bearer or order. Bills payable to bearer.

The German Law, Art. 7; the French Code de Commerce, Art. 112; Cod. Com. Italy, Art. 198; Cod. Com. Spain, Art. 438; the Commercial Code of Holland, Art. 102; and the Russian Rules on Bills of Exchange, Art. 297, forbid the issuing of bills of exchange to bearer.

5. *Indorsement of Bills in blank :*

The German Law, Art. 12; the laws of England; of the United States; the Belgian Law; 20th May, 1872, Art. 27; the Portuguese Code, Arts. 354 and 356; that of Hungary; the Russian Law; the Danish Law; and the Austrian Code, permit indorsement in blank. Indorsement of bills in blank.

Whilst the Italian Code, Art. 223; the French Code de Commerce, Art. 137; and the Spanish Code, Art. 467, prohibit such, giving only a partial validity to such indorsement, or even (as in Spanish Code) forbidding recovery.

6. *Indorsement of overdue Bills :*

All the various codes and laws give to an indorsement after due date, the effect of a simple cession; that is, as an assignment with equities attaching. Indorsement of overdue bills.

The German Law, Art. 16, makes this distinction, that, where due protest has been made, the right to indorse as before due date, continues.

7. *Due Date of Bill (Échéance).*

The Code de Commerce. (France), Art. 129; that of Spain, Art. 439; the laws of England; of the United States; the Belgian law, Art. 20; the Italian Code, Art. 216; the Portuguese Code, Art. 370; and the Hungarian law, all allow the drawing of a bill at *usance*. Due date of bill.

Whilst the German law, Art. 30; and the Austrian law, have abolished all reference to *usance*.

### 8. *Days of Grace.*

Days of  
grace

The laws of all countries allow days of grace, these varying from three to fourteen days; while *usances* vary from fourteen days to three months.

The German law, Art. 33, has abolished days of grace.

### 9. *Duplicates, Copies.*

Copies.

The German law, Art. 67; the French Code de Commerce, Art. 147; the Belgian law, Art. 57; the Italian Code, Art. 232, and the codes based on these laws, do not require the annulling clause to be inserted on the face of the bill of exchange.

Whilst the laws of England, and those of the United States, do require this.

### 10. *Acceptance of Bills:*

Acceptance  
of bills.

What constitutes acceptance varies greatly in different countries.

The German law, Art. 21; the French Code, Art. 122; the Spanish Code, Art. 461; the Portuguese Code, Art. 336; that of Brazil, Art. 394; the Belgian laws, Arts. 7 and 16; the laws of most of the Swiss Cantons; and the Dutch Code, require that the acceptance be expressed by the word "Accepted," or some equivalent term.

The law of England (1 and 2 Geo. IV. c. 78) formerly limited this to inland bills only. The United States' law permits verbal acceptance, though a holder may insist on the acceptance being in writing; and wrongful retention for over twenty-four hours, by the law of Spain, and several of the South American Codes, is deemed acceptance.

According to the Danish and Swedish laws, retention is construed to mean refusal.



### 11. *Dishonor for Non-acceptance :*

The German law, Art. 25 ; and the Austrian law ; the Code de Commerce, (France), Art. 120 ; the Belgian law, Art. 10 ; the Italian Com. Code, Art. 207 ; the Spanish Com. Code, Art. 465 ; most of the Cantons of Switzerland ; and most of the laws and codes of South America, require security to be given in case of dishonor for non-acceptance

Dishonor for non-acceptance.

Whilst the laws of England, those of the United States of America, those of Sweden and Denmark, the Hungarian Code, the Finland Code, and some of the South American States, give to the holder, on dishonor for non-acceptance, an immediate right of action for payment.

### 12. *Notice of Dishonor :*

Notice to antecedent parties is required, both on non-acceptance and non-payment, according to the laws of England, the United States, Russia, Bolivia, and Brazil.

Notice of dishonor.

Whilst the Code de Commerce (France) Arts. 173 and 175 ; the German law, Art. 45 ; the Spanish Code, Art. 522 ; the Chilian, the Argentine, and the Italian Code, require protest.

The French Code de Commerce requires that, within fourteen days, and a further period, according to the *distantia loci*, after protest, proceedings be taken against antecedent parties ; each successive indorser having the same period of delay allowed him.

The German law differs from the French law, and adapts in part the rule of the Dutch and Portuguese Codes, rendering notice necessary to protect any claim for interest, re-exchange, and to protect against any claim for damages ; it likewise limits the time within which proceedings have to be instituted.

### 13. *Limitation of actions (Prescription) :*

The law in regard to limitation of actions varies greatly in different countries.

Statutes of Limitation.

The German law prescribes 3 months, 6 months and 18 months, according to place; Code de Commerce (France), Art. 189, 5 years; Belgian Code, Art. 82, 5 years; Portuguese, Art. 323, and Spanish Codes, Art. 557, 4 years; Italian Code, Art. 282, 5 years; German law, Art. 77, 3 years, against the acceptor.

As against other parties: The Dutch Code, Arts. 206-207, 10 years; Hungary, 2 years; England, 6 years; United States, various periods.

Universality  
of mercantile  
usages.

Thus it appears that the laws of several nations on the subject of Bills of Exchange, agree in shewing that there are general principles common to all commercial communities which constitute an international code, upon which the law of bills of exchange rests, and which has become a part of the municipal jurisprudence of each nation. These principles, having their origin in the customs and practice of mercantile exchanges, are deemed so proper in themselves, as to be of universal obligation; and, in the absence of any local statutable or positive regulations, to govern cases affecting bills of exchange; while the general deductions of the common law, and the law of nations, as well as those of the Roman Law, are often resorted to in order to expound and enforce them.

Bills of  
exchange are  
cosmopolitan  
contracts.

It may, therefore, be truly said that a Bill of Exchange is the most cosmopolitan of all contracts; and that the law respecting negotiable instruments is in a great measure, not the law of a single country only, but of the whole commercial world.<sup>7</sup>

Principles  
of interna-  
tional code.

The International Commission, before referred to, also recommended the adoption of the following rules or principles for an international code governing bills of exchange, which were approved by the Conference of foreign representatives at Bremen in 1876:—

<sup>7</sup> *Per Story, J., in Swift v. Tyson*, 16 Peters, (U. S.) 1.

1. That the capacity of a party to contract under a bill of exchange shall be governed by the capacity of the party to enter into an obligation generally. Capacity.
2. That to constitute a bill of exchange it shall be necessary to insert on the face of the instrument the words "bill of exchange." Title on bill.
3. That it shall not be obligatory to insert on the face of the instrument or in an indorsement the words "value received," nor to state the consideration. "Value received."
4. That the employment of "*usances*" shall be abolished. *Usances.*
5. A bill of exchange shall not be deemed negotiable, unless restricted in express words on the face of the instrument, or in an indorsement. Negotiable bill.
6. That the making of a bill of exchange or promissory note to bearer shall not be allowed. Payable to bearer.
7. That the rule of law of *distantia loci* shall not apply to bills of exchange. *Distantia loci.*
8. That a bill of exchange be negotiable by blank indorsement. Blank indorsement.
9. The indorsement of an overdue bill of exchange which has not been duly protested for dishonor for non-payment, shall convey to the holder a right of recourse only against the acceptor and indorsers subsequent to the date of protest. Where due protest has been made, the holder shall only possess the rights of the last indorser against prior parties, subject to equities. Overdue bill.
10. That the acceptance of a bill of exchange must be in writing, on the face of the bill itself. The signature of the party or parties upon whom it was drawn (without additional words), shall constitute acceptance, if written on the face of the bill. Acceptance in writing.
11. The party upon whom a bill of exchange is drawn shall be permitted to accept for a less sum than is expressed on the bill of exchange itself. Limited Acceptance.

Cancellation  
of accept-  
ance.

12. The cancellation of a written acceptance shall not be valid.

Days of  
grace.  
Recourse  
against  
indorsers.

13. That no days of grace shall be allowed.

14. The party seeking recourse shall not be limited to the order of succession of indorsements, and he shall be entitled to his election, at any time, against all or any of the parties to the bill.

Protests.

15. That protest, or noting for protest, shall be necessary to preserve the right of recourse upon a bill of exchange dishonored for non-acceptance or for non-payment.

Default of  
notice of  
dishonor.

16. That default of notice of dishonor for non-acceptance or non-payment, shall not entail on the holder, or other parties to a bill of exchange, the loss of their right of recourse for the amount stated on the face of the bill, but the defaulting party shall, nevertheless, be liable for any damages consequent upon such default.

Extending  
time for  
protest.

17. The legal time required for protest shall be extended in the case of *vis major*, during the time of the cause of interruption, but shall not in any event exceed a short period of time to be fixed by the Code.

Annulling  
on dupli-  
cates.

18. That the annulling clause on the face of a bill of exchange shall not be necessary in the case of duplicates.

Right of  
action on  
bill.

19. That the right of action on a bill of exchange shall be allowed against all or any one or more of the parties to a bill of exchange.

Definition of  
"promissory  
note."

20. That in the foregoing articles the expression "promissory note," shall not apply to coupons, bankers' cheques, and other similar instruments, in those countries where those instruments are classed as "promissory notes."

The Conference also suggested that, in the event of a universal code for bills of exchange coming into operation, no special agreement between the parties to a bill of exchange, or any custom, should exclude or limit the operation of the code.

Many of the recommendations of this Conference have since been incorporated into the statutes passed by many of the English-speaking communities, and many of them will be found in the new Canadian Act.

The necessities of trade and commerce have extended the negotiable qualities of bills and notes to other mercantile securities, such as bills of lading, shipping receipts and, in a limited sense, to warehouse receipts. Since 1780,<sup>8</sup> bills of lading have held to be transferable and negotiable by the custom of merchants in this sense, that the indorsement of them transferred the right of property in the goods covered by the bill; although subsequently it was held that the right of action, *ex contractu*, did not pass with the right of property. But first in England (1855), and later in Ontario (1869), this technical rendering of the law was altered, and all the rights in the contract were made similarly assignable by the statute, 33 Vic. c. 19, now R. S. O. 1887, c. 122.

Other negotiable securities.

Bills of lading.

The shipping receipts given by railway companies, were by a judicial decision in 1879, brought within the same category as bills of lading, for the reason that "the ship and the railway are alike the instrumentalities used for the transport of goods."<sup>9</sup>

Shipping receipts

Warehouse receipts are negotiable securities authorized by the Bank Act, R. S. C. c. 120, and by the Ontario Act, R. S. O. 1887, c. 122, and are also transferable by indorsement. The indorsement may be in blank, as in the case of bills of lading and other securities, and is such a mode of transfer as satisfies all the requirements of the Acts. 10

Warehouse receipts.

The bonds and debentures of corporations, were made negotiable in Ontario by the Act of 1872, previously referred to (35 Vic. c. 12, R. S. O. c. 122, s. 9); so that, a

<sup>8</sup> See page 8, and *Lickbarrow v. Mason*, 2 East 70.

<sup>9</sup> Per Moss, C. J., in *Ash v. Great Western R. Co.*, 3 App. R. 481.

<sup>10</sup> *Bank of Hamilton v. Noye*, 9 Ont. R. 637.

transfer by indorsement, if payable to order, or by delivery, if payable to bearer, vests an indefeasable title to such bond or debenture in the holder thereof for the time being.

Bank  
deposit  
receipts.

Bank deposit receipts given by bankers for money deposited, but not subject to immediate demand, are apparently passing through the same preliminary contest for negotiability which promissory notes and goldsmith's notes were subjected to during the last century. The decisions in Canada, with one exception, have been adverse to their negotiability; although the Judicial Committee of the Privy Council, in a case from Quebec, intimated that there was high authority in favor of their being transferable by indorsement.<sup>1</sup>

Law-making  
by mer-  
chants.

The history of the Law-Merchant may be cited as an illustration of the law-making power of purely democratic communities of merchants, who, without the formalities of regal summons or assent, without national legislative functions or authority, without parliamentary procedure or debate, or even a delegated or municipal power, but qualified by their financial skill and business experience, have, *nemine contradicente*, established "usages and customs" affecting the currency and credit securities of their separate nations, which Judges and Courts have been compelled to recognize as being of equal authority with the common and municipal law of the nation; and which sovereign legislatures have accepted and clothed with statutory force as having the essential qualities of wise and beneficent legislation.

Codification  
of the law.

The codification of the law-merchant affecting Bills of Exchange and Promissory Notes by the present Act, brings the Canadian law into harmony with the laws of Great Britain, India, and some of the other Colonies of the Empire; and also into harmony with the leading provisions of many of the European commercial codes.

<sup>1</sup> *Richer v. Voyer*, L. R. 5 P. C. at p. 477. See also, note 2, p. 52.

# THE BILLS OF EXCHANGE ACT, 1890.

53 Victoria, Chapter 33.

(Canada.)

## An Act relating to Bills of Exchange, Cheques, and Promissory Notes.<sup>1</sup>

Part I.—PRELIMINARY, 1-2.

Part II.—BILLS OF EXCHANGE.

Form and Interpretation, 3-21.

Capacity and Authority of Parties, 22-26.

Consideration for a Bill, 27-30.

Negotiation of Bills, 31-58.

General Duties of Holder, 39-52.

Liabilities of Parties, 53-58.

Discharge of Bill, 59-63.

Acceptance and Payment for Honor, 64-67.

Lost Instruments, 68-69.

Bill in a Set, 70.

Conflict of Laws, 71.

Part III.—CHEQUES ON A BANK, 72-74.

Crossed Cheques, 75-81.

Part IV.—PROMISSORY NOTES, 82-88.

Part V.—SUPPLEMENTARY, 89-97.

[Assented to 16th May, 1890.]

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: Preamble.

### PART I.

#### PRELIMINARY.

1. This Act may be cited as "*The Bills of Exchange Act, 1890.*" Short title  
Imp. Act, s. 1.

<sup>1</sup> The first legislative references to Bills of Exchange in England are in the statutes 3 Rich. II. c. 3, and 5 Rich. II. c. 2 (see p. 6, *ante*). But the first general legislative enactment regulating the acceptance and use of bills of exchange was an Ordinance of Barcelona, passed in 1394; and the first Bank of exchange and deposit was established in the same city in 1401, and was for the accommodation of foreigners as well as citizens. The first Canadian legislative enactment was an ordinance passed in 1777, for ascertaining damages on protested bills of exchange, and fixing the rate of interest in the Province of Quebec (17 Geo. III. c. 3). This ordinance regulated the par of exchange, and the damages on bills drawn within the province, or "in any place beyond the Long Sault on the Ottawa river, or beyond Oswegatchie (Oswego) in the upper part of the province," and on bills drawn on persons in any of the colonies on the continent of America. Ordinances regulating the currency, and other commercial matters, were also passed in the same year.

Sec. 2.

2. In this Act, unless the context otherwise requires,<sup>2</sup>—

Interpreta-  
tion.  
Imp. Act, s. 2.

<sup>2</sup> The modern legislative practice is to commence a statute by an introductory interpretation clause explanatory of expressions used in the Act. An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain: *Regina v. Pearce*, 5 Q. B. D. 389. An interpretation clause in an Act should be understood to define the meaning of the words thereby interpreted, in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation: *Midland R. W. Co. v. Ambergate, &c., R. W. Co.*, 10 Hare 359. An Interpretation Act is not intended to exclude the rule alike of good sense, and grammar and law, that general words are to be restrained to the subject matter dealt with: *Charlton v. Lings*, L. R. 4 C. P. 387. Words which are terms of art ought to be distinctly explained. Common words, therefore, ought to be used in their common acceptation, and when they have different acceptations in common language, these, when it is necessary, ought to be distinguished. It is sufficient to define words that are uncommon, or that are used in an uncommon meaning: *Reid's Intellectual Powers*, 219. The first general Interpretation Act was passed by the Legislature of Upper Canada in 1837: 7 Wm. IV., c. 14. In 1849 a similar Act was passed by the Legislature of Canada: 12 Vic. c. 10. These Acts were consolidated in C. S. C. c. 5, and C. S. U. C. c. 2; and were made applicable to the whole Dominion, with some additions in 1867, in 31 Vic. c. 1, now consolidated in R. S. C. c. 1. There is a similar Interpretation Act in Ontario, R. S. O. c. 1. In 1850 a similar but shorter Act was passed by the Imperial Parliament (Lord Brougham's Act), 13 & 14 Vic. c. 21, which was repealed in 1889 by an *Act for consolidating the enactments relating to the construction of Acts of Parliament, and for further shortening the language used in Acts of Parliament* (52 & 53 Vic. c. 63, Imp.) The definitions here given are merely verbal. The substantial and operative interpretations affecting the property, rights and liabilities incident to bills and notes, appear in other clauses of the Act.

"Accept-  
ance."

(a) The expression "Acceptance" means an acceptance completed by delivery or notification; <sup>3</sup>

<sup>3</sup> "Acceptance" in its ordinary signification is an engagement by the drawee of a bill of exchange to pay the bill when due: *Clarke v. Cock*, 4 East. 57. Such payment must be in money (s. 3). An acceptance to pay by another bill is no acceptance: *Russell v. Phillips*, 14 Q. B. 891; s. c. 19 L. J. Q. B. 297. The acceptance must be "written on the bill" (s. 17, sub-s. 2). Prior to this Act the following were held to be a sufficient acceptance: A letter stating that the writer was prepared to pay the bill: *Billing v. Devaux*, 3 M. & Gr. 565; 5 Jur. 1182. A letter stating that a bill drawn on the writer would meet with due honor from him: *Clarke v. Cock*, 4 East. 57.



(b) The expression "Action" includes counter claim and set off; <sup>4</sup> Sec. 2.  
"Action."

<sup>4</sup> "Action" is defined by the *Ontario Judicature Act*, (R. S. O. 1887, c. 44), to include suit, and to mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court. The sections to which this definition applies are s. 30 (evidence in an action on a bill), ss. 52 and 82 (costs of action before maturity of a bill or note), and s. 60 (action on a lost bill). In Quebec "Every action before the Superior Court is instituted by means of a writ of summons in the name of the sovereign; saving the exceptions contained in this code and other cases provided for by special laws:" Tit. I. c. 1, s. 43. "Actions founded on bills of exchange, notes to order of bearer, cheques or orders for payment, *bons*, or acknowledgment of debt," are deemed to be summary matters and are to be tried as such: *Code Civil Procedure*, Tit. II. c. 1, s. 887.

(c) The expression "Bank" means an incorporated bank or savings bank carrying on business in Canada; <sup>5</sup> "Bank."  
Ind. Act, s. 3.

<sup>5</sup> The *Bank Act* (R. S. C. c. 120), provides that, "Every person, firm or company assuming or using the title of 'bank,' 'banking company,' 'banking house,' 'banking association,' or 'banking institution,' without adding to the said designation the words 'not incorporated;' or without being authorized to do so by this Act, or by some other Act in force in that behalf, is guilty of a misdemeanor, and shall incur a penalty not exceeding one thousand dollars." The new *Bank Act* (53 Vic. c. 31, s. 100), which is to come into force 1st July, 1891, varies the above provision in some particulars. In the English Act the clause reads "banker," and includes a body of persons, whether incorporated or not, who carry on the business of banking. The nature of the business of bankers is a part of the law-merchant, and is to be judicially noticed by the Courts: *Bank of Australasia v. Breillat*, 6 Moo. P. C. 173; 12 Jur. 189. Banks may stand in various legal relations to their customers: (1) The first is the ordinary one where a customer opens an account with a bank by depositing a sum of money to his credit, the bank undertaking to hold itself liable for the payment of a like sum to the customer's use, and either paying interest on it, or not, according to agreement, and also agreeing to honor or cash any cheques or orders for the payment of any sums of money which the customer may draw, to the extent of the sum deposited. In this case the bank and customer stand in the common law relation of debtor and creditor. (2) Another relation is the converse of the first. The bank may make advances to its customer by specific loans, or by allowing him to overdraw his account, charging interest on the advances, and requiring either the guarantee of a third person or making such advances on the deposit of securities, against warehouse receipts, or on bills of lading for produce shipped, or other shipping

Sec. 2.

securities allowed by the Bank Act. In such cases the relation of the bank and its customer is that of creditor and debtor. (3) A third relation is when a bank acts as agent for the customer in purchasing and selling British, Colonial, or Foreign securities, or stocks and shares, and in receiving or collecting, when due, interest, dividends, coupons, debentures, bills of exchange and promissory notes, cheques, drafts, and other commercial paper, when left with the bank for collection. In these and similar cases the relation of the bank to its customer is that of agent and principal. (4) A fourth relation is when the bank receives debentures, mortgages, shares, deeds and other securities, and also boxes of plate, jewelry, and other valuables for safe custody, and deposits them in its safes or strong rooms along with its own securities. As a general rule no compensation is made for this service, and the relation between the customer and the bank is that of bailor and gratuitous bailee. (5) The transactions which arise from the ordinary banking business of discounting bills of exchange, promissory notes and other negotiable paper draw the bank and its customer into the legal relation of principal and surety. (6) But when the bank sells to its customer its own drafts, or other negotiable paper on its branches or correspondents, the relations are changed, and the customer becomes a principal creditor, and the bank the surety, although the relations of debtor and creditor may also intervene. In the ordinary and simpler relations of bank and customer, no fiduciary relation arises, and money deposited in a bank to the customer's credit and account, has no "ear mark," and ceases to be the money of the person depositing it; it becomes the money of the banking company, which is bound to return an equivalent by paying a similar sum to that deposited with it, when asked for by the customer's cheque or order.

"Bearer."

(d) The expression "Bearer" means the person in possession of a bill or note which is payable to bearer;<sup>6</sup>

<sup>6</sup> A bill is payable to "bearer," which is so expressed, or on which the last indorsement is an indorsement in blank (s. 8, sub-s. 3). But the definition given above, excludes a bill or note payable to order. When the holder of a bill payable to order transfers it without indorsing it, such holder acquires under s. 31, sub-s. 4, all the title of the transferor, and the right to have the indorsement of such transferor. "The possessor of a bill or note payable to order is not technically the bearer of it:" *Chalmers on Bills*, 4.

"Bill,"  
"Note."

(e) The expression "Bill" means bill of exchange, and "Note" means promissory note;<sup>7</sup>

<sup>7</sup> The fuller definitions of "bill" and "note," are given in ss. 3 and 83. The essential qualities of a bill of exchange are, that it must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and must be for the payment of money only, and not

for the performance of any other act, or in the alternative: *Gillilan v. Myers*, 31 Ill. 525. A cheque is an inland "bill of exchange" drawn on a banker, payable on demand (s. 72). Sec. 2.

(f) The expression "Delivery" means transfer of possession, actual or constructive, from one person to another; <sup>8</sup> "Delivery."  
Ind. Act,  
s. 14.

<sup>8</sup> Delivery of a bill or note is a transfer of possession from one person to another, and is necessary to complete the acceptance of a bill, or the indorsement of a note: *Re Hayward*, L. R. 6, Ch. 546. Before delivery the acceptance may be revoked: *Cox v. Troy*, 5 B. & Ald. 474. Delivery is necessary to give effect to the contract (s. 21): *Abrey v. Cruix*, L. R. 5 C. P. 42. It is an act in which both parties must join. The minds of both parties must concur in the act of delivery: *Kinne v. Ford*, 52 Barb. (N. Y.) 194. Actual delivery may be made by delivering the bill to an agent of the indorsee; or by transmitting the bill by post;—for by the *Post Office Act*, (R. S. C. c. 35, s. 43), from the time a letter is deposited in the post office, for the purpose of being sent by post, it ceases to be the property of the sender, and becomes the property of the person to whom it is addressed. What will constitute *constructive* delivery of a bill or note must depend upon special facts and circumstances. Delivery may be effected without change of actual possession in three cases, namely: (1) A bill is held by C. on his own account; he subsequently holds it as agent of D. (2) A bill is held by C.'s agent, who subsequently attorns to D., and holds it as his agent. (3) A bill is held by D. as agent for C.; he subsequently holds it on his own account: *Chalmers on Bills*, 4. An indorsement on a note, and signed by the payee, requesting payment to be made to a third person is not, without proof of delivery, evidence of the assignment of the note: *Pardee v. Lindley*, 31 Ill. 174.

(g) The expression "Holder" means the payee or indorsee of a bill or note who is in possession of it: or the bearer thereof; <sup>9</sup> "Holder."  
Ind. Act, s. 8.

<sup>9</sup> The term "holder," is sometimes used in different senses, and it may be held to signify the mercantile owner of the instrument, who may or may not be the legal owner of it. It is generally used to denote the lawful holder, *i. e.*, the "holder in due course," who is defined by s. 29 *post*. The Act also makes a distinction between a "holder" and a "holder in due course" by s. 38. A "holder" includes the payee, the indorsee, and the bearer, of a bill, and may denote: (1) The person to whom the bill is payable, and whose title is good against all parties to it, and is a "holder in due course." (2) The person to whom the bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, although, as between himself and the transferor, or "holder in due course," he is an indorsee for collection, and has no higher title to the bill than that of agent or bailee. See *Law v. Parnell*, 7 C. B. N. S. 282. One

Sec 2.

who holds a note merely as agent, may maintain an action on such note, although he has no beneficial interest in it: *Allison v. Central Bank*, 4 All. N. B. 270. *Prima facie* a person who has the possession of a note indorsed in blank, is the legal holder: *Howard v. Godard*, 4 All. N. B. 452. (3) The person who has a defective title, or whose possession is unlawful, *i. e.*, a thief who has stolen a bill indorsed in blank, but who can nevertheless give a valid discharge to a party to it who pays it in good faith; or a good title to a person who takes it before maturity in good faith, and pays value for it to such holder (s. 38): *Caruth v. Thompson*, 16 B. Mon. 572. But a wrongful possessor, that is a person holding under a forged indorsement, or a person who has possession of a stolen bill, payable to the order of another, has no rights, and can transfer none (s. 24).

“Indorsement.”

(h) The expression “Indorsement” means an indorsement completed by delivery;<sup>1</sup>

<sup>1</sup> “Indorse” is a technical term, having sufficient legal certainty without more particular explanatory definition: *Brooke v. Edson*, 7 Vt. 356. Indorsement creates two distinct contracts, one executed and the other executory. It transfers the property in the bill or note, and it also involves the assumption of a contingent liability to pay the amount of the bill or note to the holder. The indorsement, to be operative, must be in writing and signed by the indorser (s. 32). The indorser’s contract to transfer is incomplete until the delivery of the indorsement (s. 21). A transfer by indorsement consists of an indorsement of, or writing, the name of the party transferring the bill, on the back of the bill, and a delivery for the purpose of completing such transfer; and it will follow that the issue raised by the pleading, “did not indorse,” involves both these propositions: *Marston v. Allen*, 8 M. & W. 504. An indorsement written in pencil is valid: *Closson v. Stearns*, 4 Vt. 11.

“Issue.”

(i) The expression “Issue” means the first delivery of a bill or note, complete in form, to a person who takes it as a holder;<sup>2</sup>

<sup>2</sup> This definition refers to the term “issue” in ss. 9 (3), 12, and 71. Notes delivered after the time they bear date are valid only from the day of delivery, and are considered as made and issued on that day: *Lansing v. Gaine*, 2 Johns. (N. Y.) 300.

“Value.”

(j) The expression “Value” means valuable consideration.<sup>3</sup>

<sup>3</sup> This expression is further defined by s. 27, *post*, and means any consideration which is sufficient to support a simple contract, or an antecedent debt, or other liability. A valuable consideration in the sense of the

law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other: *Comyn's Digest*, Action on Case, Assumpsit B. 1-15. It excludes illegal or immoral considerations. But a transfer of shares which may be valueless, is not *nudum pactum*: *Cheale v. Kenward*, 3 DeG. & J. 27.

Sec. 2.

(k) The expression "Defence" includes counter-claim. <sup>4</sup> "Defence."

<sup>4</sup> This definition only applies to a modern form of pleading. It would have been more appropriate if it had read "such forms of pleadings as are authorized for that purpose in the Provincial and Territorial Courts." The definition applies to s. 30, sub-s. 5, which contains provisions relating to bills or notes given for the purchase of patent rights.

## PART II.

### BILLS OF EXCHANGE. <sup>1</sup>

<sup>1</sup> By s. 72, except as otherwise provided in Part III., the provisions of the Act applicable to bills of exchange payable on demand (s. 10), apply to cheques; and by s. 88, with the following exceptions, the provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes as follows: The maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to the drawer's order. But the following provisions as to bills are not to apply to promissory notes, namely:—(a) Presentment for acceptance (s. 39 *et seq.*); (b) Acceptance (see ss. 17 and 21); (c) Acceptance *supra* protest (s. 64 *et seq.*); (d) Bills in a set; (s. 70 *et seq.*) Where a foreign note is dishonored, protest thereof is unnecessary, except for the preservation of the liability of indorsers.

#### *Form and Interpretation.*

3. A bill of exchange <sup>2</sup> is an unconditional order in writing <sup>3</sup> addressed by one person to another, <sup>4</sup> signed by the person giving it, <sup>5</sup> requiring the person to whom it is addressed to pay, <sup>6</sup> on demand or at a fixed or determinable future time, <sup>7</sup> a sum certain in money <sup>8</sup> to or to the order of a specified person, or to bearer; <sup>9</sup>

What is a Bill of Exchange.

Imp. Act, s. 3.  
Ind. Act, s. 5.

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition

When instrument is not such a bill.

**Sec. 3.** to the payment of money, is not, except as hereinafter provided, a bill of exchange :

Unconditional order defined.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional, <sup>1</sup>

Bill not invalid as to—

4. A bill is not invalid by reason—

Date.

(a) That it is not dated ; <sup>2</sup>

Value.

(b) That it does not specify the value given, or that any value has been given therefor ; <sup>3</sup>

Place.

(c) That it does not specify the place where it is drawn or the place where it is payable. <sup>4</sup>

<sup>2</sup> The term Bill of Exchange derived its name from the French *Billet de Change*, sometimes called *Lettre de Change*. Pothier makes a distinction between a *Lettre de Change* and a *Billet de Change*. He says that a *Billet de Change* is given when the party with whom the contract is made is not at present prepared to give the bill of exchange agreed upon, and merely gives a *billet*, by which he engages thereafter to furnish one : *Pothier de Change*, n. 4. A Bill of Exchange is sometimes called a draft. The person who gives or draws the order in the bill or draft, is called the “drawer.” The person on whom it is drawn, or who is required to pay is called the “drawee”; and if he accepts the bill or draft by writing his acceptance thereon (ss. 17-23), he is then called the “acceptor.” The person to whom the money is required to be paid, is called the “payee,” who may be the same person as the drawer, or bearer, as the case may be ; and if he transfers the bill or draft to another by indorsement, he is called the “indorser” (s. 56) ; or if he transfers it by delivery without indorsing it, he is called the “transferor” (s. 58) ; the person to whom the bill or draft is indorsed is called the “indorsee,” who may transfer it to another as above stated. The “holder” means the payee or indorsee who is in possession of the bill, or draft or note, or the person who holds it as “bearer.” A bill of exchange or promissory note may be drawn in any language, and any form of words : *Byles on Bills*, 56. A bill drawn in French by a domiciled Frenchman in France, on an English company and accepted in England, was treated as an English bill : *Smallpage’s & Brandon’s Cases*, 30 Ch. D. 598. See also s. 71. An

instrument, invalid as a bill of exchange, may be valid as an agreement, if it is otherwise conformable to the general law as to contracts: *Hamilton v. Spottiswoode*, 4 Ex. 200; *Reed v. Reed*, 11 U. C. Q. B. 26. The terms of a note cannot be varied by evidence of a parol agreement: *Harper v. Paterson*, 14 U. C. P. 538. Whether an instrument is a bill of exchange or not, must be determined from its face: its character cannot be changed by extrinsic evidence: *Rice v. Ragland*, 10 Humph. (Tenn.) 545. The first case on bills of exchange to be found in the reports is *Martin v. Boure*, Cro. Jac. 6, an action to recover the amount of a foreign bill drawn for "1,326 dollars, called reals of eight, *moneta Hispania, secundum usum mercatorum*" payable at Aleppo, in Spain. The definition given in the Act of a Bill of Exchange, embraces a cheque, and is declaratory of the former law: *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95.

"An unconditional order in writing." A bill of exchange is an "order," and must therefore be a request and not precative; but the use of terms of courtesy will not make it invalid. The usual form of a French bill, is "*Il vous plaira payer.*" The bill or note may be written in pencil as well as in ink. There is no authority for saying that when the law requires a contract to be in writing, that writing must be in ink: *Geary v. Physic*, 5 B. & C. 234. A note written in pencil and written over in ink, is valid: *Reed v. Rourke*, 14 Tex. 329. Every bill of exchange imports a command to the drawee to pay, and his acceptance is not only an admission of money or effects in his hands sufficient to pay, but it is an undertaking by the acceptor as well with respect to the drawee as the payee, to pay the bill: *Parminter v. Symons*, 2 Bro. P. C. 43.

## ILLUSTRATIONS.

A paper in these words, "Mr. L. please to let the bearer have £7, and place it to my account, and you will oblige your humble servant, R. S.," is not an unconditional order, nor a bill: *Little v. Slackford*, M. & Mal. 171.

"We hereby authorize you to pay on our account to the order of G.," with an acceptance, as follows: "Having received the foregoing authority from Messrs. W. & S., I undertake to make you the payments as above stated," is only an authorization to pay: *Hamilton v. Spottiswoode*, 4 Ex. 200.

An order as follows: "Please let the bearer have \$50. I will arrange it with you this noon," is a bill: *Biesenthal v. Williams*, 1 Duv. (Ky.) 329.

"Please pay E. R., attorney for the plaintiffs in this case, the sum of £125 on account of plaintiff's claim in this suit," is dependent upon the plaintiff's claim in the suit: *Corporation of Perth v. McGregor*, 21 U. C. Q. B. 459.

"Mr. B. will much oblige Mr. A. by paying to the order of Mr. C.," is valid: *Ruff v. Webb*, 1 Esp. 129.

An order directed to B. by A., that B. pay C. \$100, and take up A.'s note of that amount, is a bill: *Cook v. Satterlee*, 6 Cow. (N. Y.) 108.

A request to pay a promissory note written under the note by the promisor, is a bill: *Leonard v. Mason*, 1 Wend. (N. Y.) 522.

## Sec. 3.

A "promise to pay as soon as I am in possession of funds to do so from the estate of B.," is conditional : *Wiggins v. Vaught*, Cheves, (S. C.) 91.

¶ "On demand, I promise to pay Mr. S. £50 in consideration of his foregoing and forbearing an action for damages, ascertained by consent to amount to that sum, by reason of the injuries sustained by his wife in respect of non-repair of a footway," is a note : *Shelton v. James*, 5 Q. B. 199; 7 Jur. 1130.

A promise to pay "on the death of G. H., provided he leaves either of us sufficient to pay the said sum," is conditional : *Roberts v. Peake*, 1 Burr. 323.

A promise to pay so many days after marriage, is conditional : *Beardsley v. Baldwin*, 2 Stra. 1151; s. p. *Pearson v. Garrett*, 4 Mod. 242.

"Twelve months from the 26th June, 1873, 1, (defendant), will pay J. C., (plaintiff) \$90, for D. P., or otherwise settle the sum of \$90 for him on a note that he says he gave J. C. for \$100;"—Held, that this was not a promissory note, payable to the plaintiff, nor an agreement with plaintiff, but with D. P. : *Cochrane v. Cail*, 3 Pugs. N. B. 224.

<sup>4</sup> "Addressed by one person to another." In all bills of exchange the drawer is bound to the person from whom the value is received, as the acceptor is to him to whom it is made payable, for although the drawee and acceptor are bound by the one bill, and both equally liable for the payment thereof, yet they are not commonly bound to the one man : *Beaves, Lex Mercatoria*, 563. The payee should be named or indicated with reasonable certainty (s. 7). He should be particularly described so that he cannot be confounded with another person of the same name : *Byles on Bills*, 60. Nor should the bill be addressed to persons in the alternative, or in succession (s. 6). A bill of exchange ought to specify to whom the same is payable, for in no other way can the drawee, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability : *Story on Bills*, s. 54. As to a fictitious payee, see s. 7 (3); inchoate bills in blank, see s. 20; and misdescription of payee or indorsee, see s. 32 (4).

## ILLUSTRATIONS.

"Three months after date pay to the order of W. T.," not addressed to a drawee, is not a bill : *Forward v. Thompson*, 12 U. C. Q. B. 103.

"Pay \_\_\_\_\_ or order," before this Act (see now s. 20) was invalid : *Rex v. Randall*, R. & R. 195; But see *Mutual Safety Insurance Co. v. Porter*, 2 All. N. B. 230.

"Mr. A., pay on the within \$750," is invalid ; *Douglass v. Wilkeson*, 6 Wend. 637.

A promise without the name of a promisee, "to pay the amount which should be made," on a certain execution, is not a note : *Matthews v. Redwine*, 23 Miss. 233.

<sup>5</sup> "Signed by the person giving it." The signature is intended to authenticate and give effect to the contract. It matters not where the drawer (maker) or indorsers sign, provided it appears from the bill or note what their respective liabilities as indicated by such bill or note



are : *Quin v. Sterne*, 26 Ga. 223. See also *Caton v. Caton*, L. R. 2 H. L. 127. The name of the drawer is usually written or subscribed at the bottom of the bill, but this does not seem to be absolutely indispensable, for if the bill is written by him, and his name is inserted in the body of the bill or is otherwise signed to it, so that it clearly appears that he is the drawer, that will be sufficient : *Story on Bills*, s. 52. As to what is a sufficient signature, the following are cases under the Statute of Frauds : A contract in writing for the sale of goods in which the name of the vendor is printed, and that of the vendee is written, at the time of an order given for the future delivery of goods, is a sufficient signature under the Statute of Frauds to charge the vendor : *Saunderson v. Jackson*, 2 B. & P. 238 ; 3 Esp. 180, s. p., *Schneider v. Norris*, 2 M. & S. 786. So a memorandum written on a letter bearing a printed heading : *Tourret v. Cripps*, 48 L. J. Ch. 567 ; 27 W. R. 706. The signature may be written in pencil, or by initials, or by a stamp, or it may be a printed signature of the party, if intended to be taken as the signature of such party. The signature may be signed by some other person, by or under the authority of the party to be bound (ss. 25 and 90.)

## ILLUSTRATIONS.

An instrument in the following form : " Four months after date pay to my order £300, for value received," addressed to and formally accepted by the party, and transferred to C. for value, but having no date and no drawer's name, is not a bill : *McCall v. Taylor*, 19 C. B. N. S. 301 ; 12 L. T. N. S. 461 ; 13 W. R. 840.

A. wrote his name on the back of the note before delivery ; held liable as maker : *Bell v. Moffat*, 4 Pugs. & Bur. 121 ; s.p., *Quin v. Sterne*, 20 Ga. 223.

Where the maker signed " A. for B.," the maker alone is liable : *McBean v. Morrison*, 1 A. K. Marsh 545.

" We jointly and severally promise," and signed " P. and I., for G.," is the note of G. : *Rice v. Gore*, 22 Pick. (Mass.) 158.

A person able to write placed the figures 1, 2, 8, in pencil on the back of a bill as an indorsement, held a good indorsement : *Brown v. Butchers and Drovers Bank*, 6 Hill (N. Y.) 443.

A signature written in pencil is valid : *Closson v. Stearns*, 4 Vt. 11.

The initials might be equivalent to the name : *Caton v. Caton*, L. R. 2 H. L. at p. 143.

A signature made by a mark is valid : *George v. Surrey*, M. & M. 516 ; s. p. *Baker v. Dening*, 8 A. & E. 94 ; *Willoughby v. Moulton*, 47 N. H. 205.

° " Requiring the person to whom it is addressed to pay \* \* a sum certain in money." The sum for which a bill is made payable is usually written in the body of the bill, in words at length, the better to prevent alteration, and is also usually superscribed in figures ; but where there is a discrepancy between the figures and the words, the amount stated in words is to govern (s. 9). It seems positively indispensable that the exact amount to be paid should be inserted ; for in no other way can the drawee know what he is to pay, or the holder know what he is entitled to demand.

**Sec. 3.**

Hence if the specific sum to be paid be not expressed at all, or it be uncertain in amount, or be accompanied by other words that make the sum more or less, according to circumstances, the instrument is void as a bill of exchange: *Story on Bills*, s. 42. ♦

ILLUSTRATIONS.

An instrument promising to pay £14, to be paid in carpenter's or joiner's work such as may be required, is not a note: *Downs v. McNamara*, 3 U. C. Q. B. 276.

A promise to pay a sum certain on a day named "in cash or mortgage on real estate," is not a note: *Goings v. Barwick*, 16 U. C. Q. B. 45; s.p. *Newhorn v. Lawrence*, 5 U. C. Q. B. 359.

"Due J. J., or bearer \$482 in Canada bills, payable in 14 days after date" is not a note: *Gray v. Worden*, 29 U. C. Q. B. 535.

An instrument made in Canada promising to pay in "current funds of the United States" is not a note: *Bettis v. Weller*, 30 U. C. Q. B. 23. *Sed contra*, *St. Stephens Branch R. W. Co. v. Black*, 2 Han. N. B. 139.

A promise to pay a sum certain at Kingston, Upper Canada, "with exchange on New York," is for an uncertain sum, and is not a bill or note: *Palmer v. Fahnstock*, 9 U. C. C. P. 172; s.p. *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442.

A custom between merchants in Canada and the United States to draw bills "with current rate of exchange on New York," is not part of the *lex mercatoria*; *Cazel v. Kirk*, 4 All. N. B. 543.

An instrument "payable in Pennsylvania or New York paper currency, to be current in the State of Pennsylvania or the State of New York," is not a note: *Leiber v. Goodrich*, 5 Cow. (N.Y.) 186.

A paper consisting of a promise "to pay A. or order £13, for value received, together with interest at £5 per cent. per annum, and all fines according to rule," is not a note, on account of the introduction of the last words: *Airey v. Fearnshides*, 4 M. & W. 168; 2 Jur. 596.

"I, J. D., have this day borrowed of J. C. £300 at 4 per hundred payable yearly," is not a note: *Cory v. Davis*, 14 C. B. N. S. 370.

"I have received the sum of £200 which I borrowed of you, and I have to be accountable for the said sum with interest," is not a note: *Horne v. Redfearn*, 4 Bing. N. C. 430.

"I will pay J. C., \$90 for D. P., or otherwise settle the sum of \$90 for him on a note that he says he gave J. C. for \$100," is not a note: *Cochrane v. Cail*, 3 Pugs. N. B. 224.

"I promise to pay to Mr. S., or his order, at three months after date, £100, as per memorandum of agreement," is a note: *Jury v. Barker*, E. B. & E. 459; 4 Jur. N. S. 587.

"Port of London Sea, Fire and Life Assurance Company. To the cashier,—Fifty-three days after date, credit P. & Co., or order, with the sum of 500*l.* claimed, per Cleopatra, in cash, on account of this corporation. (Signed) A. C. (the drawer), Managing Director." The words "credit in cash," meaning pay, is a bill: *Eddison v. Collingridge*, 9 C. B. 570; 14 Jur. 869.

An order to pay in "three good East India bonds" is not a bill: *Anon.* Buller's N. P. 268.

A promise to pay A. B. or his order \$750 in grain, is not a note: *Carlton v. Brooks*, 14 N. H. 149.

“Due to S. G. \$10,000 to be paid as wanted for her support,” is not valid: *Gordon v. Rundlett*, 28 N. H. 435.

An order requiring the drawee to pay a sum certain, and deliver up a wharf, is not a bill: *Martin v. Chantry*, 2 Stra. 1271.

An order to pay £7,000, “which sum is on account of the dividends and interest due on the capital and deeds registered in the books of the Bank of E. in the name of C. & B., which you will please charge to my account and credit according to a registered letter I have addressed to you,” is a negotiable bill: *Re Boyse*, 33 Ch. D. 612.

The following addressed to executors: “We do hereby authorize and require you to pay to G. P. or his order, the sum of £250, being the amount directed by the order of the 29th July last to be paid to our order,” is not a bill: *Russell v. Powell*, 14 M. & W. 418.

An instrument by which A. promises to pay to the bearer £50, being the portion of a value, as under, deposited in security for the payment thereof,” is a note: *Haussoullier v. Hartsinck*, 7 T. R. 733. And see *Collis v. Emmett*, 1 H. Bl. 313; *Read v. McNulty*, 12 Rich. (S. C.) 445.

A promise to pay a sum certain “with exchange not to exceed one-half per cent.” is not a note: *Saxton v. Stevenson*, 23 U. C. C. P. 503.

A note payable to the representatives of S. three months after his decease, “first deducting thereout any interest or money which S. might owe to the maker on any account,” is not a note for the payment of a definite sum at all events: *Barlow v. Broadhurst*, 4 Moore 471.

An instrument promising to pay a sum “to collaterally secure the payment of the money mentioned in an assignment of mortgage,” is not a note: *McRobbie v. Torrance*, 5 Man. R. 114.

7 “On demand, or at a fixed or determinable future time.” The time of payment is regularly and usually stated in the beginning of the note or bill; but if no time be expressed, the instrument will be payable on demand. There is no limitation as to the time when the bill or note is made payable; but it may be on demand, or at sight, or any certain period after date, or sight, or usance. “If a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill.” *Per* Willes, C.J., in *Colehan v. Cooke*, Willes 396. It is obvious that some time must be fixed, either absolutely or by necessary relation to some fact, or by implication of law, at which every bill is to be payable; for otherwise the rights, duties and obligations of the parties respectively would be indeterminable and uncertain: *Story on Bills*, s. 50. See further definition in s. 11.

#### ILLUSTRATIONS.

Due to R. R. £500 for value received, &c., “payable at the sale of timber marked P. A. in Quebec, or elsewhere,” is not a fixed time; *Russell v. Wells*, 5 U. C. O. S. 725.

A promise to pay “on the sale or produce, immediately when sold, of the White Hart, St. Albans, Herts, and the goods, value received,” is not a fixed time: *Hill v. Halford*, 2 B. & P. 413.

A bill payable at 30 days after the ship P., shall arrive at C., is contingent: *Palmer v. Pratt*, 7 Bing. 185.

**Sec. 3.**

A promise to pay "at such a period of time that my circumstances will admit, without detriment to myself or family," creates no debt: *Ex parte Toolell*, 4 Ves. 372.

An order for a sum "payable ninety days after sight, or when realized," is not a bill: *Alexander v. Thomas*, 16 Q. B. 333; 15 Jur. 173.

Mr. S. has this day deposited with me £500, on the sale of £10,300 per cent. Spanish, to be returned on demand: Held, not a bill or note: *Sibree v. Tripp*, 15 M. & W. 23.

<sup>8</sup> "A sum certain in money." It is an indispensable requisite that the bill should be for the payment of money, and of money only. Thus a bill to pay money and to do some other thing, or a bill to deliver goods, merchandize, or stock or bonds, or bank notes, or current medium, or drafts, is not a bill of exchange. It may be payable in coins, such as guineas, sovereigns, Napoleons, florins, or dollars. It may be payable in the currency or money of England, France, Germany, Italy, Russia, Spain, Holland, India, United States, or any country, as pounds sterling, francs, marks, liras, roubles, piastres, florins, rupees, or dollars, for in all these cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par. See *Story on Bills*, s. 43. "Money is the medium through which the incomes of the different members of the community are distributed to them; and the measure by which they estimate their possessions;" 2 *Mill's Political Economy*, 8. "In the rude ages of society, cattle are said to have been the common instrument of commerce. The armour of Diomedes, says Homer, cost only nine oxen; but that of Glaucus costs an hundred oxen;" *Smith's Wealth of Nations*, 11. "Furs have been employed as money in some countries; cattle in others; in Chinese Tartary, cubes of tea closely pressed together; the shells called cowries, on the coast of Western Africa; and in Abyssinia, at this day, blocks of rock salt; though even of metals the less costly have sometimes been chosen, as iron in Lacedæmon, from an ascetic policy; copper in the early Roman Republic, from the poverty of the people. Gold and silver have been generally preferred by nations which were able to obtain them, either by industry, commerce, or conquest;" 2 *Mill's Political Economy*, 7.

<sup>9</sup> "To, or to the order of a specified person or bearer." Every bill of exchange ought to specify to whom the same is payable; for in no other way can the drawee, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability. It should also be stated to whom absolutely and certainly, and not alternatively, the bill is to be paid; for if it is payable to A. or to B., it is not properly a bill of exchange, since it is payable to one only on the contingency that it is not paid to the other: *Story on Bills*, s. 54. It is not indispensable that the name of the payee should be inserted in the bill when made. The blank may be filled up afterwards by any person in possession with his own name as payee, and thenceforth it will be valid and effectual for all purposes in the hands of such person as holder *ab initio* (s. 20).

Sec. 3.

<sup>1</sup> If the bill or note be payable out of a particular fund only, or upon an event which is contingent, or if it be otherwise conditional, it is not, in contemplation of law, a bill of exchange, or in its essential character negotiable. And hence the general rule is that a bill of exchange implies a personal general credit, not limited or applicable to particular circumstances and events which cannot be known to the holder of the bill in the general course of its negotiation: *Story on Bills*, s. 46. Where the direction is to pay "out of" a particular fund the order is conditional; but where the words are used merely to indicate that a particular fund is to be debited, the order is unconditional. Whether a bill or note is conditional, is a question of law: *Sproutt v. Matthews*, 1 T. R. 182.

## ILLUSTRATIONS.

A bill drawn payable "out of the growing substance" of the drawer is invalid: *Josselyn v. Lucier*, 10 Mod. 294.

A promise to pay "out of the net proceeds of ore to be raised and sold," is conditional: *Worden v. Dodge*, 3 Den. (N. Y.) 159.

An order to pay £15 "out of my half-pay which will become due the 1st January," is conditional: *Stevens v. Hill*, 5 Esp. 247.

An order to pay "out of the moneys arising from my reversion when sold," is conditional: *Carlos v. Fancourt*, 5 T. R. 482.

An order to pay "out of rents," is conditional: *Morton v. Naylor*, 1 Hill (N. Y.) 583.

An order to pay a sum certain "on account of moneys advanced by me to the S. & F. Company," is unconditional: *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

An order to pay a sum certain "against credit No. 20, and place it to account as advised by J. P. & Co.," is unconditional: *Banner v. Johnston*, L. R. 5 H. L. 157.

An order to pay £9.10 "as my quarterly half-pay due 1st February by advance," is unconditional: *Macleid v. Snee*, 2 Stra. 762.

An acceptance on a draft in these words "We will keep the sums of \$605 and \$405 from the first estimate of McL. and M. & Co., as requested above, provided they have done sufficient work to earn that sum;" Held, to be a bill: *McLean v. Shields*, 1 Man. R. 278.

A bill or note drawn on a particular fund, and not payable generally, is not valid: *Dawkes v. Earl Deloraine*, 2 W. Bl. 782.

An order drawn in express terms for a particular fund, will operate as an assignment of the fund, but it will not be negotiable, and is not a bill of exchange: *Cowperthwaite v. Sheffield*, 3 N. Y. (Comst.) 243.

"Mr. O.—Mr. B. wants £25, twelve o'clock this day, *i.e.*, 15th of Feb., 1860. I want you to get it him immediately out of S.'s money:" signed by H., and accepted by the defendant:—Held, not a bill, because payable out of a particular fund: *Ockerman v. Blacklock*, 12 U. C. C. P. 362.

An authority to pay money "out of the moneys now due or hereafter to become due to me under the will of my late father," is conditional: *Fisher v. Calvert*, 27 W. R. 301.

Sec. 3.

An order to pay "out of the moneys in your hands belonging to the proprietors of the Devonshire mines and quarries," is conditional: *Jenny v. Herle*, 2 Ld. Raym. 1361.

An order drawn upon the treasury by a public officer for his salary is not a bill: *Shader v. Batchelor*, 8 B. Mon. (Ky.) 168.

An order on a public auditor as follows: "From proceeds of drafts of Messrs. A. & T. in my favour filed in your office, pay to the order of Messrs. R. & Co., of Philadelphia, \$650, acceptance received, and charge without further notice to account of C. A.," is not a bill: *Raiquael v. Ayliff*, 16 Ark. 594.

A warrant issued by a county auditor, dated at his office, and reading, "Treasurer of S. F. county will pay to the order of J. D. M. the sum or \$1,000, as ordered by the Board of Supervisors, &c.," is not a bill: *Dana v. San Francisco*, 19 Cal. 486; s.p. *Bayerque v. San Francisco*, 1 McAll. 175.

Township orders drawn by the township treasurer, and "payable out of the moneys arising from road taxes," are not bills: *Dyer v. Township of Covington*, 19 Pa. St. 200.

<sup>2</sup> The definition given of a bill by the preceding part of this section does not make the date essential to the form of a bill. But in general it may be stated that there should be a date to every bill of exchange. However it is not in all cases indispensable, although in foreign bills the date is rarely if ever omitted. In all cases of bills drawn so many days after date, it would seem almost indispensable that the date should appear upon the face of the instrument, for otherwise it cannot be known to the drawee at what period it is payable; nor can the holder know when it should be presented for payment. But when bills are drawn at, or so many days after, sight, or on demand, it does not seem indispensable that the date should appear. It is obvious, however, that every such omission must be attended with some practical inconvenience, and therefore it seldom occurs except from pure mistake: *Story on Bills*, s. 37. Most of the continental codes require the bill to be dated. If the date of a bill or note is omitted, it is considered as dated on the day on which it is made: *Giles v. Bourne*, 6 M. & S. 73. And such date may be shewn by parol evidence: *Davis v. Jones*, 17 C. B. 625. A note dated in 1837, and made payable "January 1, one thousand forty," was held to mean 1st January, 1840: *Evans v. Steel*, 2 Ala. 114. By s. 12 *post*, the true date of a bill may be inserted by any holder. The date of a note is only descriptive: it is not necessary to its validity, and may be explained: *Dean v. DeLezardi*, 24 Miss. 424.

<sup>3</sup> It was formerly a matter of controversy in our law whether it was necessary that a bill should import on its face to be for value received. "If the drawer mentions it *for value received*, then he is chargeable at common law; but if no such mention, then you must come upon the custom of merchants only:" *Per Holt, C.J.*, in *Cramlington v. Evans*, 1 Show. 5. It has long been fully established that the words are not necessary or material: *Watson v. Kightley*, 3 Per. & D. 408. The words "value

received," are ambiguous where the bill is to a third person; for they may mean either value received by the drawer or the payee, or by the acceptor of the drawer. But the first is the more probable interpretation; for it is more natural that the party who draws should inform the drawee of a fact which he does not know, than one of which he must be aware: *Byles on Bills*, 64.

<sup>4</sup> Our law seems less strict and peremptory than most of the European codes. By the French code it seems indispensable to the essence of a bill of exchange that it should contain the place where drawn, and also the place upon which it is drawn; for the definition of a bill on their code is, that it is drawn from one place upon another place: *Code de Com.* Art. 110. In order to ascertain whether a bill be a foreign bill or an inland bill, as the rights, duties and obligations in regard to each are not exactly coincident, it seems proper that the place where it is drawn or made, and is to be paid, should in all cases be stated upon the face of the bill. But whatever may be the necessity in respect of foreign bills, it does not seem indispensable that the place where drawn should be stated on the face of inland bills, and between the original parties.

4. An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within Canada, or (b) drawn within Canada upon some person resident therein. Any other bill is a foreign bill: <sup>Inland and foreign bills defined. Imp. Act s. 4. Ind. Act, s. 11.</sup> 1

2. Unless the contrary appears on the face of the bill, <sup>When an inland bill.</sup> the holder may treat it as an inland bill.

<sup>1</sup> A definition of what bills are inland and foreign bills of exchange is of great practical importance, as the rights and remedies thereon are not exactly the same, nor are they governed by the same doctrines and laws. The forms of foreign bills of exchange have varied at different periods, and are even at the present time, different in different countries.\* A bill of exchange is properly denominated a foreign bill, though formerly called an outland bill, when it is drawn in one state or country upon a person in another or foreign country, as when a bill or draft is drawn in Canada upon some person in the United States, or in the United Kingdom. But a bill is properly denominated an inland bill (which is equivalent to the expression that it is a domestic or intra-territorial bill), when both drawer and drawee reside, and the place of payment is, within the same country or government. But what properly constitutes, in the sense of the law, a foreign country has been the subject of much judicial discussion. For the purposes of nationality and allegiance, all parts of the Empire are within the one sovereignty; except perhaps as to local naturalizations of aliens. (See

\*Some early forms of Bills of Exchange commenced with an invocation to the Deity "Al nonne de Dio, Amen, a di 1. di Febrero, 1351."

**Sec. 4.** Imperial Naturalization Act, 33 Vic. c. 14, s. 16, and Canadian Naturalization Act, 44 Vic. ch. 13, s. 17). Before the union of the three United Kingdoms, each of them was "foreign" to the other, although they were at the time under the dominion of the same sovereign; and the several Acts of union still left each of them, for some purposes, separate and distinct, and therefore "foreign" in regard to local laws, jurisprudence and the jurisdiction of their Courts. Thus where the question as to bills came directly before a Court, Lord Tenterden, C. J., said: "It is indeed admitted that Irish and Scotch bills drawn upon England, were foreign before the respective unions between the countries: and it does not follow because Ireland and Scotland were united into one Kingdom with this, that the bills drawn there, which before were foreign, became inland bills: *Mahony v. Ashlin*, 2 B. & B. 482. And in a later case (1850), Sir F. Pollock, C. B., said: "We have to administer the law according to the law of England, and not according to the law of Scotland, of which, so far as it has reference to the present case, we may be assumed to have no knowledge whatever:" *Bonar v. Mitchell*, 5 Ex. 419. And so until the Imperial Act of 1882, bills drawn in one part of the United Kingdom and payable in another, were not distinguished from foreign bills drawn or payable, or both, abroad: *Byles on Bills*, 313. According to similar reasoning, it has been held that a company incorporated by the Imperial Parliament for the purpose of building a railway in Scotland, is a foreign corporation in England: *Mackereth v. Glasgow, &c., R. W. Co.*, L. R. 8 Ex. 149, although Scotland is not a foreign country to England: *Re Orr Ewing*, 22 Ch. D. 465. So an Irish company incorporated by the same Parliament, is a foreign corporation in England, and may be compelled to give security for costs: *Kilkenny, &c., R. W. Co. v. Fielden*, 6 Ex. 81. Similar decisions appear in the Irish and Scotch Courts. But an exception is made in winding up cases, and the Court acquiring jurisdiction in a case under the Companies Act, 1862, becomes a Court for the United Kingdom; and no actions affecting the assets of the company in liquidation can be brought in other Courts: *International Pulp Co.*, 3 Ch. D. 594. A similar line of decisions prevails in the Canadian Courts. The locality of the forum of litigation is the test whether a corporation or individual suing in it, is foreign or not within its jurisdiction. Thus the Bank of Montreal is a foreign corporation in Ontario: *Bank of Montreal v. Bethune*, 4 U. C. O. S. 341; so a judgment of a Lower Canada (now Quebec) Court is a foreign judgment in this Province: *McPherson v. McMillan*, 3 U. C. Q. B. 34. And similarly a judgment of a Manitoba Court is a foreign judgment in Ontario: *McLean v. Shields*, 9 Ont. R. 699. But these rules have not been applied in all cases to bills and notes. Under the Upper Canada Act, 7 Wm. IV. c. 5, s. 1, which provided that when a bill or note was drawn payable at a bank or any other particular place, it should be a general acceptance, it was held that a note made in Upper Canada, payable in Montreal, in Lower Canada (then a separate Province), being payable generally, was an inland note: *Bradbury v. Doolie*, 1



U. C. Q. B. 442. But in another case, where the note was also drawn in Upper Canada and made payable at the Bank of Montreal, in Montreal, it was apparently dealt with as a foreign note, and according to the law of Lower Canada, as proved at the trial: *McLennan v. McLennan*, 17 U. C. C. P. 109. This Act, however, makes all bills "drawn and payable within Canada, or drawn within Canada upon some person resident therein," inland bills. From the two classes of cases illustrating what are inland bills, it may be inferred that a bill drawn in Canada upon a person resident in a foreign country, but payable here, is an inland bill. And a bill drawn in Canada upon a person resident here, but payable in a foreign country, would seem to be properly a foreign bill; for the rule of law is that where a contract is made in one country to be performed in another, it is the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance: *Story's Conflict of Laws*, s. 280. The place of performance is then, *fictione juris*, the *locus contractus*: 3 *Burge on Colonial and Foreign Law*, 171. "Inland bills (under 55 Geo. III. c. 184, Imp.) are such as are not drawn payable abroad:" *Per* Lord Abinger, C.B., in *Amner v. Clarke*, 2 C. M. & R. 468. The Indian Act of 1881 has a similar clause to the above, with the addition: "Any such instrument not so drawn, made, or made payable, shall be deemed to be a foreign instrument," (s. 12).

## ILLUSTRATIONS.

A bill signed in France by a Canadian, and payable in Canada, is an inland bill: *Merchants Bank v. Stirling*, 1 Russ. & Gel. 439.

A bill drawn in London, on a person resident in Brussels, but payable in London, is an inland bill: *Amner v. Clarke*, 5 Tyr. 942.

A bill payable to order, drawn, accepted, and payable in England, but indorsed in France, is an inland bill: *Lebel v. Tucker*, L. R. 3 Q. B. 77.

Where the body of a bill was written, and the acceptance of it made in England, and it was afterwards transmitted to the drawer abroad for his signature, and was there signed by him, it was held to be a foreign bill: *Boehm v. Campbell*, Gow 56.

A firm resident in Ireland signed and indorsed four copper-plate bills of exchange, dated at a place in Ireland, but leaving blanks for dates, sums, times of payment, and names of drawees, and sent them to their agent in London, who filled up the blanks and negotiated the bills: Held, to be bills of exchange made in Ireland, and therefore foreign bills: *Snaith v. Mingay*, 1 M. & Sel. 87.

A note made and indorsed in a foreign country, is negotiable here, within the statute of Anne: *Thompson v. Sloan*, U. C. M. T., 2 Vict.

A note payable to the bearer made in England, is transferable by delivery in a foreign country: *De la Chaumette v. Bank of England*, 2 B. & Ad. 385.

5. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee: <sup>1</sup>

Bill payable to drawer or drawee.  
Imp. Act, s. 5.  
Ind. Act, s. 13.

## Sec. 5.

Where both  
are the same  
or a fictitious  
person.

2. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person<sup>2</sup> or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.<sup>3</sup>

<sup>1</sup> The drawer is the person giving the order "addressed by one person to another." And it may be drawn payable to the drawer or his order: *Butler v. Crips*, 1 Salk. 130. The law as to notes drawn to the maker's order has led to some variance of judicial opinion. In *Flight v. Maclean*, 16 L. J. Ex. 23, the Court of Exchequer held that a note payable to the order of the maker, and indorsed to the plaintiff, was not within the statute of Anne. But the Court of Queen's Bench, in *Wood v. Mytton*, 16 L. J. Q. B. 446, held that such a note was within the statute, and assignable by indorsement. Subsequently, in *Hooper v. Williams*, 2 Ex. 13, the Court of Exchequer adopted the decision of the Queen's Bench, and held, on a note payable to the maker's order, that the order was complete when the maker's indorsement was made, and the note then became a binding contract; and that when the maker's indorsement was in blank, and the note put in circulation, it became a note payable to bearer.

## ILLUSTRATIONS.

"If a man draw an instrument in the form of a bill of exchange on himself, and accepts it, it is a promissory note. If he says, 'I pay to A. B. £100,' and adds an address to the instrument, it may be declared on as a note:" *Per Parke, B.*, in *Hooper v. Williams*, 12 Jur. 270.

A banking company carried on business in London and Liverpool. The London house draw a bill on the Liverpool branch house. It is a note made by the banking company payable to the same company in Liverpool: *Miller v. Thomson*, 3 M. & Gr. 576.

Although bills of exchange, drawn and accepted by the same parties, may in strictness be promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly: *Williams v. Ayers*, 3 App. Cas. 133.

<sup>2</sup> By the Interpretation Act, R. S. C. c. 1, the expression "person" includes "any body corporate, and politic, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply, according to the law of that part of Canada to which such context extends." The term "fictitious person" is also used in the Imperial Acts, but the more appropriate designation in view of the above interpretation of "person," would seem to be "fictitious name," which is the term used in the Indian Act (s.42). It is not clear how such contracts as bills and notes, made to fictitious or non-existing persons, came to be recognized as having any legal validity whatever. To draw or indorse bills or notes in the name of a fictitious or non-existing person,

is clear fraud, and is a fraudulent misrepresentation made wilfully and knowingly, and with fraudulent intent. Such fraud in ordinary contracts vitiates them *in toto*; and the Courts will not exercise any jurisdiction to enforce them. So in judicially construing wills, if the description of a person or thing named in the will, be wholly inapplicable to the subject intended, or said to be intended by it, evidence is held to be inadmissible to prove whom or what the testator really intended to describe: *Greenleaf on Evidence*, s. 290. But apparently for the benefit of mercantile transactions, the Courts have waived their judicial abhorrence of fraud, and have recognized the validity of bills and notes drawn or indorsed in the names of fictitious persons, for certain purposes. The reasons for this judicial declension were thus stated in an early case in the House of Lords: The intent of the drawers and acceptors of the bill in question, was to make a negotiable instrument; and for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put into a state of negotiability by indorsement. There is no rule of law to prevent its being transferred by delivery, and have the effect of a bill expressed to be made payable to bearer, that being the only other method of negotiating bills of exchange. By thus giving effect to the bill, justice is done betwixt the parties, and the rule affords protection to the fair holders of bills of exchange, against frauds by which they might otherwise be injured, without which protection, the currency of bills of exchange would be greatly obstructed, and great inconveniences would arise in commercial transactions: *Gibson v. Minet*, 2 Bro. P. C. 61.\* Since then (1791), Parliament has given legislative recognition to bills and notes drawn or payable to fictitious or non-existing persons. The sections in which these expressions are used, are ss. 7 (3), 41 (2) (b), 46 (2) (b), 50 (2) (c) and (d). But see as to the effect of an indorsement of such a bill or note, s. 55 (2).

## ILLUSTRATIONS.

In an action by an indorsee of a bill drawn payable to the order of a fictitious person, it was held that such a bill was completely void, and that the indorsee could not recover against the acceptor, unless it appeared that the latter was aware of the fraud, or that the money advanced on the bill had found its way into his hands: *Bennett v. Farnell*, 1 Camp. 130.

But in another case it was held that, although a bill made to fictitious payees was a mere nullity, yet as against the indorser it did not signify what the bill was, it being his business to see what he could make of the bill: *Ex parte Clarke*, 3 Bro. C. C. 238.

A person discounting a bill payable to a fictitious payee for the benefit of the drawers, and with knowledge of the transaction, cannot recover against the acceptor: *Hunter v. Jeffrey*, Peake's Ad. Cas. 146.

Where a bill was drawn by the defendant and others, on the defendant alone, in favor of a fictitious person (which was known to all the

\*The reporter's digest of this case states that "It is not necessary to the validity of deeds or contracts that they can in all cases operate according to the words in which they are expressed; for where the rules, or the policy, of the law prevent such operation the instrument may legally operate in a different manner to give effect to the legal interest of the contracting parties."

**Sec. 5.** parties concerned in drawing the bill), and the defendant received the value of it from the second indorser :—Held, that a *bona fide* holder for value might recover the amount of it against the acceptor: *Tallock v. Harris*, 3 T. R. 174.

In a case in the House of Lords it appeared that A. drew a bill on B. payable to a fictitious payee or order, and indorsed it in the name of such fictitious payee, which B. accepted. In an action by an innocent endorsee for value against B., it was held that in order to draw an inference either that B., at the time of his acceptance, knew that the name of the payee was fictitious, or that he (B.) had given authority to A. to so draw the bill by his having given a general authority to A. to draw bills on B., payable to fictitious persons, evidence may be admitted of irregular and suspicious transactions and circumstances relating to other bills drawn by A. on B., payable to fictitious payees, and accepted by B., although none of these transactions have any apparent relation to the bill in question, and although none of them prove that B. accepted any of those other bills with a knowledge that the payees were fictitious: *Gibson v. Hunter*, 6 Bro. P. C. 255.

The names of real persons as drawer and payee were forged to a bill of exchange, which was accepted by V., payable at a bank, and paid by the bank: *Held*, that such forged names were not “the names of fictitious or non-existing persons,” which would make the bill payable to bearer, and that the bank was not entitled to credit for the bill. “Fictitious person” means fictitious to the knowledge of the person sought to be charged upon a bill: *Vagliano v. Bank of England*, 22 Q. B. D. 103, and 23 Q. B. D. 243.

A bill of exchange drawn in fictitious names, where there are no such persons existing as the bill imports, may be a forgery: *Ree v. Wilkes*, 2 East’s P. C. 957.

<sup>3</sup> If it be ambiguous whether an instrument is a bill or a note, the person who receives it, may treat it as against the drawer or maker, as either: *Shuttleworth v. Stephens*, 1 Camp. 407; s. p. *Forbes v. Marshall*, 11 Ex. 166. See s. 25. Particularly where an instrument which appears on common observation to be a bill, may be treated as such, although words are introduced into it for the purposes of deception, which might make it a note: *Allan v. Maunson*, 4 Camp. 115. As to persons not having capacity to contract, see s. 22.

Drawee must be named in bill.  
Imp. Act, s. 6.

**6.** The drawee must be named or otherwise indicated in a bill with reasonable certainty: <sup>1</sup>

If more than one, not alternative or successive drawees.

2. A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange. <sup>2</sup>

<sup>1</sup> A bill of exchange being an open letter of request, should regularly be addressed to the drawee by his christian and sur-name; and also by a designation of his place of residence or business. This seems indispen-

able to the rights and duties and obligations of all the parties ; for the payee cannot otherwise know upon whom he is to call to accept and pay the bill ; nor can any other person know whether it is addressed to him or not, and whether he would be justified in accepting and paying the bill on account of the drawer : *Story on Bills*, s. 58. Every man who takes a bill of exchange, must know where to call upon the drawee, for he undertakes to demand the money of him ; and when the bill is indorsed, the indorsee undertakes to demand the money of the drawee : *Heylyn v. Adamson*, 2 Burr. 674. See further notes to ss. 54 and 55.

## ILLUSTRATIONS.

If the drawee's name is not mentioned on the bill by the drawer, but if there is a place of payment fixed as "at No. 1 Wilmot street, London," and the person who lives there accepts the bill in such form, by writing his name thereon, it will be an adoption of the bill on his part, and he will be liable on it as an acceptor : *Gray v. Milner*, 8 Taunt. 739. See *Peto v. Reynolds*, 9 Ex. 415, and cases there cited.

A party gave the following instrument : At sight, please pay D. S. M. P. or order, the sum of £200, value received, and place the same as per letter of advice to the account of A. R. Across it was written in the handwriting of A. R., "Accepted, S. R., Shin Lane, Redminster, Bristol." It was held that not having the name of a drawee, it was void as a bill of exchange : *Peto v. Reynolds* ; s. c., *Reynolds v. Peto*, 9 Ex. 410 ; 18 Jur. 472 ; 11 Ex. 418.

A bill drawn upon and addressed to the Milford Spinning Company as the drawees, was accepted by F. M., one of the partners, "for the Milford Spinning Company and self ;" Held, that the acceptance did not entitle the drawer to rank on the separate estate of F. M. : *Malcolmson v. Malcolmson*, 1 Ir. L. R. Ch. D. 228 ; s. p., *Re Barnard*, 32 Ch. D. 447.

Where A. made a note, payable to B. or order, and C. wrote his name on the back without B.'s first endorsement : Held, that C. could not be considered as a new maker, and that the note would not support a recovery against him by B. : *Steer v. Adams*, 6 U. C. O. S. 60.

A note made by A., payable to B. or order, and endorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him, the plaintiff : *Wilcocks v. Tinning*, 7 U. C. Q. B. 372.

An instrument in the form of a note was addressed to a third party, who accepted it : Held, to be a note : *Edis v. Bury*, 6 B. & C. 433.

A note of a joint stock company was signed O. A. H., per D. S., manager. It was intended to be a renewal of a note previously given by the company, and that the name of the company was to be inserted over the signatures by a stamp held by the manager, but which was not done ;— Held, in appeal, that the instrument had never been perfected, and was not therefore a promissory note : *Brown v. Howland*, 9 Ont. R. 48 ; 15 A. R. 750.

<sup>2</sup> This clause re-enacts the old rule of law as to alternative or successive drawees. But the next section makes a material alteration in the law respecting payees. When in case of need the name of a person to whom the holder may resort is inserted in the bill by the drawer, he is more properly an original alternative drawee, than an acceptor for honor : *Byles on Bills*, 207n.

## Sec. 6.

## ILLUSTRATIONS.

“Three months after date, we or either of us, promise to pay E. S. R. or J. F., his guardian,” is not a note : *Reed v. Reed*, 11 U. C. Q. B. 26.

A promise to pay a sum certain to A. or to B. and C., is not a note : *Blanchenhagen v. Blundell*, 2 B. & Ald. 417.

A promise to pay a sum certain “to A. or B.,” is not a note : *Osgood v. Parsons*, 4 Gray (Mass.) 455.

A promise to pay to one of two persons in the alternative, is not a note : *Muselman v. Oakes*, 19 Ill. 81.

A note payable to the “order of J. B. G. for W. M.” is a promissory note, and negotiable, but the endorser would be bound to see that the proceeds were applied for M. : *Munro v. Cox*, 30 U. C. Q. B. 363.

A note payable to A., “or to his wife, and to no other person,” is the same as if payable to A. alone : *Moodie v. Rowatt*, 14 U. C. Q. B. 273.

Payee when payable to bearer. Imp. Act, s. 7.

1. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty :<sup>1</sup>

Payable to more than one.

2. A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being :<sup>2</sup>

Payee fictitious or non-existing.

3. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.<sup>3</sup>

<sup>1</sup> The payee should be particularly described so that he cannot be confounded with another person of the same name. But if the bill get into the hands of a wrong payee, unless it be payable to bearer, he can neither acquire or convey a title : *Byles on Bills*, 70.

## ILLUSTRATIONS.

To constitute a bill, the payee must be a person capable of being ascertained at the time the instrument is drawn : *Yates v. Nash*, 8 C. B. N. S. 581.

A plaintiff suing upon a note, which purports to be payable to a person of a different name, may show by evidence that he was the person intended : *Willis v. Barrett*, 2 Stark. 29.

A promissory note payable to \_\_\_\_\_ or order, cannot be recovered by the person to whom it was given, either as payee or bearer, without inserting his name in the blank as payee : *Mutual Safety Insurance Company v. Porter*, 2 All. N. B. 230. See *contra* : *Lowery v. Stewart*, 3 Bosw. (N. Y.) 505.

In an action by indorsee against acceptor of a bill payable to A. or order, he may be relieved of liability by giving evidence that the person who indorsed to the plaintiff was not the real payee, though of the same name : *Mead v. Young*, 4 T. R. 28. Sec. 7.

Where an agent, having money in his hands belonging to his principal, bought a bill with it, which he indorsed specially to the latter, who was dead at the time of the indorsement, but of which circumstances the agent was ignorant : Held, that the property in the bill passed to the administrator of the principal ; and, consequently that he might sue on it in his own character as such : *Murray v. East India Company*, 5 B. & A. 204.

<sup>2</sup> This clause makes an alteration in the law as to the classes of persons therein described. See note 2 to s. 6. In England a distinction has been made between joint stock companies and friendly societies, for the reason that jurisdiction as to the latter was vested in justices of the peace. See *Byles on Bills*, 55.

## ILLUSTRATIONS.

A document as follows : " On demand we jointly and severally promise to pay to Messrs. W. P. & M., or to their order, or the major part of them, £100," is a note upon which the three payees may maintain an action : *Watson v. Evans*, 32 L. J. Ex. 137.

" We, or either of us, promise to pay to A. B., treasurer of, &c., or to his successor or successors in office, or order, &c.," is a note, the words, " or to his successor or successors in office," being void : *McGregor v. Daly*, 5 U. C. C. P. 126.

An instrument promising to pay a sum certain to J. P., " treasurer of the building committee of the congregation of St. John's Church, or his successor duly appointed," is a promissory note ; the words being descriptive only, as the payee could have no successor legally speaking as treasurer, the building committee not having any corporate capacity : *Patton v. Mcville*, 21 U. C. Q. B. 263.

Where a note was made payable to the trustees acting under A.'s will, parol evidence was held admissible to show who they were, and what the trusts were : *Meggison v. Harper*, 4 Tyr. 96.

An indorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain : *Auldjo v. McDougall*, 3 U. C. O. S. 199.

" On demand, I promise to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being, £100," is a good note, for there is no uncertainty in the payees, as the trustees alone are to be considered as payees, and their treasurer as their agent merely to receive payment : *Holmes v. Jacques*, L. R. 1 Q. B. 376.

An instrument made payable " to the estate of A. B., deceased," is not a note : *Lyon v. Marshall*, 11 Barb. (N. Y.) 241.

" Nine months after date I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Insurance Society, or order, company's rupees twenty thousand." Held, that the instrument was not a note, the payee being uncertain at the time of making it : *Cowie v. Stirling*, 6 E. & B. 333 ; 2 Jur. N. S. 663.

A bill payable " to the order of the treasurer for the time being " of a benevolent institution, is null and void : *Yates v. Nash*, 8 C. B. N. S. 587.

Sec. 7.

<sup>3</sup> Formerly it was held that a bill payable to a fictitious person or order was completely void, and that the indorsee of such a bill could not recover against the acceptor: *Bennett v. Farnell*, 1 Camp. 130. The words in the above clause, "the bill may be treated as payable to bearer," mean as against those who are to be made liable for the bill: *Vagliano v. Bank of England*, 23 Q. B. D. 261. See further the notes to s. 5.

## ILLUSTRATIONS.

Where a note is payable to a fictitious payee, and not to his order or bearer, a person receiving it from a third party for value, cannot declare against the maker as on a note payable to bearer: *Williams v. Noxon*, 10 U. C. Q. B. 259.

A. drew a bill on B., a fictitious person, and negotiated it to another. The holder may treat it as, a bill or note made by A., and presentment is dispensed with: *Smith v. Bellamy*, 2 Stark. 223.

If a bill is drawn in favor of a fictitious payee, and that circumstance is known as well to the acceptor as the drawer, and the name of such payee is indorsed on the bill as indorsing it to the drawer, who indorses it to an innocent indorsee for a valuable consideration, the latter may recover on it against the acceptor, as on a bill payable to bearer: *Gibson v. Minet*, 1 H. Bl. 569.

Forged bills of one C., drawn on S., payable to a fictitious person, were refused acceptance by him and protested, and S. requested T. to accept them for honor, and he, assuming them to be genuine, accepted them: Held, that T. was liable; and *semble*, that the payee being a fictitious or non-existing person, the bill was to be treated as payable to bearer: *Phillips v. im Thurn*, L. R. 1 C. P. 463.

A distinction is to be drawn between the forged signature of a real person, and the signature of a fictitious or non-existing person. Fictitiousness or non-existence does not depend merely upon the selection of a fictitious or non-existing name. The test is the intention of the acceptor. If no one is known to exist, to the knowledge of the acceptor, answering the name and description used, the payee is non-existing; or if a name and description is adopted which happens to be of an existing person, but if the acceptor does not intend to accept the actual order of the named payee, and knows that he is in that sense fictitious, the bill is treated as payable to bearer: *Vagliano v. Bank of England*, 22 Q. B. D. 103; 23 Q. B. D. 243.

Down to the passing of the recent statutes, the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer, was based uniformly on the law of estoppel, and applied only against the parties who, at the time they became liable on the bill, were cognizant of the fictitious character, or of the non-existence, of the supposed payee: *Per Bowen, L. J., Ibil* 23 Q. B. D. 260.

Where a note is made payable to a firm, which does not exist, the person to whom such note is given, may assume such firm's name, and so indorse the note, and it will be a good indorsement in the hands of a *bona fide* holder: *Blodgett v. Jackson*, 40 N. H. 21.

A note drawn payable to ship Fortune or bearer, is a note payable to bearer: *Grant v. Vaughan*, 3 Burr. 1516.

Where to the knowledge of all parties, a bill was drawn and indorsed in the name of a dead man, and so accepted by the payee;—Held, that the executor of the dead man could recover against the acceptor: *Ashpital v. Bryan*, 2 L. T. N. S. 716.



8. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable: <sup>1</sup>
- Sec. 8.  
Non-transferable bills valid.  
Imp. Act, s. 8.
2. A negotiable bill may be payable either to order or to bearer: <sup>2</sup>
- Negotiable bill.
3. A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank: <sup>3</sup>
- Bill payable to bearer.
4. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable: <sup>4</sup>
- Bill payable to a particular person.  
When transferable.
5. Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option.
- Bill payable to order.  
Option of payee.

<sup>1</sup> It was formerly a matter of doubt whether, by our law, it was not essential to the character of a bill of exchange that it should be negotiable, for otherwise it was thought that it might be deemed to have no greater effect than being evidence of a contract. It was formerly held that a bill payable to A. or bearer, was not negotiable. It is essential, however, to the negotiability of a bill between all persons except the Queen or Government, that it should be payable to order or bearer, or that some other equivalent words should be used, authorizing the payee to assign or transfer to third persons: *Story on Bills*, s. 60. There must be an intention apparent on the face of the bill or in the indorsement, that it is not negotiable. The drawing or indorsing it payable to a particular person simply, will not make it non-negotiable. See subs. 4, and s. 35.

#### ILLUSTRATIONS.

A note payable to A., without the words or bearer, or order, is valid: *Smith v. Kendall*, 6 T. R. 123.

A note payable to the "treasurer of the corporation of Toronto township," without words making it negotiable, cannot be sued upon by the township corporation: *Township of Toronto v. McBride*, 29 U. C. Q. B. 13.

A director of a company, jointly and severally with three others, made a promissory note payable to said company, and not negotiable, with the intent that it should be used by the company, upon the credit of the makers, for the purposes of the company, and the company indemnified

Sec. 8.

the makers against liability thereon; the plaintiffs discounted the note for the company, and paid the proceeds to the company, and the money was applied to the purposes of the company, and that after default in payment the director gave security to the plaintiffs against his liability upon the note: Held, that the plaintiffs were entitled to recover against the defendant the amount of the note, though not a negotiable instrument: *Bank of Hamilton v. Harvey*, 9 Ont. R. 655; 16 S. C. R. 714.

An indorser of a non-negotiable note, or if negotiable, not indorsed by the payee, cannot be sued on such note: *West v. Bown*, 3 U. C. Q. B. 290.

<sup>2</sup> A bill or note is a *chase in action*, and the title to it may be transferred by a separate writing, or by a voluntary deed constituting a declaration of trust, or by a written contract of sale: *Chalmers on Bills*, 118. Formerly it was the policy of the common law not to recognize the assignment of *choses in action*, for the reasons given by Lord Coke: "And first was observed the great wisdom and policy of the sages and founders of our law who have provided that no possibility, right, title or thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits of great oppressions of the people:" *Lampert's Case*, 10 Co. R. 48. But when the necessity of facilitating the operations of trade and commerce led to the recognition and ultimate reception of the *lex mercatoria*, the rigor of the common law had to be modified in regard to the assignment of bills of exchange. Legislative recognition was given to such assignments of bills by 3 & 4 Anne, c. 9, which provided that promissory notes should be assignable or indorsable over "in the same manner as inland bills of exchange are, or may be, according to the custom of merchants." *Choses in action*, previously assignable in equity, were first made assignable at law in Ontario in 1872 by the Act 35 Vic. c. 12, now R. S. O. 1887, c. 22, s. 6. There are some decisions holding that bank deposit receipts are not negotiable; but those payable to order have been held negotiable.

#### ILLUSTRATIONS.

A deposit receipt acknowledging the receipt of a sum certain by a bank to be accounted for to the party depositing the money, is not a negotiable instrument in equity any more than at law, so as to entitle the transferee to demand payment of the money from the bank: *Morder v. Royal Canadian Bank*, 20 U. C. C. P. 125 and 21 U. C. C. P. 492; s. p., *Bank of Montreal v. Little*, 17 Grant 313; *Lee v. Bank of British North America*, 30 U. C. C. P. 255; *Moore v. Ulster Banking Co.*, I. R. 11 C. L. 512; *Voyer v. Richer*, 13 L. C. J. 613, but see the latter case in L. R. 5 P. C. 461.

A bank deposit receipt payable to C. or order, with interest, but with the following condition: "No interest will be allowed unless the money remains with this bank six months; this receipt to be given up to the bank when payment of either principal or interest is required," is negotiable, and the holder is entitled to recover on it as a promissory note: *Re Central Bank, Morton's & Block's Cases*, 17 Ont. R. 574. But see the prior cases above referred to.

A writing, purporting to be a bank certificate that B. had deposited a sum of money in the C. Bank, dated C. Bank, July 6th, 1889, and payable

on the 1st December then next, to the order of B. and on the return of the certificate, and signed "W., President," is negotiable and a bill of exchange: *Kilgour v. Bulkley*, 14 Conn. 362. Sec. 8.

<sup>3</sup> "Bearer" is a *descriptio personæ*, and a person holding a bill so payable, may take by that description as well as by any other. The contract is to pay to the bearer or the person to whom he shall deliver the bill: *Grant v. Vaughan*, 3 Burr. 1527. A transfer by mere delivery, without indorsement, of a bill or note, made or payable to bearer, does not render the transferor liable on the instrument to the transferee. The sending to market of a bill or note payable to bearer without, indorsing it, is *prima facie* a sale of the bill or note, and there is no implied guarantee of the solvency of the maker or any other party: *Byles on Bills*, 122. See as to warranty in such case, s. 58. Although a note is not in form negotiable, the payee may make it so by indorsing it payable to order, after which it becomes, as between him and the holder, an inland bill of exchange, which an indorsee takes subject to the same rules which govern instruments negotiable in the inception: *Brenzer v. Wightman*, 7 Watts & S. (Pa.) 264.

<sup>4</sup> This sub-section alters the former law, under which it was held that a bill not drawn payable to order, was not negotiable: *Plimley v. Westley*, 2 Bing. N. C. 249; although the rule was held to be otherwise in regard to indorsements without the words "or order:" *More v. Manning*, Comyns 311; and evidence of a contrary mercantile usage was held to be inadmissible: *Eddie v. East India Company*, 2 Burr. 1216. This clause does not apply to bills or notes dated prior to the first day of September, 1890.

9. The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid— Sum must be certain.  
Imp. Act s.9.  
Ind. Acts. 5.

(a) With interest; Interest.

(b) By stated instalments; Instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; <sup>2</sup>

(d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill: <sup>3</sup> Rate of Exchange.

2. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable: <sup>4</sup> Discrepancy between figures and words.  
Ind. Act s.18

**Sec. 9.**

Time when  
interest  
payable.

3. Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.<sup>5</sup>

<sup>1</sup> By s. 3, a bill must be an order to pay "a sum certain in money." See note 8 to that section, p. 38 *ante*. On a note payable by instalments, an action of debt will not lie until the last day of payment be past; because the different instalments are considered to constitute but one debt, and for one debt the plaintiff can bring but one action of debt, and cannot split his demand, and vex the debtor with a multitude of suits: *Byles on Bills* 333.

ILLUSTRATIONS.

"For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102.15, cy., to be paid in yearly proportions:"—Held, that the effect of this was to give two years for payment; and that no parol evidence could be admitted to prove that it was payable in four years, or until after the death of the plaintiffs' father: *McQueen v. McQueen* 9 U. C. Q. B. 536.

A bill of exchange was drawn, payable in three instalments. When the first instalment became due, the holder presented it at the bank where it was payable; the cashier paid the first instalment and returned the bill to the holder with the following indorsement: "Paid on the within \$741.00, August 12, 1861;"—Held, an acceptance for the remaining instalments: *Berton v. Central Bank*, 5 All. N.B. 493.

A note payable by instalments is assignable under the statute of Anne, and three days grace are allowed on each instalment: *Oridge v. Sherbone*, 11 M. & W. 374; 7 Jur. 402.

"I agree to pay A. B., or order, £695, at four instalments, viz., the first on, &c., being £200; the second on, &c., being £150; the third on, &c., being £150; the fourth on, &c., being £100; the remainder, £95 to go as a set-off for an order of R. to G. and the remainder of his debt from D. to him," is an agreement and not a note: *Davies v. Wilkinson*, 10 A. & E. 98; 3 Jur. 405.

A premium note was given in these words: "I promise to pay said company the sum of \$21 in such portions and at such time or times as the directors of said company may, agreeably to their Act of incorporation, require;"—Held, a promissory note, and that the whole amount thereof was absolutely due: *Washington Mutual Ins. Co. v. Miller*, 26 Vt. 77.

In Quebec an action lies on a note payable by instalments as soon as the first day of payment is passed; but it lies only for the amount of the first instalment, each of them being considered as a separate debt: *Clarihue v. Morris*, 2 Rev. Leg. 30.

<sup>2</sup> It is conceived that presentment and notice of dishonor are required when each instalment falls due, but that laches as to one instalment in ordinary cases only discharges an indorser as to that one; and that a note payable by instalments, cannot be indorsed over for less than the entire sum due upon it: *Byles on Bills*, 5.

## ILLUSTRATIONS.

## Sec. 9.

Where a bill or note is subject to a condition, that, on default in payment of the first instalment, the whole shall become payable, and default is made, an indorser is liable for the whole amount: *Carlton v. Kennedy*, 12 M. & W. 139.

A non-transferable note, payable in two instalments, or, on default in the former, at once, is valid, and the maker has three days grace: *Miller v. Biddle*, 14 Jur. N. S. 980; 13 L. T. N. S. 34.

A promissory note made on the 25th April, 1872, to pay £170 with interest at five per cent. as follows: The first payment to wit, £10 or more, to be made on the 1st February, 1873, and £5 on the first day of each month following, until the note and interest should be fully satisfied; and upon default in payment of any of the instalments, the full amount then remaining due is to be forthwith payable, is a valid note: *Cooke v. Horn*, 29 L. T. Rep. 369.

<sup>3</sup> The just and true exchange for moneys that is at this day used both in England and other countries, by bills, is *par pro pari*, or value for value, so that the English exchange being grounded on the weight and fineness of our own money, and the weight and fineness of those of each other country, according to their several standards, proportionable in their valuation, which being truly and justly made, ascertainment and reduces the price of exchange to a sum certain for the exchange of moneys to any nation or country whatsoever: *Beaves, Lex Mercatoria*, 561. See as to exchange as damages, s. 57, and as to how the rate of exchange is to be calculated, s. 71.

## ILLUSTRATIONS.

The current rate of exchange must be proved by extrinsic evidence: therefore a promise to pay a sum certain with the current rate of exchange added, is not a negotiable note, but a special promise, and requires proof of a consideration: *Lowe v. Blisse*, 24, Ill., 168.

Action on a sterling bill drawn by plaintiffs in London upon defendants in Upper Canada, accepted by defendants in London (one of them being at the time in London), and payable in London: Held, that the plaintiffs were entitled to recover the current rate of exchange: *Greatorex v. Score*, 6 U. C. L. J. 212.

It is not necessary in an action on a note, due and payable in the United States, to prove the value of dollars and cents in the States, as Canada has a corresponding currency, and there being no par value for the American currency fixed by law: *Griffin v. Judson*, 12 U. C. P. 430.

<sup>4</sup> The figures at the top of the bill do only, as it were, serve as the contents of the bill, and a *breviat* thereof; but the words at length are in the body of the bill, and are the chief and principal substance thereof, whereto special regard ought to be had: *Marius on Bills* (1655). 34.

## ILLUSTRATIONS.

A bill was drawn in words, "Pay to the order of C. two hundred pounds," and in the margin were the figures £215: Held, a bill for £200 only: *Saunderson v. Piper*, 5 Bing. N. C. 561.

**Sec. 10.** A signed a blank acceptance in which the amount in words was left blank, but in the margin were the figures £14. 0. 6. The drawer filled up the blank with one hundred and sixty-four pounds, and fraudulently altered the figures to £164. 0. 6. : Held, that no alteration of the marginal figures could vitiate the bill in the hands of a holder for value who is unaware of the alteration : *Garvard v. Lewis*, 3 Q. B. D. 30.

The figures in the margin of a bill of exchange are merely an index for convenience of reference, and form no part of the bill ; and an alteration in them, without the consent of the drawer, making them conform with the body of the instrument, does not vitiate the bill : *Smith v. Smith*, 1 R. L. 398.

Where the marginal figures differ from the amount in the words in the bill, evidence is inadmissible to show that the marginal figures express the true value : *Standerson v. Piper*, 5 Bing. N. C. 425.

A bill " Pay to my order twenty-five, seventeen shillings and three pence," is a bill for twenty-five pounds seventeen shillings and three pence : *Phipps v. Tanner*, 5 C. & P. 488 ; s. p. *Booth v. Wallace*, 2 Root (Conn.) 247.

Where a note was expressed to pay " one hundred and ninety-one fifty cents ;"—Held, to be a note for one hundred and ninety-one dollars and fifty cents : *Beardsley v. Hill*, 61 Ill. 354.

<sup>5</sup> " Issue " of a bill is defined by s. 2 ; see note 2, p. 30.

#### ILLUSTRATIONS.

Interest made payable by a note is part of the debt, and not merely damages for detaining it : *Crouse v. Park*, 3 U. C. Q. B. 453.

Interest is recoverable on a note at the rate specified in it till payment : *Howland v. Jennings*, 11 U. C. C. P. 272.

The agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant it may be : *Young v. Fluke*, 15 U. C. C. P. 360.

The holder sued the maker and indorser of two notes, adding a count for interest ; and at the trial, offered in evidence two written undertakings, one signed by the maker and the other by the indorser, to allow him interest at the rate of thirty per cent., until payment, in consideration of an extension of time. The learned judge rejected the evidence, and after judgment had been entered up with interest at six per cent., and satisfied, the holder sued the maker on his undertaking to recover twenty-four per cent., the balance of interest agreed to be paid by it :—Held, that the former judgment was a bar to any further claim for interest upon the same notes : *McKay v. Fee*, 20 U. C. Q. B. 268.

**10.** A bill is payable on demand—

(a) Which is expressed to be payable on demand, or on presentation ;<sup>1</sup> or—

(b) In which no time for payment is expressed :

2. Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.<sup>2</sup>

Bill payable  
on demand  
or presenta-  
tion  
Imp. Act, s. 10

Ind. Act, s. 19

No time.

Acceptance  
when  
overdue.

<sup>1</sup> The words "at sight," in the English Act, are omitted in this Act. But a "bill payable on presentation" would include a "bill payable on sight." This definition, when compared with s. 14, shows that such bills as the above are ~~not~~ entitled to "days of grace."

Sec. 10.

<sup>2</sup> This applies to all kinds of bills which become overdue. As regards bills payable on demand, see, s. 36 (3), as to overdue bills; s. 45 (2), as to presentment for payment; s. 72 as to cheques; and s. 85 as to promissory notes.

#### ILLUSTRATIONS.

A promissory note payable on demand, is due from the day of its date, and the statute of limitations runs against it from that date: *LaRocque v. Andres*, 2 L. C. R. 335.

A bill payable at sight is not to be considered a bill payable on demand: *Anson v. Thomas*, Bayl. Bills, 79; s. c. nom., *Janson v. Thomas*, 3 Dougl. 421. See also *Dixon v. Nuttall*, 1. C. M. & R. 307.

A note payable to bearer generally, is payable on demand: *Whitlock v. Underwood*, 2 B. & C. 157.

A note payable only to A., generally, is not one payable to bearer on demand: *Cheetham v. Butler*, 5 B. & Ad. 837.

11. A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable—

Bill payable at a future time. Imp. Act s. 11

(a) At a fixed period after date or sight:<sup>1</sup>

Fixed period

(b) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain:<sup>2</sup>

After event certain. Ind. Act. s. 5.

2. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.<sup>3</sup>

Or contingent event.

<sup>1</sup> Where the words in an instrument refer to what must necessarily happen, it is no contingency: *Boraston's Case*, 3 Co. R. 19.

#### ILLUSTRATIONS.

A note in this form: "I promise for myself and my executors to pay A. (or her executors), one year after my death, £300," is valid: *Raffey v. Greenwell*, 10 A. & E. 222.

A note to pay A. or order, six weeks after the death of the maker's father, is a note, for though the contingency is uncertain as to time, as in the case of bills payable at so many days after sight, there is no contingency whereby it may never become payable: *Colehan v. Cooke*, 2 Str. 1202; Willes 393.

**Sec. 11.**

An instrument whereby the defendant promised to pay A. or order, a sum certain by instalments; but it was declared "that it was thereby considered and fully intended by the receiver, as well as the giver of this note of hand, that all installed payments thereupon whatsoever, from and immediately after the decease of the receiver, should cease and become null and void to all intents and purposes against the executors," is not a note, being payable only on a contingency: *Worley v. Harrison*, 3 A. & E. 669.

<sup>2</sup> ILLUSTRATIONS.

A note given to an infant, payable when he comes of age, and specifying the particular day, is good: *Goss v. Nelson*, 1 Burr. 226.

"Seventeen months after date I promise to pay J. H. or order, £50 without interest; or three years and five months after date with two years interest, for value received," is a valid note, being payable certainly at the latest day: *Hogg v. Marsh*, 5 U. C. Q. B. 319.

A note payable "twenty after date," is not void for uncertainty, nor is it a note payable on demand; it is payable some time after date, and the jury will be judges of the time of payment intended: *Connor v. Routh*, 7 How. (Miss.) 176.

A note payable "six after date." is not void. The ambiguity being patent is not explainable by parol evidence, but may be construed as a note payable six months after date: *Nichols v. Frothingham*, 45 Me. 220.

A promise given to pay a sum certain, for the purchase of fir, but with a condition that it should be void if any dispute should arise respecting the fir, is not a note: *Hartley v. Wilkinson*, 4 M. & S. 25.

<sup>3</sup> ILLUSTRATIONS.

A promise to pay sixty guineas two months after the promisor should marry Elizabeth Pretty, is not a note *secundum consuetudinem mercatorum*: *Pearson v. Garrett*, 4 Mod. 242,\* s. p., *Beardsley v. Baldwin*, 2 Stra. 1151.

A bill or note payable on a contingency is absolutely void: *Palmer v. Pratt*, 2 Bing. 185; s. p. *Carlos v. Fancourt*, 5 T. R. 432.

The contingency in order to vitiate a bill or note as such, must be apparent on the face of the instrument: *Richards v. Richards*, 2 B. & Ad. 447.

The happening of the contingency on which the payment of the instrument is dependent, as out of the produce of the sale of an hotel, will not cure the defect: *Hill v. Halford*, 2 B. & P. 413.

"Twelve months after date I promise to pay A. and B. £500, to be held by them as collateral security for any moneys now owing to them by C. which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him," is payable on a contingency: *Robins v. May*, 11 A. & E. 213; 3 Jur. 1188.

\*The report of the case (1693) states that "Dr. Witherly's son brought the like action upon a note, and he was a gentleman, and no trading merchant, but travelling into France, and had judgment, which was afterwards affirmed in the Exchequer Chamber."



**12.** Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly; <sup>1</sup>

Sec. 12.

Holder may insert omitted date.  
Imp. Act, s. 12

Provided that (a) where the holder in good faith and by mistake inserts a wrong date, and (b) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, <sup>2</sup> the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Wrong date not to avoid bill.

<sup>1</sup> Date of "issue" is defined by s. 2, p. 30, and s. 21, p. 80.

#### ILLUSTRATIONS.

A cheque without a date was given to the holder with an instruction to fill in the date when there were funds to meet it: Held, that after retaining it six years, the holder could not fill in the date, nor present it for payment: *Re Bethell*; 34 Ch. D. 561.

A note takes effect by delivery, and from the time of its delivery; but a delivery and at the time of the date, will be presumed: *Woodford v. Dorwin*, 3 Vt. 82.

A Nova Scotian, resident in France, gave M. an accommodation note dated Halifax 6th, 1875, and mailed it to him on the 11th June. The 6th June being Sunday, M. altered the 6 to 8, and inserted "June," which had been omitted:—Held, that as the alteration was made to correct a manifest mistake on the part of the maker, the note was good: *Merchants Bank v. Stirling*, 1 Russ. & Gel. 439.

A joint note made by two persons appeared on its face to have been altered in the date. The note was delivered to the plaintiff by an agent of one the makers (defendants) in its altered state; the other defendant was called as a witness, and stated that he could not write, or read writing beyond his own name, and could not say that the note had been altered since he signed it:—Held, that the jury might infer that the alteration was made before the note was signed: *Street v. Walsh*, 5 All. N. B. 343.

<sup>2</sup> "Holder" is defined by s. 2; see note 9, p. 29, *ante*. "Holder in due course" is the expression used in this Act, and is apparently substituted for "bona fide holder for value" formerly used. See the definition given in s. 29 *post*.

**13.** Where a bill or an acceptance, or any indorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be: <sup>1</sup>

Date is *prima facie* evidence  
Imp. Act, s. 13

Ind. Act, s. 118 (6).

**Sec. 13.** 2. A bill is not invalid by reason only that it is ante-dated or postdated, or that it bears date on a Sunday<sup>2</sup> or other non-judicial day.

Certain datings not to invalidate.

<sup>1</sup> The *prima facie* case made by the production of the bill, showing its date, is rebuttable.

#### ILLUSTRATIONS.

A note dated 20th September, 1847, payable four months after date, was accepted by the defendant. At the trial the date of acceptance was not proved, but it was proved that the defendant became of age on the 24th December, 1847: Held, that there was no evidence of his being an infant at the time of his accepting the bill: *Harrison v. Clifton*, 17 L. J. Ex. 233; but see *Roberts v. Bethell*, 12 C. B. 778.

A bill of exchange must, in the absence of evidence, to raise a presumption to the contrary, be taken to have been drawn on the day on which it bears date: *Anderson v. Weston*, 8 Scott 583.

<sup>2</sup> "The reason of Sunday not being a day of business, is the decent observance of the Sabbath:" *Per Eyre, C.J., in Measure v. Britten*, 2 H. Bl. 617.

#### ILLUSTRATIONS.

Under the Lord's Day Act, 8 Vict. c. 45, s. 2, a note made on Sunday in payment of goods sold on that day, is void, as between the original parties, but not as against an indorsee for value and without notice: *Houliston v. Parsons*, 9 U. C. Q. B. 681; *Crombie v. Overholzer*, 11 U. C. Q. B. 55.

An indorsee may recover against the acceptor of a bill dated on Sunday, when there is no evidence that the bill was accepted on that day: *Begbie v. Levy*, 1 C. & J. 180.

A promissory note, payable to order, may be validly made in Quebec on the Lord's Day, commonly called Sunday: *Kearney v. Kinch*, 7 L. C. J. 31.

A promissory note was executed on Sunday, but was not delivered to the payee until the following Wednesday: Held, that it took effect at the time of delivery, and was valid: *Fritsch v. Heisten*, 40 Mo. 555.

An indorsee of a bill indorsed by a payee, who died before the day which it bore date, may give evidence that the bill was post-dated, and may make title through such indorsement: *Pasmore v. North*, 13 East 517.

A post-dated cheque given and received, with the intention that it should be held over and not presented for payment until the day on which it was dated, is a bill of exchange, and therefore, in the absence of express authority, one partner of a firm of solicitors cannot bind his co-partners by drawing a post-dated cheque, as a bill, in the name of the firm: *Forster v. Muckreth*, L. R. 2 Ex. 163; 16 L. T. N. S. 23.

Computation of time  
Imp. Act, s. 14

Ind. Act, s. 22.

Three days grace allowed.

**14.** Where a bill is not payable on demand, the day on which it falls due is determined as follows:—

(a) Three days, called days of grace, are, in every case, where the bill itself does not otherwise provide, added to

the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: <sup>1</sup> Provided that— Sec. 14.

(1) Whenever the last day of grace falls on a legal holiday or non-juridical day in the Province where any such bill is payable, then the day next following, not being a legal holiday or non-juridical day in such Province, shall be the last day of grace: <sup>2</sup>

Last day of grace a holiday. Ind. Act, s. 25.

2. In all matters relating to bills of exchange the following and no other shall be observed as legal holidays or non-juridical days, that is to say:

What are legal holidays.

(a) In all the Provinces of Canada, except the Province of Quebec,—Sundays; New Year's Day; Good Friday; Easter Monday; Christmas Day; The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign; and if such birthday is a Sunday, then the following day;

In all Provinces except Quebec.

The first day of July (Dominion Day,) and if that day is a Sunday, then the second day of July as the same holiday;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada; and the day next following New Year's Day and Christmas Day, when those days respectively fall on Sunday;

(b) And in the Province of Quebec the said days, and also—The Epiphany; The Annunciation; The Ascension; Corpus Christi; St. Peter and St. Paul's Day; All Saints' Day; Conception Day;

In Quebec.

(c) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant Governor of such Province for a public holiday, or for a fast or thanksgiving within the same, or being a non-juridical day by virtue of a statute of such Province: <sup>3</sup>

Special holidays in a Province.

**Sec. 14.** 3. Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment : <sup>4</sup>

When time begins to run in fixed periods. Ind. Act, s. 24.  
When time begins to run in sight bills. Ind. Act, s. 23.

4. Where a bill is payable at sight or a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery : <sup>5</sup>

Month. 5. The term "Month" in a bill means the calendar month : <sup>6</sup>

How months in bills are computed.

6. Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated—unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month—with the addition, in all cases, of the days of grace. <sup>7</sup>

<sup>1</sup> These days of grace, which take their name from being days of indulgence, seem to have had their origin at a very early period in the history of negotiable paper. They were probably introduced by the usage of merchants in the first place to enable the acceptor the more easily to make payments of his acceptances, as they became due, which as the payments were all to be made in gold and silver, might sometimes from the occasional scarcity of the precious metals, become a matter of no small difficulty and embarrassment ; and in the next place to point out to the holder what time he might reasonably grant to the acceptor for such payment, without being guilty of laches, or endangering his right of recourse, upon the ultimate non-payment of the bill by the acceptor, against the other parties thereto. The usage was at first discretionary and voluntary on the part of the holder, and gradually from its general convenience and utility, it ripened into a positive right : *Story on Bills*, s. 333. The number of days of grace varies in different countries from 3 to 15 days. In some countries, especially where the French code prevails, no days of grace are allowed. Days of grace were allowed on promissory notes by 3 & 4 Anne, c. 9, as notes were then put on the same footing in all respects as bills of exchange : *Brown v. Haraden*, 4 T. R. 151. The general rule of law is that "days" mean consecutive days,

except where Sunday is the first or the last day. But in commercial cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to commercial usage: *Brown v. Johnson*, 10 M. & W. 331. Days of grace are not allowed to bills payable "on demand," or "on presentation," ~~or "at sight."~~ See further, note 1 to s. 10.

## ILLUSTRATIONS.

By usage in Canada, all bills of exchange are allowed three days of grace after becoming due, and in order to hold the indorsers liable, demand of payment ought to be made on the third day of grace, with protest and notification if not paid: and these formalities are to be observed even where the bill is made payable at the residence of the holder himself: *Knapp v. Bank of Montreal*, 1 L. C. R. 253.

The maker of a note payable by instalments is entitled to the days of grace upon the falling due of such instalment: *Oridge v. Sherborne*, 11 M. & W. 374.

<sup>2</sup> This clause is taken from C. S. C. c. 123, s. 2. Where the last day for doing an act falls on a day upon which the public offices are closed, by reason of its being a holiday there, then such day is not to be reckoned: *Wilkinson v. Britton*, 1 M. & Gr. 557. See also s. 91.

<sup>3</sup> This is a re-enactment of C. S. C. c. 123, s. 3. Sunday, Christmas Day, Good Friday, a public thanksgiving or fast day, or any festival, on which a man is forbidden by his religion to transact any secular affairs (for the law-merchant respects the religion of different people), is not to be reckoned in computing the time when notice of dishonor should be given. If a man receive a letter containing notice of dishonor on such a day, he is not bound to open it, and will be considered as having received notice on the next day: *Byles on Bills*, 224. The dates when the special festivals occur in the year, may be ascertained from an almanac. "All the Court agreed that the almanac is part of the law of England, of which the Court must take judicial notice:" *Regina v. Dyer*, 6 Mod. 41. "But the almanac to go by, is that annexed to the Common Prayer Book:" *Brough v. Perkins*, 6 Mod. 81, s. p. *Tutton v. Darke*, 6 Jur. N. S. 983.

<sup>4</sup> The general rule for the computation of time fixed by statute is, unless there is something in the statute to the contrary, to hold the first day excluded and the last day included: *Rex v. Justices of Cumberland*, 4 N. & M. 378. Where goods were sold to be paid for "in two months' time," it was held that the last day was included, and the first day, the day of sale, was excluded: *Webb v. Fairmaner*, 3 M. & W. 473. The rule for determining whether, in computing time from an act or event, the day is to be included or excluded, has been thus stated: Where the act done, from which the computation is made, is one to which the party against whom the time runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger, it ought to be excluded: *Lester v. Garland*, 15 Ves. 248. "Our law rejects fractions of a day more generally than the civil law does. The effect is

**Sec. 14.** to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed: *Per* Sir W. Grant, M. R., *Ibid* 15 Ves. 257. Where it is necessary to show the time at which two events took place on the same day, the Court may enter into the question of the fraction of a day, as the particular hour at which a person died: *Clinch v. Smith*, 8 D. P. C. 337. Where the computation of time is from an act done, the day on which the act is done is to be included in the reckoning: *Castle v. Bardett*, 3 T. R. 623. See also s. 91.

<sup>5</sup> The noting a bill for protest, and the extending of the protest need not be done on the same day, but both acts must bear the same date. S. 51 sub-s. 4 provides "Subject to the provisions of this Act when a bill is protested, the protest must be made or noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting." See the notes to s. 51.

<sup>6</sup> Before the Interpretation Act, when the word "month" was used in a statute, without the addition of the word "calendar," or any other words to show that the legislature intended "calendar," it was understood to mean a lunar month: *Lacon v. Hooper*, 6 T. R. 224. But in the case of bills and notes, and other mercantile contracts, the rule was otherwise, and by custom of trade, when the bill is made payable at a month or months after date, the computation must in all cases be by calendar, and not by lunar, months: *Chitty on Bills*, 406.

<sup>7</sup> This re-enacts s. 1 of R. S. C. c. 123. As all the months of the year have not an equal number of days, the following example may illustrate how the time, including days of grace, for the payment of bills or notes should be computed. A bill or note dated the 28th November, another on 29th November, and another on the 30th November, each being payable three months after date, all fall due on the 3rd March, in the following year.

Referee in  
case of need.  
Imp. Act, s. 15

Ind. Act, s. 7

**15.** The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit.<sup>1</sup>

<sup>1</sup> A stranger to the drawer and indorser may intervene *supra* protest, and accept. And it is no objection to such intervention, and does not impair such acceptor's remedy against the party for whom he intervenes, that it is done at the request and under the guarantee of the drawee:

*König v. Bayard*, 1 Pet. U. S. 250. See also *Phillips v. im Thurn*, L. R. 1 C. P. 463. A bill must be protested or noted for protest, before it can be presented to the "referee in case of need." See ss. 64-67, under the title "Acceptance and Payment for Honor." Sec. 15.

**16.** The drawer of a bill, and any indorser, may insert therein an express stipulation—

Drawer may negative or limit liability. Imp. Act, s. 16

(a) Negating or limiting his own liability to the holder; <sup>1</sup>

(b) Waiving, as regards himself, some or all the holder's duties. <sup>2</sup> Waiver.

<sup>1</sup> It was always competent for a drawer or indorser to limit his liability. A drawing or indorsement is restrictive when it restrains the negotiability of the bill to a particular person or for a particular purpose. An indorsement is qualified when it restrains or limits, or qualifies, or enlarges, the liability of the indorser in any manner different from what the law generally imports as to his true liability deducible from the nature of the instrument. An indorsement is conditional when it is made upon some condition which is either to give effect to, or avoid it: *Story on Bills*, s. 206. A man may indorse a bill without incurring any personal responsibility, by expressing in his indorsement that it is made with this qualification that he shall not be liable on default of acceptance, or payment, by the drawee, such qualified indorsement will be made by writing in French the words "*san recours*," or in English "*without recourse to me*," or any other equivalent expression; and this is the proper mode of indorsement by an agent: *Byles on Bills*, 117. An indorsement with the words *sans recours*, or "*without recourse*," will negative the liability of the indorser, and will simply pass his title to the bill, but will not affect its negotiability. No English case on such a restrictive indorsement of a bill is reported, but the case of *Lewis v. McKee*, L. R. 2 Ex. 37 shows that the indorsement "*without recourse*" on a bill of lading, exonerated the indorser from liability. The "*negating or limiting his own liability to the holder*" does not apply to the drawee; and though it appears at variance with the definition in s. 3 that a bill is an "*unconditional order*," it is only unconditional as respects the drawee when he, by accepting the bill, becomes the acceptor, subject however to the qualifications defined in s. 19. The Indian Act (s. 52) also provides that an indorser may exclude his own liability therein, and that "where an indorsee so excludes his liability, and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him."

#### ILLUSTRATIONS.

For every practical purpose, an indorsement "*without recourse*" may be placed upon the same footing as a note payable to bearer, or

**Sec. 16.** transferred by delivery. The party so making the transfer does not thereby incur the obligation or responsibility of an indorser: *Dumont v. Williamson*, 2 U. C. L. J. N. S. 219. See s. 58.

In an agreement by which defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note: and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their \$750 note, by giving their seven notes for equal amounts payable to my order, and payable in one, two and three months," &c.;—Held, that the words "payable to my order," did not necessarily import an unconditional indorsement by defendant of the seven notes, but might mean only such an indorsement as would pass the property in them to the plaintiff; that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to show its true meaning. And it appearing that another note for \$730, also payable to defendant's order, was indorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional indorsement as to the others;—Held, that he could claim only that these notes should be indorsed as the first one was: *McCarthy v. Vine*, 22 U. C. C. P. 458.

B. acted as agent in Malta for A. for the purpose of buying and remitting to him in England bills on England, on account of money received by B. in Malta. In the course of his agency he purchased bills in Malta, and indorsed them to A. without any reservation in the indorsement as to his liability;—Held, that in the absence of special circumstances showing that any liability was intended by the general mercantile law which must be taken to be in force in Malta, B. the agent was not liable to A. upon the bills being dishonored: *Castrique v. Buttigieg*, 10 Moore, P. C. C. 94.

<sup>2</sup> These duties are defined under the title "General Duties of Holder," s. 39 *et seq.* The obligation created by law in cases of indorsement, is conditional and requires the holder to make due demand, and to give due notice to the indorser of the non-acceptance or non-payment of the bill, and if he omits to do so, the indorser is discharged. But an indorser may absolutely guarantee the payment of the bill in all events, and dispense with any such demand or notice: *Story on Bills*, s. 215.

Acceptance is assent. Imp. Act, s. 17 Ind. Act, s. 7.

**17.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer: <sup>1</sup>

Conditions of acceptance.

2. An acceptance is invalid unless it complies with the following conditions, namely:—

Must be written on bill.

(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient; <sup>2</sup>

And be for the payment of money.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money; <sup>3</sup>



3. Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature. <sup>Sec. 17.</sup>

Where drawee's name is misspelt

<sup>1</sup> After the drawee accepts the bill, he becomes the acceptor. His contract of acceptance must be evidenced by his signature in writing on the bill (s. 17), and its effect is defined by s. 54. The form of the acceptance determines the personal liability of the acceptor.

#### ILLUSTRATIONS.

Upon a bill drawn "P. C. DeLatre, Esq., President Niagara Dock and Harbour Company, Niagara, C. W.," and accepted thus:—"Accepted, payable at the office of the Bank of Upper Canada, Niagara.—P. C. DeLatre, President N. H. & D. Co.":—Held, that the acceptor was personally liable. *Quere*—Supposing the drawer had been suing, would that have made a difference? *Bank of Montreal v. DeLatre*, 5 U. C. Q. B. 362.

G., being the Secretary of an insurance company, gave this note for a loss:—"£1000 currency.—Sixty days after date I promise to pay to the order of W. £1000, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton.—C. Horatio Gates, Secretary O. F. Company":—Held, that he was personally liable:  *Armour v. Gates*, 8 U. C. C. P. 548.

A bill was drawn upon the consignees of a cargo of coals by a broker who had effected the purchase there. That bill was returned to the payees unaccepted, on account of the date being too short. Another bill was drawn at a longer date, and sent to the broker's counting-house for his signature. The broker in the meantime absconded in pecuniary embarrassment; and his brother, the defendant, who was investigating his affairs, signed, at the request of the plaintiffs, the bill they had prepared, without qualifying his liability:—Held, that he was personally liable: *Sowerby v. Butcher*, 2 C. & M. 368; 4 Tyr. 320.

Executors purchased goods of a firm, and gave notes thus: "We as executrix and executors of, &c., promise to pay," &c.; held, that they were personally liable: *Kerr v. Parsons*, 11 U. C. C. P. 513. "If the debt had accrued in the lifetime of the testator, and after his death these defendants had given these notes, I should upon the authority of decided cases hold them liable, as admitting assets and obtaining time to pay:" *Per Draper, C.J., Ibid.*

A note payable to "James G. McCreery, treasurer of the R. I. and A. R. R. Co.," is not a note to the company, but to the individual named. The addition to his name is merely *descriptio personæ*: *Chadsey v. McCreery*, 27 Ill. 253.

A promissory note in this form: "One year after date I promise to pay to the order of myself \$522, value received," signed "J. S., Trustee of Sullivan Railroad," and indorsed "J. S. Trustee," binds J. S. personally: *Fisk v. Eldridge*, 12 Gray (Mass.) 474.

The defendant, as Commissioner of the New Brunswick and Canada Railway Company, drew a bill of exchange on the company, to pay for work done on the railway, and signed it "J. J. Robinson, Commissioner." The drawee knew for what purpose the bill was drawn, and that the defendant was the agent of the company;—Held, in an action by an indorsee, that the defendant was personally liable: *Peele v. Robinson*, 4 All. N. B. 561.

Sec. 17.

A railway company had power to accept bills, and a bill addressed to the President, was accepted as follows: "for the M. R. Co., accepted, H. R., secretary, G. A. C., president;"—Held, that the president was personally liable: *Madden v. Cox*, 44 U. C. Q. B. 542; 5 App. R. 473.

Directors of a joint stock newspaper company gave the plaintiff the following note, in part payment for the purchase of a newspaper, which the company had agreed to purchase of him: "On demand, we jointly and severally promise to pay Mr. H. or order £250, value received, for and on behalf of the Wesleyan Newspaper Association." Signed by the directors;—Held, that the words jointly and severally were equivalent to the words jointly and personally; and that the directors were therefore personally liable: *Healey v. Storey*, 3 Ex. 3.

One M. procured for his two sons a loan of £100 from W. on a bill drawn by W. payable to his own order on the sons, who duly accepted it and returned it to M. who then wrote his name across the back, and handed it to W.;—Held, that M. was not liable as acceptor: *Steele v. McKintay*, 5 App. Cas. 754. But see cases in notes to ss. 23 and 56.

A partner accepted a bill on the name of his firm, and then added his own individual name:—Held, not a debt to charge his separate estate: *Re Barnard*, 32 Ch. D. 447.

The presumption of law is that *prima facie* a bill of exchange is deemed to have been accepted during its currency, and within a reasonable time after its date, and clearly before any of the days of grace, such being the regular and usual course of business: *Roberts v. Bethell*, 12 C. B. 778; 16 Jur. 1087.

See also the cases cited in the notes to s. 26.

\* The law as to what is a binding acceptance of a bill of exchange has given rise to some conflict between the legislative decisions of Parliament and the judicial decisions of the Courts. The statute of Anne (3 and 4 Anne c. 9 s. 5) expressly enacted that no acceptance of any inland bill should be sufficient to charge any person whatever "unless the same be underwritten or indorsed in writing thereupon." Two Chief Justices, after a review of the whole Act, held that this provision, although very generally expressed, only affected the right to damages, and that a person giving a verbal or collateral acceptance to the payment of the sum specified in the bill was liable: *Wilkinson v. Lutwidge*, 1 Stra. 648; *Pillans v. VanMeerop*, 3 Burr. 1663. Lord Chancellor Hardwicke subsequently held that their decisions were correct in law: *Lumley v. Palmer*, 2 Stra. 1000. Parliament then passed the Act 1 and 2 Geo. IV. c. 78, which enacted that no acceptance of an inland bill should be sufficient to charge any person unless such acceptance be in writing on such bill: but in *Defaur v. Oxenden*, 1 M. & Rob. 90, it was held that it was a question for the jury whether an unsigned acceptance was sufficient to bind the acceptor. In 1856 the Mercantile Law Amendment Act was passed, providing that no acceptance of any bill should be sufficient to bind or charge any person unless it was in writing on such bill and signed by the acceptor. Under this Act it was held that simply writing the name of the drawee across the face of the bill, without some word or words indicating an intention on the part of the drawee to be bound as an acceptor, did not constitute

a valid acceptance : *Hindhaugh v. Blakey*, 3 C. P. D. 136. Although in the United States, under a similar statute, which required acceptance to be in writing and signed by the party making it, it was held, that the writing of his name, by the drawee, across the face of a bill of exchange, was a sufficient acceptance : *Wheeler v. Webster*, 1 E. D. Smith, (N. Y.) 1 ; s. p. *Spear v. Pratt*, 2 Hill (N. Y.) 582. Thereupon by a declaratory clause in the "Bills of Exchange Act (Imp.) 1878," it was provided that the acceptance of a bill should not be deemed insufficient by reason only that the acceptance consists merely of the signature of the drawee written on such bill. The House of Lords in a case which came before it in 1880, held that the Act of 1878, was in effect a declaration that *Hindhaugh v. Blakey*, was wrongly decided : *Steele v. McKinlay*, 5 App. Cas. 754. In a case in Quebec, under C. S. L. C. c. 64, a firm in Montreal drew on a firm in Toronto on the faith of a telegram from the drawees that they might do so in order to retire a previous draft coming due. The plaintiffs discounted it ; the first draft was retired, and the drawees then refused to accept ; Held, that the drawees were liable : *Molsons Bank v. Seymour*, (1878), 21 L. C. J. 82, 23 L. C. J. 57 ; s. p. *Bank of Montreal v. Thomas*, 16 Ont. R. 503. *Torrance v. Bank of British North America*, L. R. 5 P. C. 246.

The above clause of this Act, which is taken from the English Act, requiring an acceptance to be in writing, would seem to have the effect of assimilating the provisions respecting the acceptance of a bill of exchange to those of the Statute of Frauds, which require the signature of "the party to be charged" on a guarantee, to be in writing, and signed by such party, or his agent lawfully authorized. If such a view be correct, then the words of Lord Blackburn, referring to the Statute of Frauds, may be cited : "This enactment compels the Court to refuse to enforce a promise however clearly it may be proved, unless there be the statutable evidence." *Steele v. McKinlay*, 5 App. Cas. 768.

### 3 ILLUSTRATIONS.

Every bill implies a command to the drawee to pay, and his acceptance is not only an admission of money or effects in his hands sufficient to pay, but is an undertaking by the acceptor as well with respect to the drawer, as the payee, to pay the bill : *Parminter v. Symons*, 2 Bro. P. C. 43 ; 1 Wils. 185.

In an action by a payee against the maker of a note it was pleaded on equitable grounds, that the plaintiff was captain of a rifle company organized according to law ; that defendant being a member of it and a tailor, was employed to make the uniforms, which it was agreed between plaintiff and defendant should be paid out of the moneys coming to the said company for their drills according to the statute : that in order to raise the necessary sum at once, it was also agreed that a note should be discounted, to be reduced from time to time by the moneys so received, and renewed until paid off ;—Held, no defence : *Vidal v. Ford*, 19 U. C. Q. B. 88.

Where a man draws a bill to pay a debt, he cannot set up against the indorsee that the bill was given upon a prior verbal understanding between himself and the plaintiff, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer : *Adams v. Thomas*, 7 U. C. Q. B. 249.

**Sec. 17.** In an action on a note an agreement was set up that when it became due plaintiffs would renew it for one half, and give three months for the other half; but that they claimed the whole instead of half, which the defendants were ready to pay: Held, no defence: *Bank of Upper Canada v. Jones*, 1 U. C. P. R. 185.

An instrument which orders any other act to be done, in addition to the payment of money, is not a bill: *Re Boyse*, 33 Ch. D. 612.

An acceptance of a bill must be to pay in money, an acceptance to pay by another bill is no acceptance: *Russell v. Phillips*, 14 Q. B. 891.

See further notes 6 and 8 to s. 3.

<sup>4</sup> There is no analogous clause respecting drawees in the English Act. In s. 32 there is a similar provision respecting the payee or indorsee whose name has been misspelt.

#### ILLUSTRATIONS.

A bill addressed to W. B. was accepted by his wife, in her own name M. B.: Held, that if a principal authorizes his agent to accept a bill, such principal is liable as acceptor though wrongfully described by the agent in the acceptance: *Lindus v. Bradwell*, 5 C. B. 583; 12 Jur. 230.

A note stated that J. S. promised to pay A., or order, a sum certain, and was signed J. S. or else J. G.: Held, not a note of J. G.: *Ferris v. Bond*, 4 B. & Ald. 679.

A person suing upon a note which purports to be payable to a person of a different name, may give evidence that he was the person intended: *Willis v. Barrett*, 2 Stark. 29. But see *Boiles v. Sterns*, 11 Cush. 320.

A bill drawn on A. & Co., a prior firm, but the proper style of the then firm was A. & R., by whom it was accepted in their proper name: Held, that the firm of A. & R. was liable: *Lloyd v. Ashby*, 2 B. & Ad. 23.

A bill drawn upon a firm as M. & McQ., their proper name being M. McQ. & Co., was accepted by their manager in the name of M. & McQ.: Held, that the firm of M. McQ. & Co. were not liable: *Quebec Bank v. Miller*, 3 Man. R. 17.

Where a partner who was accustomed to issue notes on behalf of a firm indorsed a particular note in a name different from that of the partnership and not previously used by it. In an action on such note by an indorsee, the proper question for the jury is whether the name used though inaccurate, substantially describes the firm, or whether it so far varies, that the partner must be taken to have issued it on his own account: *Faith v. Richmond*, 11 A. & E. 339.

A bill addressed to a firm was accepted by one of the partners in his own name: Held, that the firm were liable: *Mason v. Ramsey*, 1 Camp. 384.

A bill addressed to a firm was accepted by one of the partners in his own name: Held, that he was individually liable: *Owen v. Von Uster*, 10 C. B. 318.

See further the cases to s. 23.

#### 18. A bill may be accepted—

(a) Before it has been signed by the drawer, or while otherwise incomplete; <sup>1</sup>

Acceptance of bill while incomplete. Imp. Act, s. 18

(b) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment :<sup>2</sup> Sec. 18.  
When over-  
due.

2. When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.<sup>3</sup> Date of dis-  
honored bill  
subsequently  
accepted.

<sup>1</sup> This section may be read with s. 20 as to inchoate bills, or signatures on blank paper "in order that it may be converted into a bill." The law reports contain many instances where the authority thus given has resulted in greater damages to the person giving his signature in blank, than his original risk. Such an acceptance in blank, authorizes the person to whom it is given to make a contract for the proposed acceptor for any amount, and in the terms of s. 54.

#### ILLUSTRATIONS.

Where the defendant signed, as maker, a printed form of a note, and handed it to A., by whom it was filled up for \$855, and the plaintiffs afterwards became indorsees of it for value without notice: Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or indorsed: *McInnes v. Milton*, 30 U. C. Q. B. 489. See *Sanford v. Ross*, 6 U. C. O. S. 104.

If a man write his name across the back of a blank bill stamp, and part with it, and the paper afterwards is improperly filled up, he is liable as an indorser. If he write his name across the face of a bill, he is liable as an acceptor, when the instrument has once passed into the hands of an innocent indorsee for value, before maturity: *Per Byles, J., in Foster v. Mackimon*, L. R. 4 C. P. 712.

A form of a bill of exchange may be accepted by the drawee, and indorsed by a stranger to the acceptor, before the bill is extended: *Shultz v. Astley*, 2 Bing. N. C. 544.

A blank acceptance for £60 in figures, was sent to plaintiff by defendant, but he filled it up for £46, and altered the figures written in the margin; Held, not a satisfaction of the debt of £60: *Baker v. Jabber*, 1 M. & Gr. 212.

A firm accepted a bill to which no drawer's name was affixed, and afterwards made an assignment for the benefit of creditors. After the assignment, the bill was completed by the insertion of a drawer's name, and it then passed into the hands of a holder for value:—Held, that it did not create a debt until it had issued, which was after the bankruptcy: *Ex parte Hayward*, L. R. 6 Ch. 547.

A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor: *Carter v. White*, 20 Ch. D. 225.

Where value is given for a blank acceptance, authority to fill up the bill is not revoked by death, but where there is no such value or interest, the authority to fill up and negotiate the bill, is revoked by the death of the acceptor: *Hatch v. Searles*, 2 Sm. & G. 147; 24 L.J. Ch. 22.

**Sec. 18.** A form of bill of exchange which contained the sum of £14, in figures in the margin, but no words in the body to denote the amount, was accepted by the defendant and returned to the drawer to be filled in. The drawer fraudulently inserted the words "one hundred and sixty-four" in the body, and altered the marginal figures to that amount and issued the bill;—Held, that the defendant was liable on the bill to the plaintiff, an innocent holder for value: *Garrard v. Lewis*, 10 Q. B. D. 30.

A partner has no implied authority to bind his firm by issuing acceptances of the firm in blank: *Hogarth v. Latham*, 3 Q. B. D. 643.

A defendant intending to become surety to the plaintiffs for money to be advanced by them to B., wrote his name on the back of a blank bill stamp; after which B. wrote his name across it as acceptor, and then handed it to the plaintiffs, who filled it up as a bill of exchange, payable to their own order;—Held, that although the defendant could not be sued as indorser, he was nevertheless liable as drawer of a bill payable to bearer, or according to the tenor and effect thereof, of a bill payable to the plaintiff's order: *Matthews v. Blossome*, 33 L. J. Q. B. 209; 10 L. T. N. S. 415. See also cases in notes to s. 23. *post*.

A bill accepted in blank was filled up twelve years after it was given, and dated in the year it was filled up, is binding on such acceptor in the hands of a holder for value: *Montague v. Perkins*, 17 Jur. 577; 22 L. J. C. P. 187. But see *Re Bethell*, 34 Ch. D. 561.

<sup>2</sup> As to overdue notes see ss. 10 and 36. Where a bill has been presented and accepted after the period at which it is made payable has elapsed, the acceptor will then be liable to pay it on demand: *Byles on Bills*, 146. There cannot be a series of successive acceptors upon the same bill. It must be accepted by the original drawer, or by the drawee *au besoin*, or by a third person for honor, or where the bill states no drawee, by a person in that character: *Story on Bills*, 254. An acceptance for honor is allowable only when the bill has been refused acceptance by the drawee, and has been protested therefor: *Ibid*, s. 256. See s. 64. The absence from his home of the drawee of a bill where the holder calls with it for acceptance, is not a refusal to accept: *Bank of Washington v. Triplett*, 1 Peters, U. S. 25. If after a refusal and a protest for non-acceptance of a bill payable so many days after sight, the drawee accepts the next day, but becomes insolvent before the day of payment, the drawer is not liable if he had no notice of the original non-acceptance: *Mitchell v. DeGrand*, 1 Mason 176.

<sup>3</sup> This sub-section was intended to secure that, apart from special agreement, the holder should be put as far as possible in the same position as if the bill had not been dishonored: *Chalmers on Bills*, 41. The following case was decided before that Act: Where a bill of exchange, payable after sight, was presented for acceptance and refused, and protested; but eight days afterwards was accepted by a third person for the honor of the drawer, and at maturity was presented for payment according to that acceptance, it was held to have been presented at the proper time: *Williams v. Germaine*, 7 B. & C. 468.

19. An acceptance is either (a) general, or (b) qualified: Sec. 19.  
 a general acceptance assents without qualification to the order of the drawer; a qualified acceptance in express terms varies the effect of the bill as drawn: <sup>1</sup>

General and qualified acceptances. Imp. Act, s. 19 Ind. Act, s. 86

2. In particular, an acceptance is qualified which is— Qualified is—

(a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; but an acceptance to pay at a particular specified place is not conditional or qualified; <sup>2</sup> Conditional.

(b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; <sup>3</sup> Partial.

(c) Qualified as to time; <sup>4</sup> Qualified as to time.

(d) The acceptance of some one or more of the drawees, but not of all. <sup>5</sup> All drawees not accepting.

<sup>1</sup> In all cases the holder is entitled to have an absolute, unconditional, and unqualified acceptance of the bill as drawn. Though an acceptance varying from the tenor of the bill will bind the person making it, the holder is entitled, from the undertaking of the drawer and indorsers, to expect an absolute acceptance by the drawer (or, if there be several not connected in partnership, by each) for the payment of the full sum of money mentioned therein, according to its tenor; specifying if none be mentioned for the purpose, a place for its payment, and expressing, if the bill be payable within a limited time after sight, the time for its presentment for acceptance, and he may reject any other. Still however the holder may, at his peril and risk, take a conditional or qualified acceptance; and if he does the acceptor will, if the condition is complied with, be bound thereby. If the holder means to assent to a conditional offer of acceptance he must do so at the time of the offer, for if he then declines it, it will be a waiver of all right to hold the drawee to the offer. And if the holder should take an acceptance varying in any respect from the tenor of the bill, whether conditional or qualified, or otherwise, in such a case, he must give notice thereof to the antecedent parties; and if he does not they will not be bound by it, but will be absolved from all responsibility upon the bill. Indeed it would seem that notice would not of itself be sufficient without a protest of the bill for the non-acceptance according to the tenor of the bill; nor unless after notice such parties adopted or acquiesced in the conditional or qualified acceptance, for it may materially change their whole relations to, and responsibilities on, the bill; and each of them has a right to say,

## Sec. 19.

*non in hęc factari veni*: *Story on Bills*, s. 240. An acceptance is, wherever possible, to be construed as general and not qualified: *Chalmers on Bills*, 42. If a man purposes to make a conditional acceptance only, and commit that acceptance to writing, he should be careful to express fully the conditions; for it may be doubted whether parol evidence of the conditions would be admissible; and the proof would be of no avail if the holder or any person under whom he claims, took the bill without notice of such conditions: *Bayley on Bills*, 197. The first part of the clause is taken from the English Act; but the latter part of the clause re-enacts part of ss. 9 and 16 of R. S. C. c. 123, and is apparently substituted for clause (c) in the English Act, which refers to an acceptance to pay at a particular specified place. This section has no application to promissory notes. See note 5 to s. 45, and ss. 87 and 88.

## ILLUSTRATIONS.

Whether an acceptance is conditional or absolute is a question of law: *Sproat v. Matthews*, 1 T. R. 182.

Words which are alleged to qualify an acceptance should be construed most strongly against the acceptor: *Decroix v. Meyer*, 25 Q. B. D. 343.

Parol evidence cannot be received to show, that a bill of exchange accepted payable three days after sight, was accepted on condition that it was not to be paid till a further time had elapsed: *Bradbury v. Oliver*, 5 U. C. O. S. 703; s.p., *Hayes v. Davis*, 6 U. C. Q. B. 396; *Hull v. Francis*, 4 U. C. C. P. 210; *Harper v. Paterson*, 14 U. C. C. P. 538; *Stott v. Fair-lamb*, 49 L. T. Rep. 526.

But as between the immediate parties to the bill, a written agreement may vary or control its legal effect: *Bowerbank v. Monterio*, 4 Taunt. 844.

An acceptance on a draft: "We will keep the sums from the first estimate of M. & Co., as requested above, provided they have done sufficient work to earn that sum," is not conditional: *McLean v. Shields*, 1 Man. R. 278.

A conditional acceptance becomes as effectual as an absolute one, when the condition is complied with: *Milu v. Prest*, 4 Camp. 393.

If the payee of a bill annexes a condition to his indorsement, and the drawee afterwards accepts it, he is bound by that condition, and if the condition be not performed, the property in the bill reverts to the payee, and he may recover the amount against the acceptor: *Robertson v. Kensington*, 4 Taunt. 30.

Where a bill has been accepted on a condition to be performed by B., the performance of such condition by C., will not be a compliance with the conditional acceptance: *Swan v. Cox*, 1 Marsh. 176.

A bill accepted "payable on giving up bill of lading for 76 bags of cloverseed per Amazon, at the London and Westminster Bank, Borough Branch," is a conditional acceptance to this extent, that the holders are only entitled to receive the amount on delivering over to the acceptor the bill of lading, but the condition was satisfied by the handing over of the bills of lading, and presenting the bill of exchange the day after that on which it became due: *Smith v. Vertue*, 9 C. B. N. S. 214; 3 L. T. N. S. 583.

An acceptance to pay "when the goods conveyed to me are sold," is conditional: *Smith v. Abbot*, 7 Stra. 1152.



An acceptance to pay "when in cash for the cargo of the ship A." is conditional: *Julian v. Scholbrooke*, 2 Wils. 9. Sec. 19.

An acceptance to pay "even if the ship were lost," is conditional, depending upon two events: the ship's arriving at London, or being lost: *Sproat v. Mattheus*, 1 T. R. 182.

<sup>2</sup> Prior to this enactment, R. S. C. c. 123, s. 16 provided that unless the bill or note expressed on the face of it that it was payable at a particular place "only and not otherwise or elsewhere," it was payable generally; but, that if such words were in the acceptance of the bill, or promise in the note, "then such acceptance or promise shall be deemed and taken to be a qualified acceptance and promise, and the acceptor or maker shall not be liable to pay the bill or note, unless payment has been first only demanded at such bank, or other place." This Act has not continued the provision requiring the words "only and not otherwise or elsewhere" to be inserted in the acceptance of a bill; but the acceptor may nevertheless use them or similar words, and so take his acceptance out of the definition of a general acceptance. The words are retained in the English Act. See further note 5 to s. 45, and ss. 52 and 86.

#### ILLUSTRATIONS.

A bill drawn payable to the drawer's order, in London, and accepted payable there, is a general acceptance: *Fayle v. Bird*, 6 B. & C. 531.

A note made in Upper Canada, payable in Glasgow, not adding, "and not otherwise or elsewhere," is payable generally; and the plaintiff cannot recover the difference of exchange on such note: *Wilson v. Aitkin*, 5 U. C. C. P. 376.

A note drawn in Boston where both maker and payee resided, and made payable, "at any bank," means any bank in Boston: *Baldwin v. Hitchcock*, 1 Han. N. B. 310.

#### <sup>3</sup> ILLUSTRATIONS.

A foreign bill, drawn for £127 18s. 4d., was accepted by the drawee for £100 only; held that the partial acceptance was good *pro tanto*, within the custom of merchants: *Wegerstoffs v. Keene*, 1 Stra. 214.

B. drew a bill on A. or order requesting him to pay K. "the amount of my account furnished." On presentment A. wrote on it "correct for \$75," and signed the initials of his name;—Held, not a bill: *Kennedy v. Adams*, 2 Pugs. N. B. 162.

A bill was drawn upon B. who accepted it thus: "I do accept this bill to be paid half in money and half in bills." It was proved by divers merchants that the custom among them was that there might be a qualification of an acceptance, for he may refuse the bill totally, or may accept it in part; and the holder may refuse and protest the bill; and though there be such acceptance he hath the same liberty of charging the drawer: *Petit v. Benson*, Comber. 452.

#### <sup>4</sup> ILLUSTRATIONS.

A bill was drawn out dated 8th April, 1707, without specifying the day on which it was to be payable. A. accepts it payable on the 18th April. Held the acceptor is bound by the custom of merchants to pay at the time appointed: *Walker v. Atwood*, 11 Mod. 190.

Sec. 19.

A bill dated 8th September, 1856 drawn payable in London four months after date was accepted thus: "Accepted at O. G. & Co., London, due 11th December, 1856: B. & Co." Held, if a question of law that the bill was accepted according to its tenor; but if a question of fact, there was evidence to shew that words, "due 11th December, 1856," were not intended to qualify the acceptance: *Fanshawe v. Peet*, 2 H. & N. 1.

A bill drawn 28th November, 1836, payable forty-two months after date, was accepted thus: "Accepted on condition of its being renewed until November 28th, 1844, without interest, payable by me at W. & D. bankers, London." Held, a good acceptance, and that the bill was properly payable on 28th November, 1844: *Russell v. Phillips*, 14 Q. B. 891: 14 Jur. 806.

## 5 ILLUSTRATIONS.

One who accepts in his individual name a bill addressed to the firm of which he is a member, gives a qualified acceptance, and is individually liable thereon: *Owen v. Van Uster*, 10 C. B. 318.

A promissory note made to C. and D. jointly, was indorsed by C. alone to B., and by B. to A.:—Held, that B. was liable as indorser, and could not set up as a defence to an action by A. that D. had not joined in the indorsement: *Thurgar v. Clarke*, 2 Kerr N. B. 370.

A bill or note drawn, accepted or indorsed by one of two solicitors in the name of the firm, must be proved to have been drawn, accepted or indorsed by the authority of the other partner; but in the case of a commercial firm this is not necessary, as there is, in that case, a general authority in each partner presumed: *Lery v. Pyne*, Car. & M. 453.

See further notes to ss. 22 and 23.

Blank acceptance may be made a bill.

Imp. Act, s. 20  
Ind. Act, s. 20.

Omissions rectified.

When completed is enforceable.

Limit as to time and authority.

Subsequent holder in due course may enforce it.

20. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority<sup>1</sup> to fill it up as a complete bill for any amount, using the signature for that of the drawer, or the acceptor, or an indorser;<sup>2</sup> and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit:<sup>3</sup>

2. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time,<sup>4</sup> and strictly in accordance with the authority given;<sup>5</sup> reasonable time for this purpose is a question of fact:

Provided, that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and

effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. <sup>6</sup> Sec. 20.

1 “*Prima facie* authority.” The law defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption: 1 *Taylor on Evidence*, 115. Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring such negative: *Williams v. East India Company*, 2 East 192. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said not to be proved, when it is neither proved nor disproved: *Indian Evidence Act*, 1872, s. 3.

#### ILLUSTRATIONS.

Where one B. signed his name on a blank acceptance, intending to become the the acceptor of a bill, but placed it in a drawer at his chambers, from whence it was stolen, and one C. filled it up and negotiated it with a *bona fide* holder for value;—Held, that as the instrument was stolen without B.'s negligence, and as he had not parted with it, nor authorized it to be filled up, B. was not liable: *Baxendale v. Bennett*, 3 Q. B. D. 525.

If a man writes his name upon a blank piece of paper, and another person obtains possession of the name, and, without authority to use it for any purpose, writes a promissory note over the same, and negotiates it, such note is not valid, in the hands of an innocent holder, against the person whose name is subscribed to it: *Nance v. Lary*, 5 Ala. 370.

“Where a man loses or parts with his name written on a piece of stamped paper he is responsible to any *bona fide* holder when it is filled up as a promissory note:” *Per Byles, J.*, in *Swan v. North British Australian Co.*, 32 L. J. Ex. 278. But if a blank acceptance not delivered, is lost or stolen without the writer's negligence, he is not liable: *Byles on Bills*, 187.

F. of the firm of L. & Co. gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & Co. as drawers, and indorsed it to himself, knowing when he did so that F. had no authority to accept the bill:—Held, that L. & Co. were not liable on the bill at the suit of H. *Semble*, that a *bona fide* holder for value to whom the bill had come in a perfect state, would have been entitled to sue: *Hogarth v. Latham*, 3 Q. B. D. 643.

## Sec. 20.

## 2 ILLUSTRATIONS.

Where the defendant signed, as maker, a printed form of note, and handed it to A., by whom it was filled up for \$855, and plaintiff afterwards became indorsee of it for value without notice;—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or indorsed: *McInnes v. Milton*, 30 U. C. Q. B. 489.

An instrument in the form of a bill of exchange, but accepted with the drawer's name in blank, does not exist as a bill until the drawer's name is inserted, and even then does not create a debt against the parties to it, until value has been given for it: *Ex parte Hayward*, L. R. 6 Ch. 546.

Where the payee and indorser of a note indorsed it for the accommodation of the maker, leaving the date and sum blank, which were afterwards filled up by the maker, and the note dated of a time later than the blank was indorsed, but prior to the time when the note was actually filled up;—Held, that the note was good against the indorser, notwithstanding the alteration: *Sawford v. Ross*, 6 U. C. O. S. 104.

Where a note is signed and delivered, with a blank left for the sum payable though the first holder is restricted as to the amount to be inserted, yet, if the note comes into the hands of another, who, without notice of the restriction, fills the blank with a larger sum, the maker will be bound by it: *Bank of Commonwealth v. Curry*, 2 Dana. (Ky.) 142.

It is no objection to the validity of a note, that when indorsed to the plaintiffs it was not signed by the maker; the subsequent filling up of the maker's name, or of the amount, or of a payee's name, will be treated as if made before the indorsements: *Rossin v. McCarty*, 7 U. C. Q. B. 100.

Where a bill which had a blank space left for the drawer's name, came into possession of an administratrix, after it was overdue, and she inserted her own name as drawer;—Held, that she was entitled to insert her name as drawer, and sue on the bill as administratrix: *Scard v. Jackson*, 34 L. T. Rep. 65*n*; s. p. *Dutch v. O'Leary*, 5 Ir. L. R. 92.

Any *bona fide* holder of a note drawn payable to \_\_\_\_\_ or order, may insert his own name in the blank as payee: *Mutual Safety Ins. Co. v. Porter*, 2 All. N. B. 230.

<sup>3</sup> Section 12 authorizes the holder of any undated bill payable at a fixed date after *sight*, to insert the true date. This section applies to all kinds of bills, which, in the hands of a "person in possession," may be "wanting in any material particular," and authorizes such person "to fill up the omission in any way he thinks fit." The expression "person in possession," must be read with the limitations shewn in the cases cited. See the definition of "holder" in s. 2; and also in s. 29, where "holder in due course" is defined to be "one who has taken a bill complete and regular on the face of it."

## ILLUSTRATIONS.

A. held a note of B. with divers indorsers, which at maturity was arranged to be renewed. B. drew another note, which he signed, and to which he obtained the signature of the other indorsers; the time of payment was left blank, but B. represented to some of the indorsers that four months was the time agreed upon. A., however, had no understanding on this point with any of the indorsers, and after he received the note, he filled in the time of payment as three months;—Held, that

A. was authorized to fill the blank, fixing the time of payment, and that he was not bound by the agreements of B. with the indorsers, of which he had no notice : *Johus v. Harrison*, 20 Ind. 317. Sec. 20.

“ If a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misleading him to such a degree that the written contract is of a nature altogether different from the paper which the blind or illiterate man afterwards signs ; then, at least if there be no negligence, the signature so obtained is of no force :” *Per Byles, J.*, in *Foster v. Mackinnon*, L. R. 4 C. P. 711.

“ Negligence in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value ; the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay ” : *Per Byles, J.*, in *Swan v. North British Australian Co.*, 2 H. & C. 184 : “ If that be right, it can only be with reference to the case of a complete instrument, it can hardly be applicable to a case where a man’s signature has been obtained by a fraudulent representation as to a document which he never intended to sign :” *Per Byles, J.*, in *Foster v. Mackinnon*, L. R. 4 C. P. 709.

Where the maker of an accommodation note wrote on it “ Halifax, N. S., 6, 1875,” and signed it in blank, in the month of June, and the person to whom it was given, altered the 6 to 8 and wrote “ June ” over the figures, the 6th June being a Sunday :—Held, that he was authorized to do so : *Merchants Bank v. Stirling*, 1 Russ. & Geil. 439.

A. agreed to join his brother in a note for his accommodation, provided B. would also join. A. accordingly signed an instrument in the form of a note on condition that B. joined in the note, a blank being left for the name of the payee. R. refused to join, and afterwards A.’s brother delivered the imperfect instrument to C. for value, representing that he had authority to deal with it, and C.’s name was inserted as payee :—Held, that making the instrument complete, contrary to the condition, rendered it a false instrument as against A., and that C. could not recover on this note against A. : *Aude v. Dixon*, 6 Ex. 869.

<sup>4</sup> When no time is expressly mentioned for the performance of an act, the law considers it shall take place within a reasonable time : *Greaves v. Ashlin*, 3 Camp. 426 ; *Ellis v. Thompson*, 3 M. & W. 445. In determining what is a reasonable time for making the blank paper “ complete ” as a bill or note, there must be taken into account the purpose for which the bill or note is to be used, the ordinary limit of credit on such securities, and other contingencies, as well as a failure of the purpose, or a revocation of the authority to fill up or use the bill or note. A question of reasonable time for the performance of an act, is a question of fact, and not of law : *Startup v. Macdonald*, 2 M. & Gr. 395.

#### ILLUSTRATIONS.

A “ reasonable time ” for the acceptance of a bill would be very soon after its date : *Roberts v. Bethell*, 12 C. B. 778, 16 Jnr. 1087.

A blank promissory note was given by a debtor to his creditor in July, 1846 ; in May, 1851, he got his discharge, and on 20th October, 1852, the blanks in the promissory note were filled in, and it was negotiated for value. The jury found that the note was filled up within a reasonable time, considering the circumstances of the maker, and the probability of his being able to pay it ; and the finding was sustained : *Temple v. Pullen*, 8 Ex. 389. But see *Re Bethell*, 34 Ch. D. 561.

**Sec. 20.**

<sup>5</sup> The clause makes no restriction as to the party who may convert "the simple signature on a blank paper" into a bill. It has been held, that it is not necessary that the bill should be drawn by the same person to whom the acceptor has handed the blank acceptance: *Byles on Bills*, 145 ». From the latter part of the clause it may be inferred that "the person in possession" has the necessary *prima facie* authority. But as between the immediate parties, notwithstanding that the previous decisions have not been quite harmonious, the law now requires that the instrument shall be filled up "strictly in accordance with the authority given." But note the effect of the proviso as to this condition.

<sup>6</sup> Where a bill is accepted in blank for the purpose of being negotiated, and afterwards filled in with the name of a person as drawer or indorser whose signature is forged, or is the name of a fictitious person, the acceptor is liable to a holder in due course and cannot give evidence of such forgery or fictitiousness: *London and S. W. Bank v. Wentworth*, 5 Ex. D. 96. "The object of the law-merchant as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The mis-application of a genuine signature written across a slip of stamped paper (which transaction, being a forgery, would in ordinary cases convey no title), may give a good title to any sum fraudulently inserted within the limits of the stamp, and in America, where there are no stamp laws, to any sum whatever:" *Per Byles, J.*, in *Swan v. North British Australian Co.*, 2 H. & C. 184. The above dictum, and the unrestricted terms of the clause, must be accepted with some qualifications, and should be read as applicable only to "such instruments" as are described in it. See the cases to note 3 *ante*, and notes to ss. 22, 24, 54 and 55.

Bill not complete until delivery.  
Imp. Act, s. 21  
Ind. Act, s. 46

**21.** Every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, <sup>1</sup> is incomplete and revocable, until delivery of the instrument in order to give effect thereto: <sup>2</sup>

Notice of acceptance makes it irrevocable.

Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable: <sup>3</sup>

Delivery.

**2.** As between immediate parties, and as regards a remote party, <sup>4</sup> other than a holder in due course, the delivery—

When effectual.

(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be; <sup>5</sup>

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill; <sup>Sec. 21.</sup> <sup>Or conditional.</sup> <sup>6</sup>

But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed: <sup>Bill conclusive in hands of holder in due course.</sup> <sup>7</sup>

3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, <sup>When valid delivery presumed.</sup> <sup>8</sup> a valid and unconditional delivery by him is presumed until the contrary is proved. <sup>9</sup>

<sup>1</sup> The terms of the separate contracts in a bill of exchange of the parties here named, will be found in the following sections: Drawer's contract, ss. 16 and 55 (1); Acceptor's contract, ss. 17, 19 and 54; Indorser's contract, ss. 16 and 55 (2).

<sup>2</sup> The liability of the party under his contract as above defined, is irrevocable on the completion of two separate acts: (1) the writing of his signature on the bill by the party to be bound; and (2) the delivery of the bill so signed, to the party to whom it is transferred, so as to give the possession, or the right of possession, of the bill to the proper party. See s. 31 *et seq.* as to the negotiation of bills by indorsement and delivery.

#### ILLUSTRATIONS.

“ A transfer of a bill means indorsement *and* delivery :” *Per Rolfe, B., in Bromage v. Lloyd*, 1 Ex. 35.

If the drawee writes his name on a bill with the intention to accept, he is at liberty to erase and cancel his acceptance at any time before the bill is delivered, or before the fact of the acceptance is communicated to the holder; *Cox v. Troy*, 5 B. & Ald. 474.

If the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue the drawee as acceptor: *Beutinck v. Dorrien*, 6 East 199.

The acceptance of a bill though revocable at any time before delivery, is, if unrevoked, complete as soon as written on the bill; and the contract is made in that place where the bill is accepted, not where it is issued: *Wilde v. Sheridan*, 21 L.J. Q.B., 260; 16 Jur. 426.

Where a bill was left for acceptance and accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state:—Held, that the acceptance being once made, it could not be revoked, and that the acceptor was liable: *Trimmer v. Oldie*, Bayley on Bills, 161.

Where a joint and several note was executed, and left in the hands of M., one of the makers, to be delivered to the payee on demand in exchange for a note of the same amount, but of a previous date, signed by M. alone, and no demand was made therefor by the payee, before the death of M.:—Held, that not having been delivered, the property in such note had not vested in the payee: *Canfield v. Ives*, 18 Pick. (Mass) 253.

Sec. 21.<sup>\*</sup> The possession of a note is *prima facie* evidence of a delivery to the possessor : *Bellows v. Folsom*, 4 Robt. (N. Y.) 43.

Delivery is necessary to the complete execution of a promissory note ; but if the payee obtain possession thereof by fraud, he cannot maintain an action thereon : *Carter v. McClintock*, 29 Mo. 464.

A bill of exchange transmitted to A. B., in Charleston, for his use, becomes his property as soon as it is put into the mail at Liverpool. An action instituted on it in his name, at any time after it is mailed, will be sustained, if the bill is produced at the trial : *Mitchell v. Byrne*, 6 Rich. (S. C.) 171.

The rules of the French post-office permit a person to recover a post letter at any time before it is despatched from the office where it is posted. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post-office ;—Held, that the property in the bills did not pass to the indorsee till the letter had left such post-office : *Ex parte Cote*, L. R. 9 Ch. 27.

A defendant, wanting money, de ired T., a discount broker, to procure him £160 on discount. T. asked for security, and the defendant gave his cheque for £160, payable to T. or bearer. T. afterwards obtained the money from the plaintiff, handed him the cheque, paid over the money to the defendant, and at the same time received £15 from the defendant for discount, of which he kept £7, and paid £8 to the plaintiff. The defendant afterwards requested time for the payment of the cheque, and T. gave time without referring to the plaintiff, or mentioning any lender by name to the defendant. In an action on the cheque ;—Held, that a jury was warranted in finding a delivery of the cheque by the defendant to the plaintiff : *Samuel v. Green*, 10 Q. B. 262 ; 11 Jur. 607.

S. sent the halves of two bank notes to M. to pay the same to W. ; but the arrangement with W. went off, and S. required M. to return the halves of the bank notes ;—Held, that the transaction was an inchoate transfer, and partial delivery, and that the right of property in the bank notes remained in S. : *Smith v. Mundy*, 6 Jur. N. S. 977. See *Redmayne v. Burton*, 2 L. T. N. S. 324.

A firm was indebted to B. One of the partners was B.'s agent, and indorsed in the firm's name a bill, and placed it amongst certain securities which he held for B., but no communication of the fact was made to B. ;—Held, a good indorsement and delivery to B. : *Lysaght v. Bryant*, 9 C. B. 46.

<sup>3</sup> The act of acceptance must be in writing on the bill, but the notice of the acceptance of the bill may be either written or verbal, or may be by some act from which notice of the acceptance may be inferred. But if the language be equivocal, as "your bill shall have attention," it would not be held to be a notice of acceptance. See note 2, to s. 17.

#### ILLUSTRATION.

Y. drew a bill on T., which T. accepted. The bank became the holder for value. Before due date it was agreed between Y. and the bank, Y. assuring the bank of T.'s concurrence, that the bill should be renewed ; and Y. obtained an accepted cheque from the bank for the amount of the bill, to the intent that T. should be placed in funds to retire the original bill, and should thereupon accept the renewed bill. Y. sent the new bill to T. for acceptance, and also sent him the cheque, and T. knew the purposes for



which both were sent. T. cashed the cheque and retired the first bill, but refused to accept the second;—Held, that T.'s accepting and appropriating the cheque, was a representation to the bank that he would accept the bill: *Torrance v. Bank of British North America*, L. R. 5 P. C. 246.

Sec. 21.

Where the holders of a bill thinking the acceptor would be unable to meet it at maturity, telegraphed him to draw on them, and the acceptor on the representation of their telegram, induced a bank to cash a sight draft on the holders for the amount of the bill, and retired it;—Held, that the bank was entitled to recover against the holders the amount advanced on the faith of their telegram: *Bank of Montreal v. Thomas*, 16 Ont. R. 503; s. p. *Molsons Bank v. Seymour*, 23 L. C. J. 51; *Burns v. Rowland*, 40 Barb. (N. Y.), 368; *Parsons v. Armor*, 3 Peters U. S. 413.

<sup>4</sup> The expression "immediate parties," means those who are in direct relation to each other in respect of the bill. The Indian Act (s. 44) gives the following explanation: "The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange, or cheque, stands in immediate relation with the payee, and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder." The term "remote party" to a bill, is not referred to elsewhere in the Act. The clause excludes a "holder in due course" from the meaning of the term. Obviously it refers to some "party" between the "immediate parties," and a "holder in due course," who must stand in some relation to the bill similar to that of the intermediate parties.

<sup>5</sup> The authority to deliver a bill for or on behalf of the drawer, acceptor, or indorser, may be either express or implied, as in the cases of partners, agents, or trustees, and subject to the limitations prescribed by the clause. But the title of a holder in due course will not be affected by an unauthorized delivery of "a bill complete and regular on the face of it."

#### ILLUSTRATIONS.

A bill which is drawn payable to the order of the payee, is not transferable without his indorsement, and an authority to indorse the bill cannot be implied from the mere act of delivery of the bill to a holder: *Harrop v. Fisher*, 10 C. B. N. S. 196.

A. indorsed a note, but did not deliver it. After his death his executor delivered the note to the plaintiff;—Held, that these two acts did not constitute a delivery, and that the plaintiff had no title to sue on the note: *Bromage v. Lloyd*, 1 Ex. 32; s. p., *Clark v. Sigourney*, 17 Conn. 571.

The title to a bank note payable to bearer, passes by delivery, and though stolen, becomes the property of him who, having no notice of the robbery, gives a valuable consideration for it: *Miller v. Race*, 1 Barr. 452. See also *Raphael v. Bank of England*, 17 C. B. 161; *Goodman v. Harvey*, 6 A. & E. 870.

<sup>6</sup> By s. 3 a bill must be an "unconditional order;" but by s. 19 the acceptance may be "conditional," or dependent on the fulfilment of a condition therein stated; and by section 21 the indorsement may be conditional, and the delivery, as between the parties named, may be "condi-

**Sec. 21.** tional." And if the conditions so controlling the respective acts of the parties appear on the bill, its negotiability is affected, except in the case of a conditional indorsement, which under s. 33 may be disregarded by the payer (acceptor) of the bill, but not by the other parties affected thereby. The conditional delivery or special purpose here referred to, may create the relation of principal and agent, or pledgor and pledgee, or trustee and *cestui que trust*, between the transferor and transferee; for the delivery here defined, is not to have the effect of transferring the absolute property in the bill. See notes 8 and 9, p. 29.

## ILLUSTRATIONS.

Where A. signed and delivered a note to B., to be held by B. for a special purpose, that he should hold it for A., and not negotiate it;—Held, a good defence: *Wismer v. Wismer*, 22 U. C. Q. B. 446.

A bill was drawn by A., and accepted by B. for the purpose of being discounted for the benefit of B. While in A.'s hands for that purpose, he indorsed it for value to C., who was told it belonged to B.;—Held, that the property in the bill was in B., and that he could maintain trover for the bill against C.: *Evans v. Kymer*, 1 B. & Ad. 528.

Evidence is admissible to show that a document, apparently an agreement, was signed with the intention of making it an agreement only upon the happening of a certain event, which has not occurred: *Pym v. Campbell*, 6 E. & B. 370.

It is competent for parties to show that it was not their intention in signing a document, that it should operate as a contract: *Rogers v. Hadley*, 2 H. & C. 227.

<sup>7</sup> In ordinary cases where a bill is genuine in all respects, and with a genuine indorsement in blank by the proper owner, or holder, the possession of it is sufficient to entitle the person producing it to receive payment thereof. For such a possession is *prima facie*, or *presumptive*, evidence that he is the proper owner, or lawful possessor of the bill; and indeed if this doctrine did not prevail, the acceptor would in many cases pay at his peril, where the true owner or holder was unknown to him; and endless embarrassments would grow out of the negotiations of bills which, in a vast variety of cases pass by mere delivery from hand to hand. It is therefore for the security of all persons that the rule is adopted to prevent innocent holders from being compelled to establish their titles before the acceptor will be bound to pay; and they may be *bona fide* purchasers and holders by mere delivery, without the knowledge, or means of knowledge, of the persons through whose hands the bill has passed by delivery, after such a blank indorsement: *Story on Bills*, s. 415. This clause therefore provides that when it is established that the holder of a bill comes within the definition of "a holder in due course," a valid delivery to him is conclusively presumed, and cannot be rebutted. Conclusively, or as they are termed imperative, or absolute, presumptions of law, are rules determining the quality of evidence requisite for the support of any particular averment which is not permitted to be over-

come by any proof that the fact is otherwise. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden: 1 *Taylor on Evidence*, 79. This is similar to a provision in 17 & 18 Vict. c. 83 (Imp.), which provided that every bill of exchange which purported to be drawn in any place out of the United Kingdom, should be *conclusively* deemed to be a foreign bill, "notwithstanding that in fact the same may have been drawn within the United Kingdom." Sec. 21.

\* The prior clause is affirmative, while this is negative; and from its wording, it may yet be a question how far it may be said to vary the effect of the preceding clause. The former makes the possession of a bill by "a holder in due course," *conclusive* evidence of a valid delivery to him. When in the hands of such a holder it is "no longer in the possession of the party who has signed it as drawer, acceptor, or indorser." But this clause provides that when such negative fact is established, it is not conclusive, but may be rebutted. This clause must also be considered with s. 55, which defines what are the estoppels affecting a drawer and an indorser as against a holder in due course. Disputable presumptions answering to the *presumptiones juris* of the Roman law, may always be overcome by opposing proof. The rules in this class of presumptions, as in the class of conclusive evidence, have been adopted by common consent, from notices of public policy; yet not as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given to rebut the presumption raised. Thus as men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it; and therefore evidence is received to repel this presumption: 1 *Taylor on Evidence*, 115. The following are some of the cases on the construction of conflicting clauses in a statute. The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute: *Forlyce v. Bridges*, 1 H. L. Cas. 1, s. c. 11 Jur. 157. The language of a statute taken in its plain ordinary sense, and not its supposed intention, is the safer guide in construing its particular clauses: *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338. Wherever two parts of a statute are contradictory, the Court endeavours to give a distinct interpretation to each of them by looking at the context: *Per* Lord Romilly, M. R., in *Pretty v. Solly*, 26 Beav. 610. It is a sound principle in the exposition of statutes that less regard is to be paid to the words used, than to the policy which dictated the Act: *Broom's Legal Maxims*, (6th ed.) 539. Also if any section be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another: *Ibid.* 540.

**Sec. 21.**

° The *prima facie* fact which may be negatived under this clause is a valid and unconditional delivery of the bill by any one of the parties above named, subject to the provisions of this Act as to the title of a holder in due course. Prior cases shew that it is admissible to prove that the delivery was conditional, as described in clause 2 (b); or that the instrument was not to operate as a contract unless a certain condition was performed: *Pym v. Campbell*, 6 E. & B. 370; 2 Jur. N. S. 641; or that there was a collateral agreement varying the written contract: *Morgan v. Griffith*, L. R. 6 Ex. 70; *Abry v. Cruik*, L. R. 5 C. P. 37; or to impeach the consideration for the bill as between the maker and the party to whom he gave the note: *Per Parke, B., Foster v. Jolly*, 1 C. M. & R. 708; s. p. *O'Brien v. Ficht*, 18 U. C. C. P. 241; or that the note was a security that the plaintiff would support the maker, and not negotiate the note: *Wismer v. Wismer*, 22 U. C. Q. B. 446; or that the contract has been discharged by payment or otherwise: *Truman v. Dixon*, 2 Pugs. & Bur. 33; or that the bill was accepted for the accommodation of the drawer, and that the holder gave time to the drawer, thereby discharging the acceptor, whom he knew was a mere surety: *Overend v. Oriental Financial Corporation*, L. R. 7 H. L. 348. But when once fraud, duress, or force and fear, or other illegality, are proved by a defendant in an action on a bill or note, the burden of proof that the plaintiff is a "holder in due course" is shifted on him. The following table indicates some of the chief grounds of defence on the part of the acceptor against the drawer, and also against the indorsee respectively:

Acceptor sued by the drawer may plead—	{	<ul style="list-style-type: none"> <li>No consideration, or an accommodation bill.</li> <li>Discharge as surety.</li> <li>Fraud, duress, force and fear.</li> <li>Illegal consideration.</li> <li>Patent right defence (s. 30, (4) (5)).</li> <li>Payment, or discharge.</li> <li>Independent agreement.</li> </ul>
Acceptor sued by the Indorsee may plead—	{	<ul style="list-style-type: none"> <li>Accommodation bill, or no consideration from the indorsee, or any prior parties to him, for the bill.</li> <li>Discharge as surety.</li> <li>Fraud and no consideration.</li> <li>Fraud (as above) with notice.</li> <li>Illegal consideration (as above) with notice.</li> <li>Patent right defence, s. 30, (4) (5)</li> <li>Defective title, s. 31 (4).</li> <li>Independent agreement (with notice).</li> <li>Title acquired after bill overdue.</li> <li>Payment, or discharge.</li> </ul>

*Capacity and Authority of Parties.*Sec. 22.

**22.** Capacity to incur liability as a party to a bill <sup>1</sup> is co-extensive with capacity to contract : <sup>2</sup>

Capacity of parties, Imp. Act, s. 22

Provided, that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation : <sup>3</sup>

As to corporations.

2. Where a bill is drawn or indorsed by an infant, <sup>4</sup> minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto. <sup>5</sup>

Bills by minors, &c., enforceable against other parties.

<sup>1</sup> Originally the right to draw, hold, indorse or accept, a bill of exchange seems to have been confined to merchants, and other persons engaged in trade generally, or in the traffic of bills. The old rule was formerly prevalent on the continent of Europe, founded in some measure upon the peculiar remedies which existed in such cases in favor of merchants, and gave credit to the bills. But this is now totally disregarded; and all persons having general capacity in other respects, whether engaged in trade or not, are capable of doing all or any of these acts: *Story on Bills*, s. 71. Contracts with parties not having capacity, are void as a liability *ab initio*, but not as to the capacity to transfer the title to, and the right of action on, the bill or note, as provided in sub-s. 2. The contracts of lunatics, or drunken men, are voidable, and not void. "There are four manners of lunatics or *non compos mentis*: (a) Idiot or fool natural. (b) He who was of good and sound memory and, by the visitation of God, has lost it. (c) He who is sometimes of good and sound memory, and sometimes not. (d) He who is *non compos* by his own act, as a drunkard:" *Berkeley's case*, 4 Co. R. 124. Unsoundness of mind will not vacate a contract if it be unknown to the other contracting party, and no advantage has been taken of the lunatic. Therefore where a lunatic purchased certain annuities of a society which at the time had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, and fair and *bona fide* on the part of the society, the transaction was sustained: *Molton v. Camfoux*, 4 Ex. 17. See also *Alcock v. Alcock*, 3 M & Gr. 268, *Beaven v. McDonnell*, 9 Ex. 309, and *Re James*, 9 Ont. P. R. 88. In an action by an indorsee against a prior indorser, it is a good plea that when he indorsed the bill, he was so intoxicated and under the influence of liquor, and thereby so entirely deprived of the use of his reason, as to be

Sec. 22. unable to understand the nature or effect of the indorsement; and that the plaintiff, at the the time of the indorsement, was aware of his being in that state: *Gore v. Gibson*, 13 M. & W. 623; 9 Jur. 140.

<sup>2</sup> This may be construed as excluding from liability on bills or notes, all persons who have some inherent, or, for the time being, some irremovable incapacity to contract. Such are (1) *Infants*, or persons under the age of twenty-one years. The full age of twenty-one years is completed on the day preceding the anniversary of a person's birth: *Anon.* 1 Salk. 44. A person born on the 16th August, 1725, who died on the 15th August, 1746, was held to have lived to attain the age of twenty-one years: *Toder v. Sansam*, 1 Bro. P. C. 468. (2) *Corporations* having no express or implied power to draw bills or give notes. (3) *Alien enemies*. All contracts between the subjects or citizens of different nations which are at war with each other, made without the Sovereign's license, are utterly void: *Potts v. Bell*, 8 T. R. 548. Prior to recent legislation, married women, being classed by the common law, as persons under disability, incurred no liability by drawing, indorsing, or accepting a bill; and a married woman's incapacity to contract by reason of her coverture, was not removed by her falsely representing herself as being a widow: *Cannam v. Farmer*, 3 Ex. 698. By the common law a married woman incurred no liability by drawing, accepting, or indorsing a bill of exchange or promissory note, unless she was a sole trader within the City of London, or unless her husband had abjured the realm, or was deemed, in contemplation of law, to be civilly dead, by being under a general sentence of imprisonment for life or a term of years, or if he had renounced civil life for a religious profession, or was an alien resident abroad. Nor did her indorsement transfer any title or property in a bill or note payable to her, unless she indorsed it with her husband's consent. But under the Married Women's Property Act, R. S. O. 1887, c. 132, she may become a party to any such contracts; but the judgment entered against her, must be against her separate property. See the cases of *Lawson v. Laidlaw*, 3 App. R. 77, and *Beemer v. Oliver*, 10 App. R. at p. 661. "Legal incapacity" cannot be confined to total incapacity to do any legal act whatever, but must comprehend legal incapacity to do some particular act; though there may be capacity to do some legal acts: *Charlton v. Lings*, L. R. 4 C. P. 374. "Capacity" must be distinguished from "authority." Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another, so as to bind him. Capacity to contract is the creation of law. Authority to contract is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity is a question of law. Authority is a question of fact: *Chalmers on Bills*, 54. If a person has capacity to do any act, or is under any incapacity to do any act, by the law of the place of his domicile, the act, when done there, will be governed by the same law, wherever its validity may come into contestation in any other country: *Story on Conflict of Laws*, s. 64.

<sup>3</sup> The capacities and powers of trading and other corporations are limited in degree, according to the business or functions of such corporations; and the measure of a corporation's liability in respect of its contracts must be co-extensive with its power to make them: *Re Central Bank*, 26 Can. L. J. 335. As a general rule the contracts of corporations must be under the corporate seal; but the rule admits of some exceptions in the cases of contracts where the charter, or the purpose incidental to the business of the corporation, authorizes the making of bills and notes; and in the cases of contracts specially authorized by statute to be made without the corporate seal; also in the cases of contracts where the corporation is estopped from disputing its liability. A non-trading partnership (such as solicitors) may ratify a bill not binding on the partnership; but a bill or note *ultra vires* of a corporation, cannot be ratified. Corporations are mentioned in the statute of 3 & 4 Anne, c. 9, respecting promissory notes, as persons who may make and indorse negotiable notes.

## ILLUSTRATIONS.

The mention of a corporation not having power to take notes, in the body of a note payable to the corporation or bearer, does not put the bearer of such note on a worse footing than if the name of a fictitious payee had been inserted: *Hammond v. Small*, 16 U. C. Q. B. 374.

A departure from the style of the corporation, will not avoid a note made to it, if it substantially appears that the particular corporation was intended: *Bank of Tennessee v. Burk*, 1 Cold. (Tenn.) 623.

A company incorporated for trading and other purposes may bind itself by a contract made in furtherance of the purpose of its incorporation, though not under seal: *Henderson v. Australian Steam Navigation Co.*, 5 E. & B. 409.

Where a company is established for trading purposes, the business of which requires that it should have the power of issuing bills of exchange and promissory notes, as in banking and trading companies, such a company has impliedly that power: *Church v. Imperial Gas Light Co.*, 6 A. & E. 861.

So where the power appears to exist under the articles of association, though it could not be inferred from the nature of the business of the company, such company may issue negotiable instruments: *Peruvian R. Co. v. Thames Marine Insurance Co.*, L. R. 2 Ch. 618.

A promissory note signed on behalf of a company by its manager, but which was not necessary for the company's trading, and not authorized, is not binding on the company: *Re Cunningham & Co.*, 36 Ch. D. 532.

Where any application of the funds of a company would not be warranted by its charter, the Court cannot declare the company's property or funds liable therefor; as such a declaration would be giving judicial sanction to a liability *ultra vires* of the company: *North American Life Insurance Co.'s Case*, 20 Can. L. J. 335.

A railway company not having been authorized by its charter, or the general Railway Act of 1851, to draw bills or give notes, cannot so contract: *Topping v. Buffalo &c., R. Co.*, 6 U. C. C. P. 141.

A railway company incorporated by a special act of the Imperial Parliament containing the usual clauses inserted in such statutes, cannot accept bills of exchange: *Bateman v. Mil. Wales R. Co.*, L. R. 1 C. P. 499.

Sec. 22.

A company incorporated for repairing steamboats and other vessels, and having power to transact business of a commercial character, may give and take notes in the course of its business: *Kingston Marine R. Co. v. Gunn*, 3 U. C. Q. B. 368. See as to a salvage company, *Thompson v. Universal Salvage Co.*, 1 Ex. 694.

A mining company incorporated under C. S. C. c. 63, has not as a necessary incident to its business the right, to draw bills or give notes: *Gilbert v. McAnnany*, 28 U. C. Q. B. 384, s. p. *Dickinson v. Falpy*, 10 B. & C. 128.

Commissioners for a turnpike road trust, appointed under a statute limiting their powers, took a note from the tenant of the road for the amount of rent;—Held, that the commissioners had no power, to give time by note for payment of rent already due: *Ireland v. Guess*, 3 U. C. Q. B. 220.

A promissory note signed on behalf of a municipal corporation in settlement of a judgment against the municipality is void, no power to give promissory notes being implied as necessary to the business of the corporation; and besides the legislature having empowered municipalities to raise money in a different way: *Pacaud v. Corporation of Halifax South*, 17 L. C. R. 56.

Where no denial of the capacity of a corporation to draw a bill or make a note is pleaded, the Court will presume that the corporation is capable in law of making negotiable paper: *Farrell v. Oshawa Manufacturing Co.*, 9 U. C. C. P. 239.

Where a municipal corporation had allowed judgment to be obtained *ex parte*, on a promissory note signed by its mayor and secretary-treasurer, and then appealed on the ground that the note was void for want of authorization in the signers, the appeal was dismissed on the ground that the note being apparently regular, and the corporation not having objected in the Court below to the want of authority to make such note, could not raise such defence in appeal: *Corporation of Grantham v. Couture*, 10 Rev. Leg. 186; s. c. 2 Leg. News 350.

The secretary-treasurer of a municipal corporation has no power to sign notes and accept drafts: *Martin v. Corporation of Hull*, 9 Rev. Leg. 512; and 10 Rev. Leg. 232.

A negotiable promissory note made by building society or other corporate body, not specially authorized by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the person named therein, and will be held good as an acknowledgment of indebtedness; and in the absence of a plea specially denying the existence of the debt or the authority of the officers to make the note, the indorsee of such note may recover the amount from the corporation, on the mere production of the note: *Societ<sup>e</sup> de Construction du Canada v. Banque Nationale*, 3 Leg. News 130, and 24 L. C. J. 226.

A note given by a building society as collateral security for an advance to the society, is not an ordinary negotiable note: *Cooley v. Dominion Building Society*, 1 Leg. News 495.

By the provisions of several statutes it was enacted, that "it shall not be lawful for any body corporate to borrow, owe, or take up any money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof";—Held, that a corporation not established for trading purposes could not become acceptors of a bill payable at a less period than six months from the date: *Broughton v. Manchester Waterworks*, 3 B. & A. 1.



Directors of a cemetery company were by their act of incorporation empowered to make contracts and bargains touching the undertaking, and to do and transact all other matters and things requisite to be done and transacted for the direction and management of the affairs of the company;—Held, that they had no power to accept or indorse bills: *Steele v. Harmer*, 14 M. & W. 831; 4 Ex. 1. See also *Brown v. Byers*, 16 M. & W. 252.

Sec. 22.

If a bill is drawn on behalf of a company for any purpose not within the scope of the business of the company, and not such as the directors have power by the deed of settlement to bind the company in respect of, it does not bind the company, and is not available in the hands even of a *bona fide* holder: *Balfour v. Ernest*, 5 C. B. N. S. 601. See also *Bramah v. Roberts*, 3 Bing. N. C. 963; and *Butt v. Worrell*, 12 A. & E. 745.

See also, note 1 to s. 17, and the notes to s. 26.

\* An infant is in the eye of the law *infans*, that is speechless, or in other words, one that cannot speak for himself in the ordinary matters of contract: *Golding's Petition*, 57 N. H. 149. The law does not consider an infant is capable of making an accurate computation: *Truman v. Hurst*, 1 T. R. 40. An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physie, and such other necessaries: and likewise for his good teaching or instruction, whereby he may profit himself afterwards: 1 *Co. Litt.* 172. This is benignity to infants, for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age: 3 *Bacon's Abridgement* 593.

#### ILLUSTRATIONS.

An infant is not liable on a bill of exchange accepted by him for necessaries: *Williamson v. Watts*, 1 Camp. 553. But see *Russell v. Lee*, 1 Lev. 86, and the reporter's note to this case, in 1 Camp. 553.

An action cannot be maintained against an infant upon his promissory note as it is, but it can be maintained for the necessaries for which such note was given: *McCroillis v. How*, 3 N. H. 348, s. p. *Swasey v. Vanderheyden*, 10 Johns. (N. Y.) 33.

An action is maintainable by an indorsee for value against an acceptor of a bill, accepted while such acceptor was an infant for a debt contracted during infancy, though not for necessaries: *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124.

A note executed by an infant as surty for another, is void: *Maples v. Wightman*, 4 Conn. 376.

A note given by an infant who is the father of a bastard child, on a settlement with the mother, is valid: *Gavin v. Burton*, 8 Md. 69.

An infant who has traded while under age, and who has, while so trading, committed an act of bankruptcy, may be adjudicated a bankrupt after he has arrived at full age: *Ex parte Lynch*, 2 Ch. D. 227.

Action was brought on a promissory note made by the defendant, a minor, and indorsed by the payees to the plaintiffs before maturity. Defendant pleaded his minority; but, held, that as the evidence proved

Sec. 22. that the defendant was a trader, and that as the note was given for goods purchased for the use of his business as such, he was liable : *City Bank v. Layleur*, 20 L. C. J. 131.

Four promissory notes were made by the defendant and one H., payable to the plaintiff for the purchase of the plaintiff's interest in certain homestead lands in the state of Michigan, H. being the purchaser of the lands, and defendant signing as surety. Under the laws of Michigan only persons over twenty-one years could locate homestead lands; and the plaintiff was under that age. There was no representation that the plaintiff was of age, and H. obtained from the plaintiff a surrender of his interest in the land, whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age:—Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore entitled to recover: *Fletcher v. Noble*, 8 Ont. R. 122.

J., an infant gave to M. a promissory note for the purchase money of a buggy, indorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition;—Held, that the father's estate was not liable : *Re James*, 9 Ont. P. R. 88.

<sup>6</sup> The title, but not any contract of liability on the bill, passes from the person or corporation having no capacity to contract, to the holder, with all rights to enforce it against the other parties, and is equivalent to an indorsement "without recourse." In ordinary cases a corporation which has no capacity to draw a bill or make a note, incurs no liability by indorsing a bill or note. The question has been mooted whether corporations having no such capacity, can draw a cheque on a bank; such cheques being defined by s. 72 to be bills of exchange drawn on a banker payable on demand. But it was held in the case of a mining company (which companies have no power to draw bills; see note 3, to s. 22), that cheques drawn by the *de facto* directors of such a company, and paid by a bank, discharge the bank from liability in respect of the moneys of such company : *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869. The signature for a corporation is a procuracy signature.

#### ILLUSTRATIONS.

A note made payable to the treasurer of, and indorsed by him to, a municipal corporation, to secure a balance due the corporation on a past transaction, is not void under the Municipal Acts : *Corporation of Belleville v. Fahey*, 5 U. C. L. J. N. S. 73.

In an action against an acceptor by an indorsee, it is no defence that the drawers who had drawn the bill payable to themselves, and indorsed it, were infants when it was drawn : *Taylor v. Croker*, 4 Esp. 187.

An indorsement by an infant, though he is not capable of making a new contract, transfers the property in the bill; his indorsement being a condition of the contract : *Lebel v. Tucker*, 8 B. & S. 833; s. p. *Nightingale v. Withington*, 15 Mass. 272.

Signature  
essential to  
liability.

**23.** No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such :<sup>1</sup> Provided that—

(a) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name ;<sup>2</sup>

Sec. 23.  
Trade name binds.  
Imp. Act, s. 23  
Ind. Act, s. 23.

(b) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.<sup>3</sup>

Firm's name binds.

<sup>1</sup> By the rules of the law-merchant, no one is liable on a bill unless he is a party to it in one of the characters above named. But there has been a conflict of decisions as to how far the signature of a stranger to a bill or note, creates a liability or not. In some cases it has been held that it is not absolutely essential to the liability of the party signing, that the claim of liability on, or title to, the bill should have come through him; nor that he should have signed his name on the back of the bill where an indorser usually signs. But in other cases such a signature when placed above the indorsement of the payee, has been held to create no liability; while in other cases, such a signature has been held to make the party liable as maker. In both classes of cases the signature had been made by a party who had agreed to become a surety for the payment of the bill or note. This conflict of decisions, and the absolute terms of this section, would seem to be moderated by s. 56. In actions on bills or notes, it is not admissible to give evidence that the bill or note sued upon, is the contract or liability of an undisclosed principal: <sup>2</sup> *Taylor on Evidence*, 933. See notes to ss. 6, 30 and 56.

#### ILLUSTRATIONS.

A note was drawn by L. & E. payable to P., and was indorsed by G., and then by P. who signed his name lengthwise on the back of the note, P. signed it cross-wise;—Held, that G. by indorsing the note and giving it to P., allowed him to transfer it to whom he pleased; and that he was liable as an indorser: *McLean v. Garnier*, 2 Russ. & Gel. 432.

A. made his note payable to B. or bearer; before delivery to B., D. indorsed it;—Held, that D., the indorser, was liable to B. as holder of the note: *Fantleuven v. Vandusen*, 7 U. C. Q. B. 176.

Where A. made a note payable to B. or order, and C. wrote his name on the back, without B.'s first indorsement;—Held, that C. could not be considered as a new maker; and therefore not liable: *Stuer v. Adams*, 6 U. C. O. S. 60. See *Wilcocks v. Tinning*, 7 U. C. Q. B. 372.

A., an indorser who became a party to a note for the accommodation of the maker, on condition that B. should also become an indorser, but B. having refused;—Held, that A. was not liable, even at the suit of a holder for value: *Ontario Bank v. Gibson*, 4 Man. R. 440.

W. made a note not negotiable, for money lent to W., and A. and B. signed on the back of the note as sureties; one of them had paid interest on it, and both promised to pay the note, when spoken to;—Held, that they were not liable upon the note: *Skilbeck v. Porter*, 14 U. C. Q. B. 430. See also, *Leaf v. Gibbs*, 4 C. & P. 466.

Sec. 23. Where after a note is completed, it is signed by a third party, or is so signed by him after maturity, without any consideration or agreement to extend time, such third person is not liable: *Ryan v. McKerral*, 15 Ont. R. 460.

When a man's name is written on the back of a bill or note without the intention to indorse, and so to make himself liable for it, he is not so liable. Though he put his name on the back, that is a writing, but it is not an indorsement in the legal sense of the term. The writing must always be done *animo indorsandi*, in order to make it effectual to bind the indorser: *Keene v. Beard*, 6 Jur. N. S. 1248.

Where A. as surety indorsed a note in blank, payable to B., but not negotiable;—Held, not liable as maker: *McMurray v. Talbot*, 5 U. C. C. P. 157.

A. drew a bill on B. requiring C. to be a surety. The bill was accepted by B. and also by C., each writing his name on it: Held, C. not liable as acceptor: *Jackson v. Hudson*, 2 Camp. 447. "I know of no custom or usage of merchants according to which if a bill is drawn upon one man, it may be accepted by two. A bill may be accepted by the drawee, or failing him, by some one for the honor of the drawer:" *Per* Lord Ellenborough, C. J., *Ibid*.

A party had indorsed the bill as surety, but had signed his name after that of the payee;—Held, that the payee could not recover against him, as he was a party to the note subsequent to the payee himself: *Jones v. Ashcroft*, 6 U. C. O. S. 154.

Y. signed a non-negotiable note and H., who agreed to be his surety wrote across the back "a joint note, or better than a joint note," and signed it;—Held, that H. was liable as maker: *Piers v. Hall*, 2 Pugs. & Bur. 34.

Where A., not a payee, puts his name on the back of a promissory note payable to B. or order, before it is delivered to the payee to take effect as a promissory note, he is liable as maker: *Bell v. Moffat*, 4 Pugs. & Bur. 121.

Where A. B. & S. M. assigned their stock in trade to trustees to carry it on in the name of S. M., and S. M. was employed by the trustees as their agent, and indorsed bills which he discounted and applied the proceeds, partly to the business and partly for his private purposes;—Held, that the signature of S. M. to the bills was *prima facie*, the signature of the trustees: *Furze v. Sharwood*, 2 Q. B. 388; 6 Jur. 554.

In an action on a note payable to J. H. and indorsed by J. H. to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given, but it appeared that the indorsement was in the handwriting of the son;—Held, that although *prima facie* the presumption would be that the father was meant, that presumption was rebutted by the son's indorsement: *Stebbing v. Spicer*, 8 C. B. 827.

<sup>2</sup> Trade names, as well as trade marks are in a certain sense property; and where the name of a manufacturer is used to designate goods of his make, it will be protected in equity: *Ainsworth v. Walmsley*, L. R. 1 Ex. 518. But where the name is merely descriptive of the nature of the business and the locality, and is not so inseparably connected with the establishment that a secondary meaning may be attributable to it, will not be

protected: *Robinson v. Bogle*, 18 Out. R. 387. The assumption of a name belonging to another by a stranger, is not the subject of an action, as there is no right of property in a person to the use of a particular name, except in connection with a trade or business: *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430. Assuming and using a fictitious name, though for the purposes of concealment and fraud, will not amount to forgery: *Rex v. Boulton*, R. & R. 260.

## ILLUSTRATIONS.

Where four persons described in a contract not by their individual names but as a collective body, and not incorporated, signed with their own names, they were held to be individually liable: *Cullen v. Nickerson*, 10 U. C. C. P. 549.

One J. employed B. as manager of his business, to carry it on for him in the name of B. & Co. The drawing and accepting bills were incidental to the carrying on of such business; but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of B. & Co.;—Held, that J. was liable on the bill in the hands of an indorsee who took it without any knowledge of the relations of J. & B. or the business: *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

<sup>3</sup> The signature of a firm is deemed to be the signature of all persons who are partners in the firm, whether working, dormant, or secret, or who, by holding themselves out as partners, are liable as such to third parties: *Pooley v. Driver*, 5 Ch. D. 458.

## ILLUSTRATIONS.

A note of a firm carrying on business as bankers, was signed by one of them in the following form: "I promise to pay the bearer on demand five pounds; value received. For J. C., R. M., J. P., and T. S., R. M.;"—Held, that the holder of this note had not a separate right of action against the party so signing, but that the firm was liable: *Ex parte Buckley*, 14 M. & W. 469; s. p. *Lord Galway v. Matthew*, 10 East 264.

A. who was a cheesemonger at Woolwich, carried on at Woolwich the hosiery trade in partnership with C., but in his own name. C. accepted in the name of A. a bill drawn for goods supplied to the partnership, and which was addressed to A. at Woolwich:—Held, that the acceptance was binding on A. although the bill was not addressed to the place where the partnership business was carried on: *Stephens v. Reynolds*, 5 H. & N. 513; 2 L. T. N. S. 222.

In the absence of express agreement to that effect, a creditor taking the note of one partner for a debt of the partnership, and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership: *Carruthers v. Ardagh*, 20 Grant 579.

If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it for the purposes of the firm: *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204.

On the dissolution of a firm it was agreed that an agent should be appointed to realize the assets, and that the business should thereafter be carried on by one of the retiring partners. Bills on the old firm were

**Sec. 23.** accepted by the agent in his own name, and that of the partner;—Held, that the agent had no authority so to accept such bills, and the partner was not liable: *Odell v. Cormack Bros.*, 19 Q. B. D. 223.

One who takes from a member of a trading firm in satisfaction of his separate debt, a negotiable security in the name of the partnership, is bound to show that it was accepted or indorsed with the concurrence of the other parties: *Leverson v. Lane*, 13 C. B. N. S. 278.

In an action by indorsee against members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership, and contrary to the partnership articles, the onus is cast on the holder of the bill, of shewing that he gave value: *Hogg v. Skeen*, 18 C. B. N. S. 426.

A bill drawn by a partner in the name of his firm, indorsed by him also in such name to himself, and discounted at his private bankers for his own account, cannot be proved against the joint estate of the firm, unless he had authority from his partners to act as he did, with regard to the bill, or unless the proceeds have actually been applied to partnership purposes, and the firm is indebted to his private account sufficient to cover the amount of the bill: *Ex parte Darlington and Stockton Banking Co.*, 12 L. T. N. S. 372.

An agent of a bank discounted a note for J. N., the maker, payable to and indorsed by a firm in the partnership name, by one of the partners, the agent knowing that it was so indorsed as security for J. N., and that it had no connection with the partnership business;—Held, that the other partners were not liable: *Federal Bank v. Northwood*, 7 Ont. R. 389.

If the law protects an innocent partner in such a case as the above, it is equally strict in holding the innocent partners liable for the fraud of their co-partner in partnership matters: *Per Wilson, J.*, *Ibid.*

In an action by a *bona fide* holder against the indorsers of a note, it is no defence that the note was indorsed by one of the defendants (a firm) fraudulently, without the authority of the other defendants, and for matters not relating to the business of the partnership: *McLeod v. Carman*, 1 Han. N. B. 592.

One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt, as for money handed to the firm by a client to be laid out on mortgage: *Hedley v. Bainbridge*, 3 Q. B. 316; 6 Jur. 853.

The implied authority of one partner to bind another by a note or bill, is confined to partnerships for the purpose of trade: *Ibid.*

Two partners carried on business as brokers, under an agreement that they were to get orders on commission and divide the expenses. One of them travelled for orders, and having incurred expenses, drew a bill for the first time in the partnership name, to raise funds to execute an order. The other partner accepted it, but, before it was issued, countermanded the authority to negotiate it, and it was negotiated without his knowledge;—Held, that the mere partnership did not render him liable upon it: *Fyles v. Dalton*, 28 L. J. Ex. 69.

A partner has no implied authority by law to bind his co-partners by his acceptance of a bill except by an acceptance in the true style of the partnership; therefore where a firm consisted of J. B. and C. H., the partnership name being J. B. only, and C. H. accepted a bill in the name of J. B. & Co.;—Held, that J. B. was not bound thereby: *Kirk v. Blurton*, 9 M. & W. 284.

Sec. 23.

A bill drawn upon a firm as M. & McQ., their partnership name being M. McQ. & Co., was accepted in the former name;—Held that the firm of M. McQ. & Co. were not liable: *Quebec Bank v. Miller*, 3 Man. R. 17.

A bill was indorsed by the payee to another, who indorsed it, and added to their indorsement the following, “In need S. P. & Co.” The bill was subsequently indorsed in blank to a bank, who indorsed it in blank to the plaintiffs, who indorsed it specially, “Pay Messrs. Terney & Farley, or order” who indorsed it in blank by writing a different name, “Thomas Terney & Farley.” The bill when due was duly presented at S. & Co., London, bankers, and was dishonored. On the same day it was presented at S. P. & Co.’s who refused to pay it, solely on the ground of the irregularity of Terney & Farley’s indorsement. The custom of London bankers was admitted to be to refuse all bills, even their own acceptances, where there is a letter wrong in any indorsement. The bill was then sent to Terney & Farley, who lived in Ireland, to rectify the mistake, and the bill, with the proper indorsement on it, was then sent up to London, and again presented to S. P. & Co.’s who refused to pay it as being out of time;—Held, that the bank was liable on the bill: *Leonard v. Wilson*, 2 C. & M. 589; 5 Tyr. 415.

A former partner in a firm which had dissolved, indorsed inadvertently in the firm’s name, a note payable to the firm and made to it before the dissolution:—Held, that he was personally liable: *Lumberman’s Bank v. Pratt*, 57 Me. 563. See also *Tuten v. Ryan*, 1 Spears (S. C.) 2403.

A partner has no implied authority to bind his firm by issuing acceptances of the firm in blank: *Hogarth v. Latham*, 3 Q. B. D. 643.

24. Subject to the provisions of this Act,<sup>1</sup> where a signature on a bill is forged<sup>2</sup> or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature<sup>3</sup> is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:<sup>4</sup>

Forged or unauthorized signature inoperative. Imp. Act, s. 24 Ind. Act, s. 41

Unless party is estopped.

Provided, that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery:<sup>5</sup>

Proviso.

And provided also, that if a cheque, payable to order, is paid by the drawee upon a forged indorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid,

Payment on a forged cheque.

Sec. 24. or no defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery; and in case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein, who has not previously instituted proceedings for the protection of his rights. <sup>6</sup>

<sup>1</sup> The provisions of the Act referred to are evidently those in s. 29 subs. 2, and 30 (1). This clause makes *forged* signatures, and *unauthorized* signatures, "wholly inoperative" to convey any title to the bill; and therefore such signatures operate as a block in the chain of title to such bill, unless the party whose signature is forged or unauthorized, is estopped from denying his liability. See further, the notes to ss. 54 and 55.

<sup>2</sup> "Forged signature on a bill." This section only deals with the forgery of a *signature* on a bill, which in effect it blots out of the bill, by declaring it to be "wholly inoperative," so far as it affects any validity in, or title to, the bill. Section 63 deals with other classes of forgeries, "material alterations," under which such bills are declared to be void, except as to a *particeps criminis*, or only to the extent of the material alteration, when in the hands of a "holder in due course." See the notes to that section, and also notes to ss. 5 and 7 as to the signature in the name of "a fictitious or non-existing person." The following acts with reference to bills and notes have been held to be forgery, if done with fraudulent intent: Writing the name of another without authority; *Rex v. Dunn*, 1 Leach C. C. 57; *Regina v. Tuke*, 17 U. C. Q. B. 296; *Regina v. Beard*, 8 C. & P. 113. Writing the name of a fictitious person: *Rex v. Marshall*, R. & R. 75; *Rex v. Bolland*, 1 Leach C. C. 83. Writing the name of a fictitious firm: *Regina v. Rogers*, 8 C. & P. 629. Indorsing in the name of one of several payees, although the bill was not negotiable without the signatures of all: *Regina v. Winterbottom*, 2 C. & K. 37. Assuming a false name for the purposes of pecuniary fraud, *Rex v. Peacock*, R. & R. 278. Putting a false address to the name of the acceptor: *Regina v. Epps*, 4 F. & F. 81. Writing a promissory note on a piece of paper which has on it the genuine signature of another: *Rex v. Hales*, 17 How. St. Tr. 161, 209, 229. Writing one's own name with the intention that it should pass for another's signature: *Mead v. Young*, 4 T. R. 28. Filling up a blank acceptance with a larger sum than is authorized, *Rex v. Harte*, 7 C. & P. 652; or a blank cheque, *Regina v. Wilson*, 2 Cox C. C. 426. Altering a bill from a lower to a higher sum: *Rex v. Teague*, R. & R. 33. Altering the period of payment: *Rex v. Atkinson*, 7 C. &



P. 669. A forged paper purporting to be a bank note is a promissory note, and equally so, even if there be no such bank as that named: *Regina v. Macdonald*, 12 U. C. Q. B. 542. Sec. 24.

## ILLUSTRATIONS.

The holder of a promissory note whose title thereto was derived from an indorsement which proved to be a forgery, although he had acted in entire good faith, cannot recover the amount of the note from any of the previous indorsers: *Larue v. Eranturel*, 2 L. C. L. J. 115.

When the original indorsement of the payee's name on a bill of exchange was written without authority, and therefore a forgery, the subsequent indorsement by such payee, after the bill had arrived at maturity, was held not to give the holder any title to the bill: *Esdaile v. La Neuze*, 1 Y. & C. Ex. 394,

Notice of such fraudulent indorsement given to the *bona fide* holder of a note, will not affect his right to recover, nor will it affect the right of his indorsee, though the last indorsement was made after the note was due: *McLeod v. Carman*, 1 Han. N. B. 592.

The Court will not order the production of cheques alleged by the defendant to be forgeries, for the sake of comparing the handwriting with a document, about the genuineness of which the parties are at issue: *Wilson v. Thornbury*, L. R. 17 Eq. 517.

These (forged) documents are not bills of exchange; therefore *prima facie* such documents are not dealt with by the Act. But as between parties, where one is estopped from denying to the other that the document is a bill of exchange, the document as between them must be treated as a bill of exchange, and as being within the Act: *Per* Lord Esher, M. R., *Vagliano v. Bank of England*, 23 Q. B. D. 252.

<sup>s</sup> "Unauthorized signature." The general rule is that if any person puts the name of another on a bill or note without authority, with the intention of meeting the payment of such bill or note when due, or that the person whose name has been put on the bill or note will overlook it, it is forgery: *Rex. v. Forbes*, 7 C. & P. 224. So if a person relying upon the kindness of a near relation or friend, uses his name on a bill or note without authority, trusting that such person will pay it rather than there should be a prosecution, this is also forgery. And the fact that such relation or friend had on three or four previous occasions, when bills had been so drawn, paid them without remark or remonstrance, would afford no ground for the belief that he had authorized such use of his name: *Regina v. Beard*, 8 C. & P. 143.

## ILLUSTRATIONS.

A person who knows that another is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees whether the position of such other person is altered for the worse, or he will be held to have acquiesced in the forgery, and be estopped from denying his liability on the bill: *McKenzie v. British Linen Co.*, 6 App. Cas. 82.

The name of one F. had been forged to a note, but previous to the trial he had stated that he had signed the note for the accommodation of his co-defendant;—Held, that F.'s conduct amounted to an adoption and ratification of the signature to the note, and that he was liable thereon: *Union Bank v. Farnsworth*, 19 Russ. & Gel. 82.

Sec. 24. If a party to a bill, on being asked if it is his handwriting, answers that it is, and will be duly paid, he cannot afterwards set up a defence of forgery, for he has credited the bill, and induced others to take it: *Leach v. Buchanan*, 4 Esp. 226.

A bill purporting to be drawn by a really existing firm payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The drawing and indorsement were forgeries;—Held, that if the bill was accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped to deny the indorsement as well as the drawing: *Beeman v. Duck*, 11 M. & W. 251.

Where the trustees of a charity left their seal in the custody of their secretary, and he fraudulently affixed the seal to five forged powers of attorney authorizing the transfer of stock;—Held, that any alleged negligence in allowing the secretary to have the custody of the seal was very remotely connected with the fraudulent act of transfer, and not such as to make the trustees liable therefor. If a person negligently keeps his cheque book, or neglects to lock the desk where it is kept, and a servant or stranger takes it and forges a cheque, such person is not guilty of legal negligence to make him liable for the consequences of such forgery: *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389.

Where a bill of exchange has been negotiated by means of the forgery of the name of the payee, as indorser, equity will restrain even a *bona fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled: *Esdaile v. La Nauze*, 1 Y. & C. Ex. 394.

<sup>4</sup> The doctrine of Estoppel has been much discussed in some of the cases. It is generally favored by the courts, especially where it is essential to the quick and easy transaction of business. And so that a man should be able to put faith in the conduct and representations of his fellows, the Courts have inclined to hold such conduct and representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable: 2 *Smith's Leading Cases* 460*a*. And although it has been laid down as a broad general principle that wherever one of two innocent persons must suffer, by the act of a third, he who has enabled such person to occasion the loss must suffer it, (*Per* Ashurst, J., in *Lickbarrow v. Mason*, 2 East 70), the general rule now seems to be that where a clerk or servant of one person has by virtue of his employment, been able to commit a fraud on another, negligence of the employer of such clerk or servant, must have been the immediate cause of the fraud, so as to make such employer liable; but where such negligence of the employer is the remote and not the proximate cause of such fraud, the employer is not liable. Mere negligence, or a careless and slovenly mode of conducting business is not enough: *Fagliano v. Bank of England*, 22 Q. B. D. 117.

#### ILLUSTRATIONS.

In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that the defendant had before and afterwards indorsed for his nephew on purchases by him from the plaintiffs, and that when payment of this note was demanded from him, he had

asked for time, and had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was, that he kept no memorandum of his indorsements, and supposed it was right;—Held, that the defendant had precluded himself by his conduct from disputing his liability: *Pratt v. Drake*, 17 U. C. Q. B. 27.

On an action by indorsees for value, against a firm of M. and C., on a bill drawn by S. & Co., in their own favour, accepted by M. & C., and indorsed by S. & Co. to the plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. in the name of the firm as an accommodation for S. & Co., and without his, C.'s authority, and was not within the scope and objects of the partnership business, and that the plaintiffs took it with notice;—Held, that although it might be inferred that the defendant C. knew nothing of the bill, and that the acceptance was beyond the scope and object of the partnership, and entirely foreign to the purposes of it, he should have pleaded that it had no reference to any transaction and dealings between S. & Co. and his firm: *City of Glasgow Bank v. Murdock*, 11 U. C. C. P. 138.

<sup>5</sup> There are cases which show that a forgery in connection with a bill of exchange or promissory note cannot be ratified; and this section may be read both ways. The first part of the section declares that a forged signature is "wholly inoperative" and gives no right to retain or enforce payment of it "unless the party against whom it is sought to retain or enforce payment of the bill is precluded (*i. e.* estopped by ratification or negligence), from setting up the forgery." The subsequent proviso however would seem to countenance the view that a forgery could not be ratified. But Lord Blackburn says: "If a person whose name was used without authority, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible, just as if he had originally authorized it:" *McKenzie v. British Linen Co.*, 6 App. Cas. 99. See the cases to note 4.

## ILLUSTRATION.

One W. accepted certain bills of exchange in the name, but without the authority, of his brother J. W. was taken up on another charge of forgery, and while in custody the holders of the bills applied to J. for payment. J. then gave a written acknowledgment (after the bills had been dishonored), that he was responsible for them, and would pay them in case his brother should fail to do so;—Held, sufficient to make J. liable on the bills: *Ex parte Edwards*, 5 Jur. 706.

<sup>6</sup> This proviso is new law, and may be taken as a modification of s. 60 of the English Act which provides that when a banker, on whom a bill payable to order or demand and indorsed, is drawn, pays it in good faith and in the ordinary course of business, he shall be discharged, although such indorsement has been forged. A similar clause to s. 60 (Imp.) in this measure, was struck out of the Bill during its progress in Parliament. The effect of this proviso is to fix a limitation of time to a claim against a bank or other drawee, for paying out of and charging against the funds of a customer, the amount of a forged cheque.

## ILLUSTRATIONS.

Payment of a forged draft is no payment as between the person paying and the person whose name is forged: *Orr v. Union Bank of Scotland*, 1 Macq. H. L. Cas. 513.

Sec. 24. A customer drew upon his banker a cheque for £3, and paid it away. The amount of the cheque was altered by the holder, to £200, in such a manner that no one, in the ordinary course of business, could have observed it, was presented, and the £200 paid by the banker :—Held, that the banker was liable to the customer for the difference between the amount of the genuine and the altered cheque : *Hall v. Fuller*, 5 B. & C. 750.

The U. Bank, at Quebec, made a draft upon their branch at Montreal for \$25, without advice to the branch of the fact. The holder altered the amount of the draft to \$5,000, and deposited it to his own credit in his banking account with O. Bank which presented it without delay, to the branch at Montreal, where it was paid without objection. The O. Bank then paid part of the proceeds to the depositor. Six days afterwards the U. Bank discovered the fraud and demanded back the amount of the forgery :—Held, that they could not recover : *Union Bank of Lower Canada v. Ontario Bank*, 2 Leg. News 132 & 23 L. C. J. 66, 3 Leg. News 386, & 24 L. C. J. 309.

Procurator  
signatures  
notice of  
limited  
authority.  
Imp. Act, s. 25

**25.** A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.<sup>1</sup>

<sup>1</sup> The signature by procurator (*per proc.* or *per pro.*) is notice of the limited authority of the agent signing. But the principal cannot be bound if the agent has not the authority he represents. The agent however will be bound if he assumes so to act without authority, or if he exceeds the authority of his principal. In case of a defective power in the agent to bind the principal, if the agent speaks only in the language of the principal, and does not use apt language to bind himself, he will not be liable on the contract ; but he may be liable to an action for a false assumption or representation of authority : *Johnson v. Smith*, 21 Conn. 627. Unless an agent states upon the face of the bill that he subscribes it for another ; unless he says plainly "I am the mere scribe," he will be liable personally : *Per Lord Ellenborough, C. J.*, in *Leadbetter v. Farrow*, 5 M. & S. 345.

#### ILLUSTRATIONS.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and in conclusion authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal : *Esdaile v. La Nauze*, 1 Y. & C. Ex. 394.

A general power to an agent to sign bills, notes, &c., and to superintend, manage, and direct all the affairs of the principal, gives him a power to indorse notes : *Auldjo v. McDougall*, 3 U. C. O. S. 199.

A person taking a bill signed (*per proc.*) should require the production of the authority which the agent exercises : *Attwood v. Munnings*, 7 B. & C. 278.

An acceptance or an indorsement expressed to be per procuracy, is a notice to the indorsee that the party so accepting or indorsing, professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority : *Alexander v. McKenzie*, 6 C. B. 766 ; 13 Jur. 346.

Sec. 25.

A bill accepted per procuracy is notice to any party who takes the bill that the acceptor has but a limited authority, and the holder cannot maintain an action against the acceptor if the authority has been exceeded : *Stagg v. Elliott*, 12 C. B. N. S. 373 ; 6 L. T. N. S. 433.

A person who accepts a bill per procuracy, having no authority to do so, is liable to an action of tort for falsely representing that he was so authorized, although he may at the time have thought he had authority, or that his act would be ratified : *Polhill v. Walter*, 3 B. & Ad. 114.

If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongfully described by his agent in the acceptance : *Lindus v. Bradwell*, 5 C. B. 583 ; 12 Jur. 230.

In an action against a party as acceptor of a bill accepted in his name by another person, when evidence has been given of a general authority in that person to accept bills, in the defendant's name, an admission by the defendant of liability on another bill so accepted, is good evidence confirmatory of the former : *Llewellyn v. Winckworth*, 13 M. & W. 598 ; 14 L. J. Ex. 329.

From the facts that the defendants' confidential clerk had been accustomed to draw cheques for them : that in one instance, at least, they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name, a jury is warranted in inferring that the clerk had a general authority to indorse : *Prescott v. Flynn*, 9 Bing. 19.

Where an agent is authorized to indorse the name of his principal, he may do so by the instrumentality of a third party, and such authority may be exercised by the clerks of such agent : *Lord v. Hull*, 2 C. & K. 698 ; *Ex parte Sutton*, 2 Cox 84.

Certain notes for debts payable to the executors of an estate came into the hands of B. the agent of the executors, who indorsed two of them, "J. M. B., agent of the executors of the late E." and the third "the executors late E., per pro. B." B. held a power of attorney from the executors, authorizing him (among other things) to make and indorse all such promissory notes as might be requisite in the conduct and management of the estate. These notes indorsed as above were given to M., one of the executors, who was largely indebted to the estate, and was in difficulties, and who discounted them with the bank, to whom M. owed a large sum, and who made no inquiries as to the extent of B's. authority, or the circumstances under which M. obtained them :—Held, 1. That the indorsements were sufficient in form ; but, 2. That not being for the purposes of the estate, they were not within the authority given to B., the extent of which it was the bank's duty to ascertain : *Gore Bank v. Crooks*, 26 U. C. Q. B. 251.

P. & C. foreign correspondents of H. G. & Co., remitted to them a bill upon the defendant for £300. inclosed in a letter advising them that it was sent to meet a draft on H. G. & Co. of the same amount. Before the arrival of the letter, G. (who alone constituted the firm of H. G. & Co.), had absconded, having previously addressed a letter to L. authorizing him, for and in the name of H. G. & Co., to indorse any bill or bills which

**Sec. 25.** might be remitted to them, and to dispose of them in a particular way;—Held, that the last mentioned letter did not authorize L. to indorse the bill in question, inasmuch as that bill never became the property of H. G. & Co., the condition upon which it was sent to them not being capable of fulfilment: *Fearn v. Felicia*, 8 Scott, N. R. 241.

It was proved that one D. was clerk or agent for the defendant keeping a store at L., and that defendant had sanctioned his purchasing certain goods;—Held, that these circumstances gave no implied authority to D. to sign the defendant's name to negotiable paper, and that the jury were warranted in finding that the defendant had given D. no authority to purchase goods of the plaintiff: *Heathfield v. Van Allen*, 7 U. C. Q. B. 346.

Where a bill of exchange was accepted thus: "The Richardson Gold Mining Company, per James Glass, secretary;—Held that the secretary was not personally liable: *Robertson v. Glass*, 20 U. C. C. P. 250.

A bill payable to order and addressed to a tramway company which had no power to accept bills, was accepted "for and on behalf of the company" by two directors and the secretary. The bill was indorsed to a holder for value, and it was held that the directors and secretary were personally liable, as by their acceptance they represented they had authority to accept on behalf of the company, which was a false representation of a matter of fact: *West London Commercial Bank v. Kitson*, 12 Q. B. D. 157; 13 Q. B. D. 360.

Person signing as agent or in representative character. Imp. Act, s. 26. Ind. Act, s. 29.

**26.** Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal,<sup>1</sup> or in a representative character,<sup>2</sup> he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability:<sup>3</sup>

Construction favorable to the validity of such bill.

2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.<sup>4</sup>

<sup>1</sup> The words added to the signature of the agent, whether clerk, book-keeper, cashier, secretary, director, or other officer of a firm, or commercial company, must clearly indicate that the instrument signed is intended to be binding on the principal, or on the company, and not on him as such agent, or officer, so as to bring him within the protection from personal liability here intended. The mere addition of the word "agent", or "director," or other official title, to the signature, will not exempt him from such liability. The proper mode therefore for an agent to draw, indorse, or accept bills, or make or indorse notes, so as to avoid personal responsibility, is by indicating that he acts as agent, and by adding the words, "*sans recours*," or "*without recourse to me as agent, director, or officer*." The disqualifications as to the capacity of persons to make

contracts on their own account, do not apply to agents: for an agent is considered a mere instrument for another. Therefore infants, married women, aliens, or other persons labouring under legal disabilities, may be agents for the purposes above specified. No particular form of appointment is necessary to enable an agent, director, or officer, to draw, accept or indorse bill or notes, so as to charge his principal, or company, so long as the authority to do so is clearly conveyed. The authority may be verbal, or be conveyed by a special form of appointment, or it may be derived from some general or implied grant or power. Subsequent ratification of the agent's or officer's acts is equivalent to a previous authority, provided the agent or officer when he acted, assumed to act as such agent or officer. General authority to collect debts, does not give the power to accept bills, or make notes, or indorse either. And special authority to accept, make or indorse must be clearly given, for such authority is generally construed strictly. Much will depend upon the construction given to the words used in the appointment of the agent or officer; and where special objects and business are enumerated, subsequent general words will generally be restrained so as not to go beyond the special powers conveyed. As the responsibilities of an agent of a firm, or officer of a company, are commensurate with the extent of his delegated authority, it may be useful to summarize some of the general duties of an agent in the business of his principal: The agent should be careful,—

1. To perform with care the duties he has undertaken.
2. To do all acts in the name of his principal.
3. To act in person, unless authorized to delegate his duties to another.
4. To keep faithfully within the terms of the authority given him, and to obey his principal's instructions.
5. In the absence of specific instructions in any special matter, to conform to usage or recognized modes of dealing in the special business.
6. To act in good faith during his agency.
7. To use reasonable skill and ordinary diligence.
8. To make a full disclosure to his principal where he has an adverse interest.
9. Not to allow his private interest to control his duty to his principal.
10. To keep the goods, accounts, and moneys, of his principal separate from his own.
11. To render full and confidential reports of his dealings, and full accounts of his receipts and disbursements as agent, to his principal.
12. To act in all matters connected with the business of his principal, as he would expect his agent to act, if he had such an agent.

#### ILLUSTRATIONS.

A firm acting as agents for another, purchased a load of coal, without stating that they were agents, and sent in payment a draft drawn by themselves on their principals, adding the word "Agents" to their own signature:—Held, that they were personally liable as drawees; *Reid v. McChesney*, 8 U. C. C. P. 50.

Sec. 26.

If an agent for A. draws a bill upon B. in favor of C. though he directs B. to place the amount to A.'s debit, the agent will be personally liable to C. if this bill is not paid, though C. knew he was only agent for A., unless he uses proper words to prevent such liability: *Leadbitter v. Farrow*, 5 M. & S. 345.

"A. & Co., by A. junr.," *prima facie* imports that A. signs the note for, and not as one of, the firm: *Dowling v. Eastwood*, 3 U. C. Q. B. 376.

A defendant's indorsement made by his wife, though in her own name, but afterwards recognized by defendant, would make him liable to an action on the bill: *Ross v. Codd*, 7 U. C. Q. B. 64.

Bills were drawn by a house in London on a house in Lisbon, payable thirty days after sight, and indorsed to A. in London. A. indorsed them, without any qualification to B. at Paris; B. without presenting them for acceptance, put them in circulation, and on being presented at Lisbon for acceptance, they were dishonored. In an action by B. against A.—Held, that A. was bound by his unqualified indorsement, and could not offer evidence to show that he was acting merely as B.'s agent: *Goupy v. Harden*, 7 Taunt. 159.

The plaintiff supplied the defendant with goods ordered through M., the plaintiff's traveller, and the defendant by way of payment accepted a bill drawn by M. upon the defendant, and made payable to his order. M. absconded, having cashed the bill, and its value did not reach the plaintiff, who then sued the defendant for the price of the goods. It was proved that M. had on a prior occasion, taken payment by a bill drawn in blank and accepted by the defendant, which the plaintiff had afterwards filled up and cashed, and also that the plaintiff had written a letter to M. which was shown to the defendant, in which he intimated a wish to draw upon him for an amount due;—Held, that neither the previous dealing nor the letter of the plaintiff to M. was evidence of an authority to M. to draw a bill in his own favour: *Hogarth v. Wherley*, L. R. 10 C. P. 630.

The treasurer of a Railway and Canal company accepted a bill drawn upon him as such treasurer, thus—"Accepted, W. A. G. Treas. W. I. R. W. & C. Co." adding the company's seal:—Held, that he was personally liable: *Foster v. Geddes*, 14 U. C. Q. B. 239.

A bill drawn by one defendant as secretary, on, and accepted by the other defendant as president of, a railway company, did not come within the provisions of the company's charter authorizing the drawing of bills to be accepted by the president and countersigned by the secretary; and both were held personally responsible: *Bank of Montreal v. Smart*, 10 U. C. C. P. 15.

In an action against an acceptor on the following bill of exchange:—" \$800.—Montreal, Feb. 19, 1869.—Two months after date, pay to the order of myself, at the Jaques Cartier Bank in Montreal, eight hundred dollars, value received, and charge the same to account of E. E. G." and addressed to the Secretary, Richardson Gold Mining Company, Belleville, Ontario, was accepted thus—"The Richardson Gold Mining Co., per James Glass, Secretary:"—Held, not to be the acceptance of the secretary, and that he was not personally liable: *Robertson v. Glass*, 20 U. C. C. P. 250.

A director of a company signed by himself and other directors a note, as follows: "We, the directors of the Royal Bank of Australia, for ourselves and other shareholders of the company, jointly and severally promise to pay G. H. W. or bearer, on the 19th of February, 1850, at the



Union Bank of London, £200, for value received on account of the company ;"—Held, that he was personally liable : *Penkivil v. Connell*, 5 Ex. 381. Sec. 26.

A bill was directed to the joint managers of an Insurance Association, was accepted thus : "Accepted, J. J., W. S. as joint managers of the Royal Mutual Marine Association ;"—Held, that they were personally liable, and that the introduction of the word "as" before the words "joint managers," made no difference with respect to such liability : *Jones v. Jackson*, 22 L. T. Rep. 828.

A. directed a bill to a company of limited liability by its name without the addition of the word "Limited," which was accepted by the secretary as follows : "Accepted, payable to Messrs. B. & Co., J. M. secretary to the company ;"—Held, that the secretary was personally liable by reason of the omission of the word "limited" in the name of the company as required by the Act : *Penrose v. Martyr*, E. B. & E. 499.

A note signed by four persons, describing themselves as "directors of the Financial Insurance Company, (limited)" and countersigned by "C. G. G. Manager," in these words, "three months after date we promise to pay the English Joint Stock Bank, (Limited) or order £1,000. value received," was held binding on the persons who signed it : *Courtauld v. Sanders*, 16 L. T. Rep. 562.

The president of a company which was authorized to borrow money and make notes, acting upon a resolution of the directors, signed the note in question, but it appeared that the directors had not been appointed as required by the Act ;—Held that the resolution sufficiently complied with the Act ; and that, as the statute empowered the directors to authorize the president to sign notes, and the plaintiff had accepted such notes in good faith, and the proceeds of which were applied for the purposes of the company, it might be presumed that the proper authority had been given : *Currier v. Ottawa Gas Co.*, 18 U. C. C. P. 202.

The charter of a company provided that all evidences of debt of the company should be issued and signed by the President and Treasurer. Upon a note signed by such officers with the addition of their official titles, and to which the seal of the company was affixed :—Held, that the officers were not personally liable : *City Bank v. Cheney*, 15 U. C. Q. B. 400.

A note written thus : "The President and Directors of the Woodstock Glass Co.," promise to pay, &c., and signed by the President ;—Held, binding on the company, although its real name was the "Woodstock Glass Company :—" *Mott v. Hicks*, 1 Cow. (N. Y.) 513.

An instrument issued by an insurance company in this form : "To the cashier, Thirty days after date, credit Mrs. A. or order with £311 9s. 6d., claims per Susan King, in cash, on account of this corporation," and signed by two of the directors of the company, is binding on the company as a note, notwithstanding it may not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding upon the shareholders : *Allen v. Sea Fire and Life Assurance Co.*, 9 C. B. 574.

The following instrument was signed by two directors of an insurance company, and sealed with the seal of the company : "Three months after date, we, two of the directors of the Ark Life Insurance Society, by and on behalf of the Society, promise to pay to Mr. May, or order, £67 15s. 6d. value received." There was no counter signature by the secretary of the company ;—Held, a note binding on the company, and not on the parties who signed it : *Aggs v. Nicholson*, 1 H. & N. 165.

## Sec. 26.

A note was signed by three directors and the secretary of a company incorporated with limited liability, in the following form: "Three months after date we jointly promise to pay S. or order £600 for value received in stock, on account of the L. and B. Hardware Company, limited;"—Held, that they were not personally liable upon the note: *Lindus v. Melrose*, 3 H. & N. 177.

See also the cases cited in notes to ss. 17 and 23.

<sup>2</sup> As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are, by our law, generally held personally liable on bills and notes, because they have no authority *ex directo*, to bind the persons for whom, or for whose benefit, or for whose estate, they act; and hence to give any validity to the bill or note, they must be deemed personally bound as drawers or makers. It is true they may exempt themselves from personal responsibility by using clear and explicit words to show that intention, but in the absence of such words the law will hold them bound. Thus if an executor or administrator should draw or indorse a note, or accept or indorse a bill in his own name adding thereto the words "as executor," or "as administrator," or "as trustee," he would be personally responsible for the amount of the bill or note. If he means to limit his responsibility he should confine his stipulation to pay out of the estate: *Story on Bills*, s. 74. But a person so signing a bill or note, will not give the holder the right to charge the estate, or to have the trust estate administered so as to rank as a creditor; for the assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased: *Lovell v. Gibson*, 19 Grant 280. But if the testator directs his property to be used by his executors in carrying on his trade, persons who become trade creditors of the executors have no claim on the general assets of the estate, but only on so much of it as was employed in such trade at the time of the testator's death: *McNeillie v. Acton*, 4 DeG. M. & G. 744, s. p. *Smith v. Smith*, 13 Grant 81. And such trade creditors who rely on the credit of the testator's estate should look to the will, to ascertain the extent to which the testator has authorized his assets to be embarked in trade: *Cuthush v. Cuthush*, 1 Beav. 184. But a provision in a trust deed indemnifying the trustees out of the estate for the expenses of the trust, does not give the creditors of such trustees in respect of such expenses, a right to claim as creditors against the trust estate or its funds: *Worrall v. Halford*. 8 Ves. 4.

## ILLUSTRATIONS.

The defendants as executors purchased goods of the plaintiffs, and gave notes: "We, as executrix and executors of the late B. P., promise," &c., signed by defendants, "executrix and executors of B. P., deceased";—Held, that they were personally responsible: *Kerr v. Parsons*, 11 U. C. C. P. 513. See also *Gore Bank v. Crooks*, 26 U. C. Q. B. 251.

Executors carried on the testator's business after his death, and in the ordinary course of such business accepted a bill, describing themselves in it as executors of their testator;—Held, that neither these circumstances

nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary liability upon the bill: *Liverpool Borough Bank v. Walker*, 4 DeG. & J. 24.

Sec. 26.

A note given by an executor, so carrying on the testator's business, to a creditor, but in the name of the testator's firm, where the testator's estate is insolvent, is binding on the executor: *Lucas v. Williams*, 3 Giff. 150; s. c., 4 DeG. F. & J. 436.

A. & B. signed a note, by which they promised "as churchwardens and overseers" to pay to C. or order a sum of money with interest; which sum was in fact the amount of a loan made by C. for the use of the church;—Held, that A. & B. were personally liable: *Rew v. Pettet*, 1 A. & E. 196. See *Furnival v. Coombs*, 6 Scott N. R. 522.

Where one gives a note as guardian of a minor, although it is so stated in the body of the note, he is personally liable: *Foster v. Fuller*, 6 Mass. 58.

Where individuals subscribe their proper names to a note, *prima facie*, they are personally liable, though they add a description of the character in which the note is given; but such presumption of personal liability may be rebutted as between the original parties, by proof that the note was given by the makers as agents with the payee's knowledge: *Brockway v. Allen*, 17 Wend. 40.

A bill drawn on "Steamer C. W. D. and owners," and accepted by "steamer C. W. D. per B. agent" binds B.'s principals the owners of the steamer; and they can be sued by their proper names: *Alabama, &c., Co. v. Brainard*, 35 Ala. 476. *Sed contra*, *Ormsby v. Kendall*, 2 Ark. 338.

A note as follows: "We the undersigned trustees of the church and in behalf of the whole board of trustees," signed by two of the trustees, binds the church, as the agency sufficiently appears on the face of the writing: *Haskell v. Cornish*, 13 Cal. 45. *Sed contra*, *Barker v. Mechanics Insurance Co.*, 3 Wend. (N. Y.) 94.

<sup>3</sup> See the cases as to the signature of agents of individuals or officers of companies given in note 1 to s. 25.

<sup>4</sup> The effect of this is that whether the agent of another, or the officer of a company, had or had not authority to sign the bill or note, the construction to be given to it shall be that which is most favorable to its validity as a bill or note for the payment of money, and the consequent liability of some of the parties signing the bill. In all such contracts it must be remembered that some person or company is intended to be bound by the bill or note; and if the principal has not been bound at law or in equity, the party making the representation of the liability of such principal must, in the absence of the words "*sans recours*," or "without recourse," be held liable. The general result of the cases is however conflicting; and no clearly defined rule can be stated as to what form of acceptance will free the agent or officer from personal liability. The French law treats the bill or note given by an agent, or a person in a representative character as strictly the contract of the principal, through the instrumentality of the agent, trustee, guardian, or other person acting *en autre droit*; but if the principal is incapable of contracting, or has not

Sec. 26. authorized the contract, the agent is personally liable: *Story on Bills*, s. 75. "This section somewhat modifies the rigor of the common law rule:" *Chalmers on Bills*, 80.

### *Consideration for a Bill.*

Valuable consideration defined. Imp. Act, s. 27

27. Valuable consideration for a bill <sup>1</sup> may be constituted by—

(a) Any consideration sufficient to support a simple contract: <sup>2</sup>

(b) An antecedent debt or liability; such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time: <sup>3</sup>

Rights of holder for value.

2. Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time: <sup>4</sup>

Holder by lien is a holder for value.

3. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. <sup>5</sup>

<sup>1</sup> A consideration founded on mere love, or affection or gratitude (which in a legal technical sense is called a good consideration in contradistinction to a valuable consideration), is not as a general rule, sufficient consideration for a bill of exchange, or a promissory note. Nor is a mere moral obligation, although coupled with a express promise, a sufficient consideration. These observations relate to a consideration for the bill as between the immediate parties, and are not applicable to the title of a holder in due course. The true doctrine seems to be that a consideration which the law esteems valuable, must in all cases exist, in order to furnish a just foundation for an action on a bill or note.

#### ILLUSTRATIONS.

A son gave his note for a debt owing by his father to the holder of the note, for which he was not responsible;—Held, that there was a good consideration for the note, viz., family affection: *Cook v. Long*, Car. & M. 510.

A note expressed to be for value received was made in favor of an infant aged nine years, who was the child of another person;—Held that neither gratitude to the infant's father, nor affection for the child, was a sufficient consideration for the note: *Holliday v. Atkinson*, 5 B. & C. 501.

A defence that the note was made to the holder as a gratuity, and that the maker never received any consideration therefor, is good: *Poulton v. Dolmaje*, 6 U. C. Q. B. 277.

A note given by testator in renewal of a previous note to secure a sum of money to a god-child, on which note the testator had paid interest ;—Held, the renewed note constituted a debt, but not to the prejudice of creditors : *Dawson v. Kearton*, 3 Sm. & Gif. 186 ; 2 Jur. N. S. 113. Sec. 27.

The want of consideration *in toto*, or in part, cannot be set up as a defence, if the plaintiff or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valid consideration : *Morris v. Lee*, Bayley on Bills, 397.

The partial failure of the consideration for which a promissory note was given, is no defence to an action on the note, without evidence of fraud : *Kellogg v. Hyatt*, 1 U. C. Q. B. 445.

Nor that the consideration proved to be less beneficial than was represented : *Dalton v. Lake*, 4 U. C. Q. S. 15.

But an entire failure of consideration is a good defence to an action brought by the vendor of goods as payee : *Kellogg v. Hyatt*, 1 U. C. Q. B. 445.

Parol evidence is admissible to disprove receipt of value for a bill or note, but not to vary the engagement to pay : *Davis v. McSherry*, 7 U. C. Q. B. 490.

A. made jointly with B. a lease of certain lands to C., taking notes from C. for the rent, payable at the time it would become due. The day after the execution of the lease, A. died intestate, and then B. died, and B.'s executor's sued C. on the notes ;—Held, that they could not recover, the consideration for the notes having failed : *Mervin v. Gates*, U. C. E. T. 7 Will. IV.

To an action on a note, defendant pleaded that it was given on an agreement by plaintiff to pay one M. a certain sum, which he had not done ;—Held, no defence : *Matthewson v. Carman*, 1 U. C. Q. B. 266.

Where a note was given by one partner to another so as to raise money to pay off a debt of the firm, the maker is not liable thereon to his partner : *Miller v. Thompson*, 10 U. C. Q. B. 391.

A note made to a wife during coverture may be sued by husband and wife. The note imports a consideration for the promise, and the wife is the meritorious cause of action : *Philliskirk v. Pluckwell*, 2 M. & S. 383.

A guarantee endorsed on a note at the time of its execution in the following words : "We guarantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds : *Lock v. Reid*, 6 U. C. O. S. 295.

Where a bill was given for the purchase of shares in a ship, which ship was burned on the morning of the day on which the bill was delivered, but the hull was afterwards sold for \$500 ;—Held, that there was not a total failure of consideration : *Whitman v. Parker*, 5 Russ. & Gel. 155.

The following have been held void for want of a sufficient consideration :

C.'s note given for the purpose of paying A.'s debt to B. : *Bingham v. Kimball*, 17 Ind. 396 ; s. p. *Tousey v. Taw*, 19 Ind. 212.

A note given by A. to B. for a debt due by C. upon a consideration of forbearance, and upon no privity shewn between A. & C. : *McGillivray v. Keefer*, 4 U. C. Q. B. 456.

A note founded upon a mere moral obligation to pay, money : *Nightingale v. Barney*, 4 Greene, (Iowa), 106.

Sec. 27.

A note given by a person to an officer of a benevolent organization for his initiation fee, and for his quarterly dues as a member: *Nash v. Russell*, 5 Barb. 556.

A promissory note, the only consideration of which is the love and affection of the maker to the payee: *Smith v. Kittridge*, 21 Vt. 238.

A note given in consideration of a supposed claim made before suit upon such claim, when in fact no such claim existed: *Sullivan v. Collins*, 18 Iowa, 288, s. p. *Bullock v. Agburn*, 13 Ala. 346.

A note given *in extremis*, payable at the death of the maker, and signed by two witnesses: *Hall v. Howard*, 1 Rice, (S. C.) 310.

A note put up as a forfeit to secure the performance of a verbal sale of land: *Weatherley v. Choate*, 21 Tex. 272.

A note given by an heir as a memorandum or evidence of an advancement made to him by the payee: *Hardin v. Wright*, 32 Mo. 452.

A note given in order to obtain possession of the maker's goods, which were wrongfully withheld: *White v. Heylman*, 34 Pa. St. 142.

A note given to the mother of a child, who had been beaten, in consideration of her not prosecuting: *Heast v. Sybert*, Cheves, (S. C.) 177.

A note given by a widow to a creditor of her deceased husband, for the amount of his debt, where the husband had left no estate or assets, though the creditor gave to the widow a receipted bill, acknowledging payment: *Williams v. Nichols*, 10 Gray, (Mass.) 83.

A banking firm advanced money to A. and took a note for such advance, which was signed by A. and his wife, who had no separate property. A died insolvent, and after his death the bank obtained a new note from the widow. It being doubtful whether the widow knew that she was not liable on the first note, her non-liability was not mentioned to her: *Coward v. Hughes*, 1 K. & J. 443.

<sup>2</sup> The consideration for the promise in bills of exchange and promissory notes to pay money, as well as the indorsement of such bills and notes, unlike the case of other contracts, is presumed until the contrary is proved. Bills and notes on their mere production, even without the words "for value received," are *prima facie* evidence of valuable consideration, not only between the original parties, but as against third persons. In all cases where the bill or note can be used in evidence, either as against the parties to it, or against third persons, the same legal presumption arises as to its having been given for value, as arises in the case of a deed under seal. A bill or note, therefore, although according to the general principles of the common law is to be considered in the light of a simple contract, is nevertheless in this respect entitled the privilege of a specialty; for it, like the contract under seal, carries with it the evidence of a valuable consideration. This privilege always belonged to foreign bills, and was, after some struggles, conceded to inland bills and promissory notes. But it is confined to negotiable paper, and does not extend to orders not payable in money. "Some of the peculiar privileges of bills of exchange are of a nature giving them a peculiar sanctity and obligation, and freeing them from the equities and cross claims which may exist between the original parties. These are allowed in order to give them a ready circula-

tion and extensive credit:" *Story on Bills*, s. 14. It was formerly held that a prior want of consideration was an equity attaching to an overdue bill or note in the hands of holder for value: *Ex parte Lambert*, 13 Ves. 179; *Brown v. Davies*, 3 T. R. 180; but such is not the law now: *Re Orendun Gurney & Co.*, L. R. 6 Eq. 344. Inadequacy of consideration or considerable under-value, may be an important element in cases alleging bad faith or fraud: *Jones v. Gordon*, 2 App. Cas. 616. But such inadequacy of consideration must be distinguished from a partial absence or failure of consideration, or a part payment on account, or a limited advance made on a bill or note pledged or deposited as security for such advance.

Sec. 27.

#### ILLUSTRATIONS.

Although notes and indorsements, as simple contracts, require a consideration, it has long been held that they import a consideration, *prima facie*, so as to throw the burden on the other side to show the want of a consideration: *McArthur v. McLeod*, 6 Jones (N. C.) 475.

Where a father gave his note in consideration of the payee marrying his daughter, which marriage was had in fact, and believed to be valid;—Held, that the marriage in fact was a sufficient consideration: *Wilkinson v. Payne*, 4 T. R. 468.

On a treaty of marriage a promissory note was given in consideration of the marriage, which was afterwards solemnized, and an action was subsequently brought by the indorsee against the makers of the note;—Held, that as the marriage, the consideration for the note, could not be undone, it was not competent to the makers to avoid the note upon the ground of fraud practiced during the marriage treaty: *Hogan v. Healy*, 11 Ir. C. L. R., 119; reversing 10 Ir. C. L. R., 6.

A note promising to pay the Church Society of the diocese of Toronto or bearer, £50. with interest, towards providing a fund for the support of a Bishop of the western diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity;—Held, to be founded upon a sufficient consideration: *Hammoud v. Small*, 16 U. C. Q. B. 371.

It is a good defence to an action on a note by the payee against the maker that such note was made for a special purpose only, to wit, that the payee should take care of it for the maker, and should not negotiate or part with it to any other person, and that there never was any other value or consideration for the note: *Wismer v. Wismer*, 22 U. C. Q. B. 446.

A note was made and delivered to plaintiff in payment of 200 hats and caps, to be delivered by plaintiff to defendant, which at the time of action remained undelivered;—Held, no defence, there being no request for their delivery: *Anderson v. Jennings*, 2 U. C. Q. B. 422.

There is plain authority that even as between the original parties, where one buys goods worth more than \$40, and gives his note for them, he cannot refuse to take the goods, and then repudiate the note, because of the goods not having been delivered,—seek to defeat the contract by his own act or default, and then repudiate the note, because the contract had failed: *Per Thompson, J.*, in *McIntosh v. McLeod*, 6 Russ. & Gel. 134.

<sup>3</sup> It was formerly supposed to be uncertain how far an antecedent debt was a sufficient consideration for a negotiable security payable on demand; although it was clear that a pre-existing debt due to the transferee of a

Sec. 27. bill, entitled him to all the rights of a holder for value, a protection which was given to such a holder on the grounds of commercial policy only, and in order to favour the unrestricted use, as currency, of negotiable paper. But it is now settled that the giving of a negotiable security payable on demand for an antecedent debt is a conditional payment of the past due debt, the condition being that the debt revives if the security be not realized: *Currie v. Misa*, L. R. 10 Ex. 153. Where there is a precedent duty which would create a sufficient legal or equitable right, if there had been an express promise at the time, or where there is a precedent consideration, which is capable of being enforced, and is not extinguished at the option of the party, founded upon some bar or defence which the law justifies, but does not require him to assert, there an express promise will create or revive a just cause of action. "Where a man is under a legal or equitable obligation to pay, the law implies a promise though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation which no Court of equity or law can enforce, and promises, the honesty and rectitude of the thing is a consideration; as if a man promises to pay a just debt, the recovery of which is barred by the Statute of Limitations. Or if a man after he comes of age promises to pay a meritorious debt contracted during his minority though not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promises to perform a secret trust, or a trust void for want of a writing by the Statute of Frauds. In such and many other instances, though the promise gives a compulsory remedy, where there was none before either at law or in equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration:" *Per Lord Mansfield, C. J., in Hawkes v. Saunders*, 1 Cowp. 290.

#### ILLUSTRATIONS.

A pre-existing debt is a good consideration in whole or in part for a note or bill: *Gooderham v. Hutchison*, 5 U. C. C. P. 241.

There is no distinction as regards consideration, between a note given for a pre-existing debt and for a new consideration: *Evans v. Morley*, 21 U. C. Q. B. 547.

A note was given by defendant, secretary of an insurance company, for a loss, the policy having been marked "cancelled." and left in the possession of the company, and the note was not payable until three days after the loss would be payable by the policy;—Held, a sufficient consideration: *Armour v. Gates*, 8 U. C. C. P. 548.

A debt due to a bankrupt estate, is a good consideration for notes given to the trustees and assignees of the estate: *Gates v. Crooks*, Dra. Rep. 459.

A debt due by a third party, but not yet payable, may form a valid consideration for a note given as collateral security for such debt: *Dickenson v. Clemow*, 7 U. C. Q. B. 421.



A note given by a man for his delay to fulfil a promise of marriage, and for household services rendered to him by the woman during the engagement, is valid, notwithstanding that other reasons, in addition to these, may have induced him to give the note: *Prescott v. Ward*, 10 Allen (Mass.) 203. But see *Raymond v. Sellick*, 10 Conn. 480. } Sec. 27.

The mere fact of forbearance would not be a consideration for a debt; but a binding promise to forbear, or an actual forbearance at a request express or implied, would be a good consideration for a promissory note: *Crears v. Hunter*, 19 Q. B. D. 341.

A note given to a committee appointed to relieve sufferers from a fire, being a special contract with such committee, is valid: *Bayou Sara v. Harper*, 15 La. An. 233.

<sup>4</sup> This clause may apply to the class of securities known as accommodation bills or notes transferred to a holder for value, or to a bill or note in the hands of a holder, who has not himself given value for it, but has received it from one who is a holder for value, and who has all the rights of a "holder in due course." The holder of such a bill or note has the rights of such holder in due course against all parties to the bill or note, except the person from whom he may have received it. See note 7, p. 125.

#### ILLUSTRATIONS.

Value arising at any time during the currency of a note, is sufficient: *Blake v. Walsh*, 29 U. C. Q. B. 541.

A member of a joint stock association, not incorporated, lending a sum of money out of the joint fund to another member and taking from him a note payable to himself, individually, for re-payment, is a sufficient consideration, notwithstanding that the funds were advanced from the common stock: *Comer v. Thompson*, 4 U. C. O. S. 256.

Where a stockholder in a joint stock company had given notes for his stock, which he afterwards forfeited by not complying with the conditions of the association:—Held, that he could not set up such a forfeiture as a defence to an action on the notes: *Glassford v. McFaul*, U. C. T. T. 3 & 4 Vict.; s. p. *Pine River Bank v. Hodslon*, 46 N. H. 114; *Burk's Case*, *Re Central Bank*, 1890.

A. indorsed a note for \$1230, for the purpose of enabling the maker to obtain, as an additional advance, the difference between that sum and a loan of \$918, which had been advanced to him before the making of the note; the additional advance, was, however, not made;—Held, that A. was not liable as an indorser for the \$918 originally loaned: *Greenwood v. Perry*, 19 U. C. C. P. 403.

Where the remitter of a foreign bill has received credit from the drawer, and the payee gives the remitter full consideration for the bill, but the remitter does not pay the drawer, the payee may maintain his action against the drawer, although the drawer has never received any consideration: *Muuroe v. Bordier*, 8 C. B. 862.

H. W. & Co., American merchants, were indebted to P. & Co., of Paris, and C. & Co., of London, and being pressed for payment by P. & Co., remitted funds to C. & Co., which paid and overpaid them, with a direction to remit the balance to P. & Co. in Paris. C. & Co. then bought in London a bill on Paris, drawn by M. & Co. to the order of C. & Co. to be remitted at once to Paris to be paid for by C. & Co. on the next

**Sec. 27.** foreign post day. The bill was so remitted, but before the next foreign post day C. & Co. failed, and thereupon M. & Co. refused to pay the bill. P. & Co. were afterwards paid by H. W. & Co. in full. In an action by P. & Co. on behalf of H. W. & Co. against M. & Co. on the bill;—Held, that P. & Co. were entitled to recover as holders for value of the bill; or if suing for H. W. & Co., C. & Co. were only correspondents of H. W. & Co., to remit the bill, and were not their agents to pledge their credit for the price of the bill: *Poirier v. Morris*, 2 E. & B. 89; 17 Jur. 1116.

Corn merchants in California agreed to sell cargoes of wheat to a miller in England, for which he was to give his acceptance against the bill of lading. The bill of lading was made out in six parts. Three parts, with corresponding bills of exchange drawn on the miller, were indorsed by the corn merchants, and transferred to a Californian bank for value, and were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and was transferred by him to an English bank for value. The bills of exchange were not met by the miller;—Held, that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice: *Gilbert v. Guignon*, L. R. 8 Ch. 16

<sup>5</sup> The discount of a bill must be distinguished from the pledge or deposit of a bill as security. A discount is a holder for full value. The position of a pledgee (or mortgagee) is this. If he sue the acceptor or indorsers, he sues as trustee for the pledgor, and must account to him for the difference between the amount he has advanced, with interest and costs, and the amount recovered by him on the bill. If the pledgor could have sued on the bill, the pledgee can recover the whole amount due on the bill. And if the pledgor is a holder in due course, he will not be affected by any defect of title in the pledgor (ss. 29 and 38). Like every other holder in due course, the pledgee of a bill must use due diligence with reference to it, having regard to the nature of the security pledged, and the duties of the holders of bills or notes as defined by the Act, otherwise he may, through negligence, release the parties to the bill, and become responsible to the pledgor for any loss sustained by his negligence. A banker's lien is an implied pledge of his customer's securities; and, in the absence of an agreement to the contrary, he has a lien on all bills received from his customer in the ordinary course of banking business for any balance that may be due from such customer. *Prima facie*, where a bill is negotiated from one person to another, it is deemed to have been wholly transferred to him, and not to have been pledged or deposited as collateral security: *Chalmers on Bills*, 78. See further, note 5, p. 25.

#### ILLUSTRATIONS.

The defendants made a note for £200 to one M., to assist M., in retiring paper in which the defendants were interested. M. discounted his own note for £200 with the bank, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, M. paid \$25 and gave a renewal for \$175, leaving defendants' note with the bank;—Held, that as the note was transferred to the bank as security for the original debt, and not for M.'s note specially, the defendants remained liable: *Canadian Bank of Commerce v. Woodward*, 8 App. R. 347.

## Sec. 27.

Where certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note had been partly paid, and a new note given, the holder of the note is entitled to retain such securities until the whole amount of the original note is discharged by payment: *Wiley v. Ledyard*, 10 Ont P. R. 182.

One M. made a note payable to T. or order, for \$4,000, which was discounted by the bank for T. Afterwards a note for \$1,500 made by W. payable to T., and indorsed by M. for T.'s accommodation, was handed to the bank by T. as collateral security for the \$4,000 note, and the bank also advanced on it \$1,000 to T. This note, when it fell due was retired by another note for \$1,500, made by W., payable to T. and indorsed by T. and by M. to the bank, and was given for the same purpose as the previous \$1,500 note. The bank received \$1,200 from T. on account of the \$4,000 note, and the plaintiff, who was one of the indorsers on that note, paid the balance. In an action on this renewal note by the plaintiff against W. & M.:—Held, that he was entitled to recover; for, 1. He was the holder of the note: 2. The note being deposited with the bank as collateral security for the \$4,000 note, and not merely for the \$1,000 advanced on it, the bank held it for the full amount; 3. If the note could not be said, when taken, to be a security for value because the \$4,000 note had not then matured, it became so when the latter note fell due, and value arising at any time during the currency of a note is sufficient: *Blake v. Walsh*, 29 U. C. Q. B. 541.

Where a bill is remitted to another, indorsed merely to enable the party receiving it to raise money to meet future advances, it is while retained for such advances a mere deposit, applicable to the demands of the remitter, but if such remitter negotiates it, he constitutes the party with whom it is negotiated a holder. Indorsement is *prima facie* evidence of the discount of a bill, but the agreement of mere deposit may be shewn: *Ex parte Twogood*, 19 Ves. 229.

A mere discount of a bill, without the indorsement of the party who receives the money, does not give the holder of the bill any claim against such party: *Ex parte Roberts*, 2 Cox. 171.

Bankers may pledge bills deposited with them by a customer, though such customer is a creditor and not a debtor: and the parties to whom the bills are pledged, may hold them if they are unacquainted with that circumstance: *Collins v. Martin*, 1 B. & P. 648.

And the bank may negotiate them to such an extent as the necessary demands of their customer may require, without his express authority: *Thompson v. Giles*, 3 D. & R. 733.

A promissory note given by principal and surety for a definite sum payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note, and if the payee asserts as against the surety that the note was to secure the balance of an account due by the principal to the payee, the burden of proof lies on the payee: *Re Boys*, L. R. 10 Eq. 467.

The holder of promissory notes, transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before that liability arises; and the payee has no control over them so as to enlarge or vary the maker's liability: *Ross v. Tyson*, 19 U. C. C. P. 294.

Where promissory notes were given to a creditor by his debtor as collateral security for the debt, unless the debtor suffers by the tardiness or laches of his creditor in collecting such notes, he is not damnified; and if he is demiffied, then such debtor is released to the extent of the loss caused by the creditor's laches: *Ryan v. McConnell*, 18 Ont. R. 409.

## Sec. 28.

Accommodation party defined, Imp. Act, s. 28 Ind. Act, ss. 43 & 52.

His liability to holder for value.

28. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person :<sup>1</sup>

2. An accommodation party is liable on the bill to a holder for value ; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.<sup>2</sup>

<sup>1</sup> The object of an accommodation bill is to enable the parties thereto, by a sale or other negotiation thereof, to obtain a free credit and circulation of such bill. The parties to every accommodation bill hold themselves out to the public, by their signatures, to be absolutely bound to every person who shall take the same for value, to the same extent as if that value were personally advanced to themselves, or on their own account, and at their own request : *Story on Bills*, s. 191. In common language, a bill accepted or indorsed without any consideration to the party making himself liable on the bill, is called an accommodation bill ; but, in strictness, an accommodation bill is not merely a bill accepted or indorsed without value received by the acceptor or indorser, but a bill accepted or indorsed without value by the acceptor or indorser, to accommodate the drawer, or some other party, *i. e.*, that the party accommodated may raise some money upon it, or otherwise make use of it. This distinction is of importance ; for a party accepting a bill merely without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and is afterwards sued on that bill, he cannot charge the drawer with the costs of defending the action ; whereas the acceptor of an accommodation bill, properly so called, who is compelled by an action to pay it, has a claim upon the drawer for all the expenses of the action : *Byles on Bills*, 323. By an accommodation bill or note the acceptor of the bill, or maker of the note, becomes the principal debtor according to the form of the instrument ; but whether a party is in that capacity, or is an accommodation indorser, he is a surety for the person who obtains value for the bill or note ; and it is the duty of such person to pay the bill or note at maturity. Where there is an account between the parties, and bills are accepted, those are not strictly accommodation bills : *Oriental Financial Corporation v. Overend*, L. R. 7 Ch. 146*n*. See also *s. c.*, L. R. 7 H. L. 348. Presentment for payment is dispensed with where the accommodation bill or note is accepted or made for the benefit of the indorser : s. 46 (2) (*d*) ; as also notice of dishonor : s. 50 (2) (*d*) ; and as a consequence it may be inferred that protest is also dispensed with : s. 51 (9). An accommodation bill when paid by the party accommodated is discharged : s. 59 (3). By s. 36 (2), an overdue bill can only be negotiated subject to any defect of title affecting it at maturity ; and

it has been held that if an accommodation bill be negotiated when overdue, the holder cannot recover, for the bill is in terms a credit for a limited time, and to negotiate it after that time is a breach of faith: *Chester v. Dorr*, 41 N. Y. 279. Where an accommodation bill is taken by a person after it has been dishonored, inasmuch as the drawer cannot recover, neither can the holder from such drawer do so: *Re Overend, Gurney & Co.*, L. R. 6 Eq. 344.

Sec. 28.

#### ILLUSTRATIONS.

An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law: *Dornes v. Richardson*, 5 B. & A. 674.

An accommodation acceptor of a bill of exchange, is a surety, as to the drawer, but a principal as to the holder, although the holder knew him to be an accommodation acceptor: *Bank of Toronto v. Hunter*, 4 Bosw. (N. Y.) 646.

Accommodation indorsers, after the note on which they were liable had matured, may obtain a relief in equity against the holder and maker to enforce payment by the latter: and the maker will be ordered to pay the costs both of the plaintiff and of the holder of the note: *Cunningham v. Lyster*, 13 Grant 575.

The maker of a note being indebted to the payee, procured A. to indorse it as surety to the payee, who had previously indorsed it in blank, and afterwards "without recourse." The note was sued by the plaintiff on behalf of the payee;—Held, that the plaintiff was entitled to recover against A: *Smith v. Richardson*, 16 U. C. C. P. 210.

Where a corporation having a debt to pay, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, the accommodation maker is entitled to relief against the corporation. And if the maker had been compelled to pay the debt he would be entitled to stand in the place of the corporation creditor: *Burnham v. Peterborough*, 8 Grant 366.

D. indorsed a promissory note for the accommodation of W., who discounted it, and gave D. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. during the currency of the note absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. to take up the note, which D. did before maturity. W. told D. that he had got the money from M. with whom he had had dealings, as D. knew, but D. had no notice of any wrong doing in connection with the money;—Held, that the mortgage ceased to be an incumbrance on the land when the note was retired: and that M. could not follow his money into the note held by D., nor the security held by him: *Jack v. Jack*, 10 Ont. R. 1: 12 App. R. 476.

<sup>2</sup> But any such accommodation party being merely a surety, may be released by the holder giving time to the principal debtor on such bill or note. The surety has the right as soon as his obligation to pay has become absolute to be exonerated by his principal. And where the principal debtor has a good defence at law or in equity against the creditor, the surety has also a right to set up a similar defence: *Becherraise v. Lewis*, L. R. 7 C. P. 373. Much confusion often arises from a common practice

**Sec. 28.** in this country of taking notes to a bank for discount; not, as in the proper course of business, from the party whose name appears last thereon as indorser, and who is legally held to be the holder under prior parties, but taking them from the maker, who brings them to the bank with one or two names on the back as indorsers, and tries to have them discounted. The experience of years has proved too clearly that persons will always be ready to borrow money upon any terms, and afterwards to refuse payment on any ground, with or without merits, that ingenuity may suggest: *Per* Hagarty, J., in *Bank of Montreal v. Reynolds*, 25 U. C. Q. B. 361. As to the rights and equities of accommodation parties, *inter se*, as co-sureties, see note to s. 59 (3) *post*.

## ILLUSTRATIONS.

Although the holder of a bill had notice when he took it that the acceptor had only accepted it for accommodation of the drawer, yet the acceptor is bound to pay it, and nothing can discharge him but payment, or a release: *Bank of Ireland v. Beresford*, 6 Dow 237.

In an action by the indorsee against the acceptor, it is competent to the acceptor to shew that the acceptance was for the accommodation of the indorsee, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by such indorsee: *Thompson v. Clibley*, 1 M. & W. 212.

A note was given by A. for £30 for the accommodation of the payee, but the holder advanced only £20 10s., to secure which it was transferred to him. The holder claimed that the sum advanced was to be paid at a particular time, but if not so paid, he was to hold the note for the whole sum secured by it;—Held, as A. was only an accommodation maker he could not be charged with more than the holder had advanced on the note: *Strathy v. Nicholls*, 1 U. C. Q. B. 32. See also *Greenwood v. Perry*, 19 U. C. C. P. 403.

Where the holder of a bill or note sues the drawers, acceptors, and indorsers, in one action, he may discharge the drawers, or indorsers, or accommodation acceptors, after, as well as before, judgment, without losing his remedies against the other parties liable in priority to those discharged: *Holcomb v. Hamilton*, 2 E. & A. 230. See also *Hamilton v. Holcomb*, 12 U. C. C. P. 38; 11 U. C. C. P. 93.

The payee of a note indorsed for the accommodation of the maker, having obtained judgment against the maker and indorser, may release the maker, reserving all his rights against the indorsers, may enforce such judgment against the accommodation indorsers: *Bell v. Manning*, 11 Grant 142.

The holder of an accommodation bill for value, after becoming aware of its being an accommodation bill, may release the drawer without releasing the accommodation acceptor: *City of Glasgow Bank v. Murdock*, 11 U. C. C. P. 138.

A security given to an accommodation indorser, does not enure to the benefit of the second indorser: *Smith v. Fralick*, 5 Grant 612.

A note was given by S. to M. & Co., and R. as accommodation indorser indorsed to M. & Co. The note was so treated to enable S. to obtain goods on credit from M. & Co. At the trial M. & Co. indorsed the note above R's name, adding "without recourse";—Held, that M. & Co., could recover: *Moffatt v. Rees*, 15 U. C. Q. B. 527. See also *Gunn v. McPherson*, 18 U. C. Q. B. 244.

The receipt by the holder of an accommodation bill, of composition notes of the acceptor, in pursuance of an arrangement in bankruptcy, is not equivalent to payment, and does not suspend his right of action against the accommodation drawer and indorser during the currency of such notes : *Provincial Bank of Ireland v. Dunne*, 2 Ir. L. R. 21.

The holder of an accommodation note may compromise with and release the accommodation maker, and may then hold the indorsers liable : *Sifton v. Anderson*, 5 U. C. Q. B. 305.

The holders of accommodation paper may rank upon the estate of and discharge the indorsers, even knowing the same to be accommodation paper, and may afterwards recover from the maker : *Lyman v. Dion*, 13 L. C. J. 166.

**29.** A holder in due course<sup>1</sup> is a holder who has taken a bill, complete and regular on the face of it,<sup>2</sup> under the following conditions, namely :—

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact ;<sup>3</sup>

(b) That he took the bill in good faith and for value,<sup>4</sup> and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it :<sup>5</sup>

2. In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud :<sup>6</sup>

3. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.<sup>7</sup>

<sup>1</sup> By the interpretation clause s. 2, a "holder" is defined to mean "the payee or indorsee of a bill or note who is in possession of it, or the bearer of it ;" and by the same section "bearer" is defined to mean "the person in possession of a bill or note which is payable to bearer." Though the Act generally has adopted the term "holder in due course," the old expression "holder for value," appears in ss. 27, 28 and 58.

Sec. 28.

Holder in due course defined.

Title defective in cases of fraud, duress, or other unlawful means.

Title of holder under holder in due course.

## Sec. 29.

<sup>2</sup> "A bill complete and regular on the face of it," *i. e.*, having all the requisites hereinbefore prescribed by the Act to make such bill a valid and negotiable security; and that there is nothing on the face of it indicating that it is incomplete or invalid in any respect (other than as indicated in s. 2 (4), *ante*); or that it is a suspicious, or doubtful, security requiring or inviting explanation or investigation. Any indication leading to any such conclusion, may convey to a business man of ordinary prudence a warning, which, if wilfully disregarded, may lead to loss of the security, or an expensive litigation. The maxim *caveat emptor*, would then give the warning: "let the purchaser who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution;" *Broom's Legal Maxims*, 605. The law-merchant in regard to the negotiability of bills and notes has made the despotic, but necessary, principle and rules of the common law, bend to the exigencies of commerce, and the usage of merchants. "The general rule of law is undoubted that no one can transfer to another a better title than he himself possesses: *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rules of the law-merchant as to negotiable instruments. These being part of the negotiable currency of the country, are subject to the same rules as money; and if such an instrument is transferred in good faith, and for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder:" *Whistler v. Forster*, 14 C. B. N. S. 257. But the negotiator for the purchase or pledge of bills of exchange or promissory notes has, notwithstanding the above enactment, and the old and well recognized rule of law in harmony with it, to make such purchase, or take such pledge, subject to the risk of forgery, and of his own carefulness or negligence in guarding against the defects in title defined by s. 29; or if he acquires the bill or note without the indorsement of the transferor, then only with the warranty defined in s. 58 (3). See notes to ss. 20, 22, 24, 24, 54, and 55.

<sup>3</sup> Notice of the previous dishonor may be, either the overdue date, or the notarial protest, or such other evidence as the bill, or marks on it, may present, or as may be inferred from the circumstances of the holder's acquisition of the bill.

<sup>4</sup> "Good faith" is defined by s. 89 to mean where a thing is in fact done honestly, whether it is done negligently or not. "Value" is defined by s. 2 to mean "valuable consideration," which by s. 27, is further and more fully defined. A total, or partial, failure of consideration is a good defence against the "immediate parties" of the bill, or against a party who is not a holder for value, unless he derives his title from a holder in due course. See notes to s. 27, and note 7, p. 125.

<sup>5</sup> This section does not speak of "actual notice of the prior holder's defect of title," although such notice would be conclusive. Constructive notice which is knowledge imputed to the parties from the facts proved,



may, therefore, be sufficient; the presumption that the knowledge must have been communicated is held to be too strong to be rebutted: *Hewitt v. Loosemore*, 9 Hare 449. And where a party has the means of knowing a fact, he is bound to show that he exercised reasonable diligence to ascertain it: *Heathorn v. Darling*, 1 Moo. P. C. C. 5. But vague and indefinite rumor or suspicion, is quite too loose and inconvenient in practice to be admitted to be sufficient to put a party on enquiry. But each case must depend upon its own circumstances. At one time the doctrine prevailed that if the holder took the bill under suspicious circumstances, or without due caution or inquiry, although he gave value for it, yet he was not deemed a holder for value without notice: *Gill v. Cubitt*, 3 B. & C. 466. But this doctrine has since been abandoned, upon the ground of its inconvenience, and obstruction to the free circulation and negotiation of bills and notes: *Goodman v. Harvey*, 4 A. & E. 870; *Uther v. Rich*, 10 A. & E. 784. See further, note 1 to s. 39.

Sec. 29.

## ILLUSTRATIONS.

Where a person, at a heavy discount, negotiated a bill drawn by a partner in fraud of his firm, from another who had taken it from the fraudulent drawer with knowledge of the fraud, the bill having on it a name which made it perfectly good:—Held, that from these facts the jury might presume that the plaintiff took the bill *malâ fide*: *Dailey v. DeFries*, 11 W. R. 376.

A person who takes a bill under circumstances calculated to excite suspicion, and having the means of knowledge, but wilfully abstains from making any inquiries, must be considered to be a holder with notice of fraud, if any exists: *Jones v. Gordon*, 2 App. Cas. 616.

Where a person without any express notice of any circumstance of suspicion, took the bill, not in the ordinary course of business, and not relying on the security; but required evidence of title from the drawer who deceived him, he has no better title in the bill than the drawer had: *Hatch v. Scarles*, 2 Sm. & Gif. 147; 24 L. J. Ch. 22. See also *Colson v. Arnot*, 54 N. Y. 253.

<sup>6</sup> Bills or notes so drawn or made, are voidable. Such bills or notes are generally “regular on the face;” and the facts necessary to bring them within the operation of this clause, have to be proved. As to the term “other unlawful means,” it must be interpreted to include only such means as are *ejusdem generis* with those described. The general rule for the construction of statutes is that where several words, preceding a general word, point to a confined meaning, such general word shall not receive such a meaning as to extend its effect beyond subjects which are *ejusdem generis*: *Regina v. Nevill*, 8 Q. B. 463.

## ILLUSTRATIONS.

A son having acknowledged to have stolen \$25, his mother was induced to sign a promissory note, under threats of having her son arrested:—Held, that she was not liable on the note: *Macfarlane v. Dewey*, 15 L. C. J. 85.

A note given in consideration of the payee's forbearing to prosecute a charge against the maker of obtaining money by false pretences, is illegal: *Clubb v. Hudson*, 18 C. B. N. S. 414.

## Sec. 29.

An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a note: *Dwight v. Ellsworth*, 9 U. C. Q. B. 539.

In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is no defence that the bill was indorsed by the drawer to the plaintiff, in order to stifle a prosecution for felony, if there is an actual debt due: *Flower v. Sadler*, 9 Q. B. D. 83; 10 Q. B. D. 572.

A father, whose son had obtained discounts from a bank on paper on which the father's name had been forged, was appealed to by the bank to take upon himself the liability in respect of his son's forgeries and who did so, but with the knowledge that unless he did so his son would be exposed to a criminal prosecution, with a moral certainty of conviction, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable, even though the forged instruments are given up, and his son's peril is not put forward by the bank as the motive for inducing the agreement: *Williams v. Bailey*, L. R. 1 H. L. 200.

To support a defence that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the criminal charge should be proved: *Henry v. Little*, 11 U. C. Q. B. 296.

Where a note not void, but voidable, as one given for what is *malum prohibitum*, is given up in consideration of another note given at a distant day, the illegality of the former note will be no defence in an action on the latter: *Witham v. Lee*, 4 Esp. 264.

A note given in consideration of counterfeit bank notes sold by the payee to the maker, is void on the ground of public policy: *Blont v. Proctor*, 5 Blach. (Ind.) 265.

A note given at the request of a director of a bank for money owed by him to the bank, in excess of the amount allowed by law, is not void: *Pemigewasset Bank v. Rogers*, 18 N. H. 255.

A note given to an insurance company, contrary to an express statutory provision, is void: *Otis v. Harrison*, 36 Barb. (N. Y.) 210.

A note given by one of several tenderers for a Government contract, to another tenderer, to induce him to withdraw his tender, is void: *Kennedy v. Mardick*, 5 Har. (Del.) 458.

A note given to a magistrate for fines and fees imposed upon the maker on a criminal charge, is void: *Kingsbury v. Ellis*, 4 Cush. (Mass.) 578.

Notes given to a municipal officer for licenses, are void: *Nevson v. Thighen*, 30 Miss. 414.

A note given to induce a person to withdraw opposition to the opening of public road is void: *Smith v. Applegate*, 23 N. J. (Zab.) 852.

Though a statute incorporating a company provides that subscriptions for stock shall be void if not paid in money, a promissory note given for such subscription is not void, and may be enforced, as the giving of such note is not contrary to public policy: *McRae v. Russell*, 12 Ired. (N. C.) 224.

A note given for a transaction forbidden by law, being for an illegal consideration, is void: *Brown v. Torkington*, 3 Wall. 377.

A note given in consideration of a promise by a defendant in a divorce suit, that she would withdraw her pleading and make no defence to the action, is void : *Stoutenberg v. Lybrand*, 13 Ohio 228. Sec. 29.

A legislature, as a condition of granting a divorce from his wife, required the husband to pay her \$500 for her future support, for which amount he gave his promissory note ;—Held, that the note was not against public policy, and was not void : *Day v. Cutler*, 22 Conn. 625.

If part of the consideration only is illegal, the bill is void for the whole : *Robinson v. Bland*, 2 Burr. 1082.

<sup>7</sup> By s. 37, when a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may re-issue and further negotiate it ; and by this clause a holder whether for value or not, who derives his title through a holder in due course, is entitled to the rights of such holder in due course, provided he has not been a party to any fraud or illegality affecting it. The clause only affects “a party to any fraud or illegality,” and not a party who has notice of such fraud or illegality. The doctrine of constructive notice as to defects in title is not to be extended. The question is whether a purchaser had the means of obtaining knowledge of the defect, and might by prudent caution have obtained it : and whether the not obtaining it, was an act of gross and culpable negligence : *Ware v. Lord Egmond*, 4 DeG. M. & G. 460 ; or that he designedly abstained from making inquiries : *Jones v. Smith*, 1 Hare 55. The equitable doctrine applicable to titles to real estate, is also applicable to titles to bills and notes. Thus where A. who had notice of an incumbrance on an estate purchased it, and then sold it to B., who had no notice, and B. being a purchaser for value without notice, afterwards sold it to C., who had notice of such incumbrance, it was held that C. got a good title from B., and that he held the estate free of the incumbrance ; for if the rules were otherwise, the sale of estates would be very much clogged : *Harrison v. Forth*, Prec. Ch. 61 ; *Lowther v. Carlton*, 2 Atk. 242.

#### ILLUSTRATIONS.

An innocent party, who is a holder for value, may transfer a good title in a bill to a person who was no party to the original fraud, though he have had knowledge of it : *May v. Chapman*, 16 M. & W. 355.

An indorsee without value is entitled to recover on a bill or note if any intermediate party is a holder for value : *Wood v. Ross*, 8 U. C. C. P. 299.

A note given for the price of lottery tickets is not under 12 Geo. II c. 28, (Imp.), void in the hands of a *bona fide* holder for value : *Evans v. Morley*, 21 U. C. Q. B. 547.

The holder of a draft payable to order, which he has obtained *bona fide*, and for value, but without indorsement, has no better title than the prior holder, even though he afterwards gets such prior holder to indorse it ; and he is affected by fraud, of which he has notice before he obtains the formal indorsement : *Whistler v. Forster*, 14 C. B. N. S. 248 ; 8 L. T. N. S. 317.

Where a trader in the course of his business received a cheque, which had been stolen from the payee, and gave the difference to a stranger, who

**Sec. 29.** presented it in payment of an article purchased;—Held, in the absence of fraud and negligence on the trader's part, that he was entitled to recover: *Lee v. Newson*, D. & R., N. P. C. 50.

B. indorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously indorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry respecting C.'s title to the note, or his authority so to deal with it;—Held, that the plaintiff was entitled to recover against B: *Cross v. Currie*, 43 U. C. Q. B. 599; 5 App. R. 31.

Where it was alleged that a prior note had been obtained by fraud from the maker, and subsequently another note was given as a substitute for such prior note, evidence of the alleged fraud is inadmissible in the action on the substituted note: *Dougall v. Post*, 5 U. C. Q. B. 554.

A note payable to L. or bearer was made by and deposited with one D. as collateral security for note made by L. payable to D., which D. had discounted in a bank. Afterwards R.'s note when overdue was also transferred to the bank, as collateral security for D.'s note;—Held, that even if the bank had no higher title than D., D. had a vested right in the note at maturity, which he could transfer to the bank: *Canadian Bank of Commerce v. Ross*, 22 U. C. C. P. 497.

Presumption of value and good faith.

**30.** Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value: <sup>1</sup>

Where onus probandi is shifted.

2. And every holder of a bill is *prima facie* deemed to be a holder in due course; but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course: <sup>2</sup>

Actual knowledge of usury.

3. No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract: <sup>3</sup>

What a bill or note for patent rights must contain.

4. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or

otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "given for a patent right:" and without such words thereon such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration. Sec. 30.

5. The indorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties: Transferee to take subject to rights of original parties.

6. Every one who issues, sells or transfers, by indorsement or delivery, any such instrument not having the words "given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. <sup>4</sup> Misdemeanor if presented words not written on such bill or note.

<sup>1</sup> This clause may be read in connection with the ss. 23 and 56. The latter section seems to modify the rule that only those who sign the bill in one of the characters mentioned in s. 23, are liable on such bill. Hitherto the judicial decisions as to the parties who sign or back the bill, intending to become sureties for the payment of the bill, have not been uniform, for sureties, as such, have not been recognized by the law-merchant. Accommodation acceptors, makers, and indorsers do not usually become parties to bills or notes "for value," nor do sureties. But if the remarks in the note to s. 56 correctly indicate the intention of the Legislature, it may follow that the liability of sureties, or parties *pour Aval*, will be found to be the same as the sureties known as accommodation parties. Bills of exchange and promissory notes differ from other contracts at common law in two important particulars; first they are assignable, whereas *choses in action* at common law are not; and secondly, the instrument itself gives a right of action, for it is presumed to have been given for value, and no value need be alleged as a consideration for it: *Foster v. Dawber*, 6 Ex. 853.

## Sec. 30.

## ILLUSTRATIONS.

Where it appeared that a note was intended to have been made to the plaintiff or order, to be indorsed by him to the defendant, to secure a debt due to the defendant by the maker, but by mistake it was made payable to the defendant or order; and he thereupon indorsed it to the plaintiff, in order to enable him to sue the maker, and on the understanding that the plaintiff should have no recourse against him as indorser;—Held, a good defence: *Blain v. Oliphant*, 9 U. C. Q. B. 473.

Where in an action on a note payable to A., it was proved that B. indorsed it, and then brought it to A., who indorsed it merely for accommodation, without receiving any value for it;—Held, that want of consideration could not be inferred, as between the maker and B., and that the plaintiff was not obliged to prove the consideration: *Mair v. McLean*, 1 U. C. Q. B. 455.

Where it appeared that before suit the defendant, by agreement with R. and O., the second and third indorsers, made, and indorsed to them another note, which was accepted in full satisfaction and discharge of the note sued upon, but which note remained in the hands of R. and O. without the fault of the defendant;—Held that the proof of consideration lay on the plaintiff: *Maulson v. Arrol*, 11 U. C. Q. B. 81.

Where an indorser indorsed a note while in blank, there being no maker's name attached to it nor any sum nor payee expressed in it, and the name of the maker was afterwards signed without authority;—Held, that the indorsee suing must shew himself a *bona fide* holder for value: *Hanscome v. Cotton*, 15 U. C. Q. B. 42.

The defendant agreed to become surety for whatever goods P. should order of the plaintiff. P. sent the goods ordered and other goods, without disclosing these facts to the defendant, but in perfect good faith. The plaintiff then presented a bill of exchange on P. for signature by the defendant, who signed the same, supposing it was for the goods ordered. P. kept all the goods;—Held, that the defendant was liable only to the extent of the goods ordered, and that the consideration for the bill failed as to the excess: *Barber v. Morton*, 7 App. R. 114.

<sup>2</sup> The effect of this clause is that the *prima facie* evidence of value which the production of the bill or note establishes, may be displaced by proof that the acceptance, issue or subsequent negotiation of the bill or note is affected or tainted with the defects of title described; and the onus is then on the party claiming to be a holder in due course, to prove that, subsequent to the defect in title, value was given in good faith by some other holder of the bill or note. The latter part of the clause differs from the English Act in regard to the party giving the "value in good faith;" the English Act reading: "the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill;" thus allowing the proof that value has been given by the then, or some prior, holder of the bill. This Act limits the proof of such value to have been given "by some *other* holder in due course." But the difference in application may be found to be more in words than in substance; and on this see s. 29. See also as to *prima facie* evidence, notes 1, p. 77, and 7 and 8, pp. 84-85.

## ILLUSTRATIONS.

Sec. 30.

Where fraud is proved in an action on a bill of exchange, the burden of proof is then on the holder, to prove both that value had been given, and that it had been given in good faith, without notice of the fraud: *Tatham v. Haslar*, 23 Q. B. D. 345.

Where a firm which had been in the habit of drawing bills on their English correspondent, drew bills on him after his requesting them to desist, and exchanged a bill so drawn for a note of H., and the firm afterwards failed, and the bill was returned dishonoured;—Held, that if the firm drew the bill for which the note was given, having no expectation that it would be honoured, there was evidence that they practiced fraud in procuring the note: *Gooderham v. Hutchison*, 5 U. C. C. P. 241.

Where one C. was induced to accept a bill by the fraud and misrepresentation of the indorsers prior to the holder, and without any consideration, and that D, the last of such indorsers, indorsed to the plaintiffs without any consideration or value given by them to him:—Held, a good defence: *Bank of Montreal v. Cameron*, 17 U. C. Q. B. 636.

The defendant was arrested on the charge of embezzling fines belonging to a township, which he had received as a Justice of the Peace, and while under arrest he compromised by giving security to procure his release, and the plaintiff gave a note to the township for the amount claimed, and obtained from the defendant a note for the amount, indorsed by his wife. The plaintiff now sought to recover on the defendant's note;—Held, that the consideration therefor, being the stifling of a prosecution for felony was illegal, rendered the note void, and that the plaintiff was in no better position than the township would have been had they taken the note: *Bell v. Riddell*, 2 Ont. R. 25.

<sup>3</sup> This clause is not in the English Act. Forfeiture of a security for usury was partly abolished in old Canada (now Ontario and Québec), in 1853 (16 Vic. c. 80); and contracts were declared to be void only to the extent of interest above six per cent. But that Act excepted from its general relief Banks, Insurance and Loan Companies, leaving them (except as to banks which were limited to seven per cent.) subject to the prohibitions and penalties of the usury laws. Banks were afterwards relieved of the penalty of forfeiture (R. S. C. c. 120, ss. 61 and 62, and 53 Vic. c. 31 ss. 80 and 81). The present statutory provisions against usury in Ontario and Quebec are set out in R. S. C. c. 127 s. 10, and 11. S. 10 limits loan companies to six per cent. "for loan of any moneys, wares, merchandize, or other commodities;" and insurance companies to eight per cent., "on any contract or agreement." S. 11 is as follows: "All bonds, bills, promissory notes, contracts and assurances, whatsoever, made or executed in violation of the provisions of the section next preceding, whereupon or whereby a greater interest is reserved and taken than authorized by this or any other act or law, shall be void; and every corporation, company, and association of persons, not being a bank, authorized to lend or borrow money as aforesaid, which directly or indirectly, takes, accepts, and receives a higher rate of interest, shall incur a penalty equal to treble the value of the moneys, wares, merchandize or other commodities lent or bargained for. (2) Such penalty may be recovered by action in any court

Sec. 31. of competent jurisdiction, and one moiety thereof shall belong to Her Majesty for the public uses of Canada, and the other moiety for the person who sues for the same." There is another clause as to usury applicable to Nova Scotia, (s. 15) ; but there appears to be no penalties in the other Provinces. The words of this clause are large enough to affect all bills and notes offending against what are technically known as the "usury laws;" but doubtless judicial construction will "answer the sense of the statute," and confine their effect to the corporations specially subject to the clauses of the usury law cited above.

\* These clauses as to patent rights are not in the English Act, but are taken from R. S. C. c. 123, s. 12. When a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question: *Redpath v. Allan*, L. R. 4 P. C. 511. All rights reside in persons, and are rights to acts or forbearances on the part of other persons. They are capable of being enforced judicially against the persons who are bound to those acts or forbearances: *Austin's Jurisprudence*, 378.

#### ILLUSTRATIONS.

A note was given for a patent right in a shingle machine, but as the letters patent were void, it was held there was a failure of consideration: *Earle v. Page*, 6 N. H. 477.

D. gave C. two promissory notes for patent rights, payable to C. or bearer, but having indorsed on each of them, contemporaneously with their making, the words "the within note not to be sold," which indorsement formed part of the contract between the parties. The notes were transferred to S., with the word "not" in one of the above indorsements erased (which S. noticed), and in the other the whole of said indorsement torn off, but without destroying any part of the face of the note:—Held, that S. was not an innocent holder, and the words of the above indorsement were part of the original contract: and the effect of it was to prevent C. disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him: *Swaistland v. Davidson*, 3 Ont. R. 320.

A. made a note upon the representations on the part of the payee and indorser, as to the formation of a company for the sale of a patent right controlled by the payee, the note being given in consideration of a share to A. in such company; but it was doubtful whether any such company existed at all, or if so, whether A. was ever placed in the position of becoming a shareholder;—Held, that as there was nothing on A.'s part to be repudiated and rescinded, A. was not precluded from setting up the defence that it had been obtained from him by fraud: *Waldell v. Jaynes*, 22 U. C. C. P. 212.

The object of the legislature in requiring the words "given for a patent right" to be on the face of notes so given, is to give the transferee notice, and subject him to any defence the maker may have: *Girvin v. Burke*, 19 Ont. R. 204.

Where notes had been given with the words "given for a patent right" on them, and subsequently cancelled, and new notes given without such words;—Held, that the substituted notes were subject to the same defences as the original notes: *Ibid.*



*Negotiation of Bills.***Sec. 31.**

**31.** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill: <sup>1</sup>

Negotiation of bills defined. Imp. Act, s. 31 Ind. Act, s. 46.

2. A bill payable to bearer is negotiated by delivery: <sup>2</sup>

Payable to bearer.

3. A bill payable to order is negotiated by the indorsement of the holder completed by delivery: <sup>3</sup>

Payable to order.

4. Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferer had in the bill, <sup>4</sup> and the transferee in addition acquires the right to have the indorsement of the transferer: <sup>5</sup>

Transfer without indorsement.

5. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability. <sup>6</sup>

Indorsement in representative capacity Ind. Act, s. 29.

<sup>1</sup> The negotiation of a bill or note means that which is equivalent to a purchase or sale of such bill or note, so as to give the title in it to another. There must be the mental assent of the owner, and the manual acts of indorsement (if payable to order) and delivery, either by the owner or his agent. In order to constitute a valid indorsement of a bill as against the indorser, there must be the writing of the name of the holder, and a manual delivery by him of the bill with the intention, not only to pass the property in it, but to guarantee the payment, if the acceptor makes default; and evidence of the facts showing the absence of this intention is admissible under a traverse of the indorsement: *Denton v. Peters*, L. R. 5 Q. B. 475. A negotiable instrument is transferable to any person holding it, so as, by delivery thereof to give a good title to any person honestly acquiring it. Where an instrument is, by the custom of trade transferable like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument; and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in *market overt*. But that if either of the above requisites be wanting, *i. e.*, if it be either not accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery pass the property of it to a vendee however *bona fide*, if the transferor have not himself a good title to it, and the transfer be made out of *market overt*: 1 *Smith's Leading Cases* 259. Instruments in the shape of bills or notes, unless they are for the payment

**Sec. 31.** of money only, are not negotiable: *Hodges v. Winton*, Mart. (N. C.) 76. This Act only deals with the negotiation and transfer of bills and notes according to the rules of the law-merchant. But where the transfer is by aid of the law, the rules of the general law govern as to their transfer as chattels, or *choses in action*. See the definition of holder s. 2; and of "holder in due course," s. 29.

<sup>2</sup> The effect of the transfer of such a bill or note by delivery, is defined in s. 58. Prior to 1872 the bonds and debentures of companies and corporations, even although payable to bearer, were not transferable: *Woodside v. Toronto Street Railway Co.*, 14 Grant 409. But by 35 Vic. c. 12 (now R. S. O. 1887 c. 122, s. 9), the bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order, shall (after a general indorsation thereof by such person) be transferable by delivery, from the time of the indorsement. See the definitions of "bearer" and of "delivery," s. 2, and the effect of delivery of a bill or note, s. 21.

<sup>3</sup> This is the more usual practice of negotiating bills and notes. Transferred or negotiated, means passed away from the original holder to another person; presentment for acceptance is not negotiating: *Griffin v. Wetherby*, L. R. 3 Q. B. 761. Every indorsement of a bill operates in the nature of a new drawing of the bill: *Penny v. Innes*, 1 C. M. & R. 141. The different kinds of indorsements are defined in ss. 32, 34, 35. The title of a holder of a bill who negotiates it *bona fide*, is described in ss. 29 and 38.

#### ILLUSTRATIONS.

Where a note is transferred by an agent without authority, if the owner of the note afterwards ratifies the act, the transfer will relate back to the time it was made by such agent: *Persons v. McKibben*, 5 Ind. 261.

The writing of his name by an indorser on the face of a bill is a good indorsement: *Young v. Glover*, 3 Jur. N. S. 637; s. p. *Herring v. Woodhull*, 29 Ill. 92.

A special indorsement does not transfer the property in bills of exchange until delivery: *Rex v. Lambton*, 5 Price 428.

One F. gave B. a bill drawn on D. payable to B. or his order. Afterwards a writ of attachment under the Insolvent Act issued against B., who thereupon indorsed and delivered the bill to E., who subsequently indorsed it to the plaintiff;—Held that as the plaintiff had no notice of B's insolvency, he was entitled to recover: *Macellan v. Davidson*, 4 Pugs. & Bur. 338.

<sup>4</sup> The effect of a transfer without indorsement is to give the transferor such title as that held by his transferee. The statute 3 & 4 Anne c. 9, provided that promissory notes should be assignable or indorsable; and authorized the holder by either mode of transfer, to bring a suit in his own name against the persons liable thereon. The ordinary rule of law as to the transfer of bills and notes is only intended to apply to transfers made in the ordinary and usual manner, whereby a title is acquired, according to

the law-merchant; and not to a transfer which is valid in equity according to the doctrine respecting the assignment of *choses in action*. Until the holder obtains the indorsement of his transferor, he will be affected with notice of a fraud attaching to the bill or note while it was in his transferor's hands. Sec. 31.

## ILLUSTRATIONS.

A mere discount of a bill, without the indorsement of the person who receives the money, does not give the holder of the bill any claim against such party for the money advanced: *Ex parte Roberts*, 2 Cox 171.

Nor can such person prove a claim against the estate of his transferor in insolvency: *Ex parte Shuttleworth*, 3 Ves. 368.

But if such note is indorsed, after the transferor's insolvency, it becomes a good petitioning creditor's debt: *Ex parte Thomas*, 1 Atk. 73, 126.

The transfer by delivery only of a note payable to order, but not indorsed by the payee, gives but an equitable title, and the transferee takes it subject to all equities against the payee: *Seymour v. Leyman*, 10 Ohio St. 283.

Where the payee of a note dies without having parted with its possession, it cannot be further negotiated without a new indorsement by his personal representatives. An indorsement written by the payee in his lifetime is not sufficient: *Clark v. Sigourney*, 17 Conn. 571; s. p. *Bromage v. Lloyd*, 1 Ex. 32.

S. transferred a note for value to G. without indorsing it, but gave a written agreement to be responsible for the amount of it to G. G. negotiated the note and agreement to M., after which all the prior parties to the note became insolvent;—Held, that M. could not prove against G.'s estate, but was entitled to have the amount made an item in the account of G., and to stand in his place: *Re Barrington*, 2 Sch. & Lef. 112.

In order to pass the title in a bill, the transfer must be made by indorsement, the indorsement of a document given as a receipt for such bill will not pass to the transferee the legal title: *Gookin v. Richardson*, 11 Ala. 889.

<sup>5</sup> If there be an assignment of a bill or note without indorsement, the holder will thereby acquire the same rights only as he would acquire upon the assignment of a bill not negotiable. If by mistake, accident, or fraud, a bill has been omitted to be indorsed upon a transfer, when it was intended that it should be, the party may be compelled by a Court of Equity to make the indorsement; and if he afterwards become insolvent this will not vary his right or duty to make it; and if he should die, his executors or administrators will be compellable in like manner to make it: *Story on Bills*, s. 201. Where a bill or note requires the transferor's indorsement in order to complete the title of a holder in due course, such transferor will be ordered to indorse such bill or note: *Ex parte Greening*, 13 Ves. 206. But a holder of such a bill or note has no authority to indorse the bill in the name of the payee, and sign it *per proc.*, where such indorsement has been omitted by mistake. "If you were to allow this, it would be very dangerous to introduce into contracts upon which so much wealth depends, the principle that a party may supply the indorsing of a name which had been omitted by inadvertance:" *Per Erle, C. J., in Harrop v. Fisher*, 6 Jur. N. S. 1059.

## Sec. 31.

## ILLUSTRATION.

Where A. fraudulently obtained a bill payable to order from B. and handed it to C. in satisfaction of a *bona fide* debt, but without indorsing it;—Held, that C. could not acquire a title to the bill by obtaining A.'s indorsement after he had received notice of the fraud: *Whistler v. Foster*, 14 C. B. N. S. 248, 8 L. J. N. S. 317.

<sup>o</sup> See cases cited in the notes to s. 16 (1), as to limiting or negating liability; and in the notes to s. 26, as to acceptances by persons in a representative character.

Requisites  
of indorse-  
ment.  
Imp. Act, s. 32  
Ind. Act, s. 15

**32.** An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

Signature  
of indorser  
on bill.

(a) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient; <sup>1</sup>

On allonge,  
or "copy."

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself; <sup>2</sup>

Must be of  
entire bill.

(b) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill; <sup>3</sup>

All payees  
must indorse

(c) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others: <sup>4</sup>

How mis-  
spelled  
payee, &c.,  
may indorse.

2. Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding his proper signature; or he may indorse by his own proper signature: <sup>5</sup>

Order of  
indorsement,  
as in bill,

3. Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved: <sup>6</sup>

4. An indorsement may be made in blank or special. It Sec. 32.  
may also contain terms making it restrictive.

How in-  
dorsement  
may be.

<sup>1</sup> An "indorsement" of a bill is defined as meaning an indorsement in writing completed by delivery. Where a torn note had been pasted upon another piece of paper, an indorsement of the note may be made on such other paper itself; and in that case it is not necessary to prove when the indorsement was made: *Crutchfield v. Easton*, 13 Ala. 337. "I guarantee the payment of the within," indorsed on a note over the signature of the payee, is an indorsement of the note, and not a guarantee or collateral engagement for its payment: *Walker v. O'Reilly*, 7 U. C. L. J. 300. An indorsement written with a pencil is valid: *Geary v. Physic*, 5 B. & C. 234; s. p., *Closson v. Stearns*, 4 Vt. 11. See the cases cited to s. 17, as to acceptances of bills of exchange; and as to delivery, see s. 21; as to negotiation, see s. 31; as to signature by an agent, see s. 90; as to indorsement of bills in a set, see s. 70.

<sup>2</sup> An *allonge* (or rider) to a bill is a term which has not been interpreted in the Act. Where words have been long used in a technical sense, and have been judicially construed to have a particular meaning, and have been adopted by the Legislature as having a certain meaning, prior to the statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used: *Ruckmaboye v. Lulloohoy*, 8 Mo. P. C. C. 4. An *allonge* is a paper annexed to the bill, which is necessary when there is no room on the bill for further indorsements. It becomes a part of the bill when the indorsements are written on it. Where the copy of a bill is used, the person who circulates the copy should transcribe the body of the bill and all the indorsements; and, after all, should write: *Copy,—the original being with* (naming the person). If he should omit to state that the bill is a copy, or should write his own indorsement after the word *copy*, he may become liable on the copy as on an original: *Byles on Bills*, 311. A "duplicate" or "copy" of a bill may be used in the countries mentioned on p. 15.

<sup>3</sup> By the law-merchant an indorsement must be of the whole bill: *Heilbut v. Nevill*, L. R. 4 C. P. 358. The following forms of indorsements may be read as illustrations of the different modes of indorsing bills. "John Smith" in all these forms is supposed to represent solely, or with his partner, "William Styles," the payee and first indorser of the bill:

1. Indorsement by drawer or payee in blank (ss. 8 (3), 32 (4), and 34):—  
"John Smith."
2. The like indorsement by the firm (s. 23 (b)):  
—"Smith & Co.;" or, by a partner:—  
"for self and William Styles, John Smith."
3. The like indorsement by an agent, (ss. 25 and 26):—  
"As agent for John Smith, John Adams;" or "John Smith, by his agent, John Adams;" or "per procuracy John Smith, John Adams." And the agent may add to his signature, "without recourse to me as agent."

- Sec. 32.** 4. Qualified indorsement to avoid personal liability (s. 16 (a)) :—“John Smith, *without recourse* ;” or, “John Smith, *sans recours* ;” or, “John Smith, *with intent only to transfer my title and interest, and not to become subject to any liability in case of non-acceptance or non-payment*.”
5. Indorsement in full, or spécial (ss. 8 (4), 32 (4), and 34 (2)) :—“*Pay William Styles, or order, John Smith.*”
6. Restrictive indorsement in favour of indorser (ss. 32 (4), and 35) :—“*Pay William Styles, for my use, John Smith ;*” or, “*Pay William Styles, for my account, John Smith.*”
7. Restrictive indorsement, in favour of indorser, or of a particular person only (ss. 8, 32 (4) and 35) :—“*Pay to William Styles only, John Smith ;*” or, “*The within to be credited to William Styles, John Smith.*”
8. Conditional indorsement (see s. 19 (2) (a) as to conditional acceptance, and s. 33) :—“*Pay William Styles, or order, upon his giving up the other bills accepted by me, and now held by him, John Smith.*”
9. Partial or limited indorsement (see s. 19 (2) (b) as to partial acceptance, and s. 32 (b)) :—“*Pay William Styles, or order, \$100, part of the within, John Smith.*”

See further, the notes and cases cited to s. 19, as to the different modes of accepting bills of exchange.

#### 4 ILLUSTRATIONS.

The indorsement of a bill by one partner in his own name does not pass the legal title ; yet as each partner has the *jus disponendi* thereof, the transfer by one partner passes the entire equitable right, unless assailed upon some adequate ground : *Alabama & Co. v. Brainard*, 35 Ala. 476.

A note made to partners in their individual names, may be indorsed by one of the partners in the firm's name : *Mick v. Howard*, 1 Ind. 250.

One of several executors may transfer a note by indorsement as collateral security for a judgment against the estate : *Wheeler v. Wheeler*, 9 Cowen 34. *Sed contra*, *Smith v. Whiting*, 9 Mass. 334.

A note made by several persons payable to “our and each of our order,” and indorsed by one is good : *Absolon v. Marks*, 11 Q. B. 19 ; 11 Jur. 1016.

If a bill is drawn by two, payable to “us or our order,” and subscribed by both, though not in partnership, they make themselves partners, by the form of the bill, to the effect of making an indorsement by one of them valid : *Carriek v. Vickery*, 2 Dougl. 653 n.

A. and B. were partners. B. fraudulently indorsed bills belonging to the partnership to C. for a private debt. C. having notice. B.'s assignees in insolvency repudiated the right of C. to the bills :—Held, that they could do so, and that the partner A. was rightly joined in the action : *Heilbut v. Nivill*, L. R. 4 C. P. 354.

When a person signs a note on a representation that others are to join, and one afterwards refuses to sign, the payee cannot recover against the person who signed it, unless the jury is satisfied that such person, knowing the facts and being aware of his rights, consented to waive his objection : *Leaf v. Gibbs*, 4 C. & P. 466.

See further the notes and cases to ss. 23, 25, and 26.

## 5 ILLUSTRATIONS.

## Sec. 32.

Wherever one Christian name appears given to a party in full, with a capital letter before or after it, besides the surname, the Court will not assume that the party so described has anything more of a name than is thus given to him, and this without distinction between vowels and consonants: *Bank of Upper Canada v. Gwynne*, 7 U. C. Q. B. 140; *Commercial Bank v. Roblin*, 5 U. C. Q. B. 498; *Dougall v. Reafisch*, 6 U. C. Q. B. 391; *Mair v. Jones*, 7 U. C. Q. B. 139.

Where the indorsement of a note was "Pay the cashier of the Bank of A., or to W. F., their agent";—Held, that W. F. was the only person that could indorse: *Frazier v. Moore*, 11 Tex. 755.

A bill drawn in favor of the cashier of a bank by his own name, only gives the bank a beneficial interest in such note, and the bank cannot sue on such bill in its corporate name: *Bank of Upper Canada v. Ruttan*, 22 U. C. Q. B. 451. But see *Bank of the United States v. Davis*, 4 Cranch C. C. 533.

A note payable to the order of John P., a person *in esse*, cannot be indorsed by Joseph P., a different person, although the note was in fact given to Joseph P. for a valuable consideration, and not to John P.: *Boiles v. Stearns*, 11 Cush. (Mass.) 820.

See further the cases cited in note 4 to s. 17 (3) p. 67 *ante*.

\* The effect of each indorsement of a bill is to give to the holder a guarantee that the prior signatures of drawer and indorsers are regular and genuine (s. 55), and that each indorser is an additional surety to him for the due payment of the bill at maturity. Every indorser of a bill is a new drawer; and it is part of the inherent property of the original instrument that an indorsement operates in the nature of a new drawing of the bill by him: *Penny v. Innes*, 1 C. M. & R. 441. The decisions in cases where the order of the indorsements has not been in the order of transfer, or where a surety has indorsed before the payee, indicate some exceptional peculiarities which have not made them uniform. See cases in the notes to ss. 6, 23, and 56. As to cases affecting indorsers as co-sureties *inter se*, see notes to s. 59 (3.)

## ILLUSTRATIONS.

A second indorser may recover from the first indorser the costs of a suit to enforce his liability without a special count of any further proof of an express request to defend: *Fox v. Soper*, 18 U. C. Q. B. 258.

But where a second indorser had indorsed a note as security to the first indorser for the amount of the note due to him upon the settlement of the accounts of a partnership, and with an understanding that M. should indorse the note after the such first indorser;—Held, that he was liable to the prior indorser: *Wordsworth v. McDougall*, 8 U. C. C. P. 403.

The payee of a note indorsed in blank cannot by merely writing his name above the indorser, sue as indorsee against the latter unless he can shew an agreement creating between them the relationship of indorser and indorsee: *Robertson v. Hueback*, 15 U. C. C. P. 298.

Where it appears on a note that the party assumes the responsibility of a second indorser, the locality of the names on the note is immaterial: *Bacon v. Burnham*, 37 N. Y. 614.

**Sec. 32.**

Parties to notes are now held liable, contrary to the older cases, in the order on which they stand on the note; and the last holder may so treat them, notwithstanding any agreement among themselves, and although some one of the latter parties may be the person for whose accommodation it was made, and who, therefore, is ultimately liable upon it; and this even when the holder is aware of the facts: *Elder v. Kelly*, 8 U. C. Q. B. 240. See *Janson v. Paxton*, 23 U. C. C. P. 439, and *Fisken v. Meehan*, 40 U. C. Q. B. 146, and note to s. 59, sub-s. 3.

Conditional  
indorsement  
Imp. Act, s.  
33. Ind.  
Act, s. 50 &  
52.

**33.** Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not.<sup>1</sup>

<sup>1</sup> This is new law; and will therefore only affect bills and notes made after the time the Act comes into operation. Prior to this enactment it was held that if the payee of a bill annexed a condition to his indorsement, the drawee, who afterwards accepted it, was bound by that condition; and if it was not performed the property in the bill reverted to the original payee, and he could recover the amount of the bill against the acceptor: *Robertson v. Kensington*, 4 Taunt. 30. Though the terms of the clause are large enough to enable the "immediate parties" (see note 4, p. 83) to disregard the condition, it may be presumed that the contract of such parties would be binding, and that the payee would not be allowed to vary the legal and equitable rights of the other parties under the condition specified in the indorsement. See also *Archer v. Bank of England*, 2 Doug. 637, and *Bill v. Lord Ingestre*, 12 Q. B. 317; and s. 35 as to restrictive indorsements.

Indorsement  
in blank.  
Imp. Act, s. 34  
Ind. Act, s. 16.

**34** An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer:

Special in-  
dorsement.

2. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable:<sup>1</sup>

Application  
of Act to  
indorse

3. The provisions of this Act relating to a payee apply, with the necessary modifications, to an indorsee under a special indorsement:<sup>2</sup>

Conversion  
of blank  
indorsement.

4. Where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.<sup>3</sup>

<sup>1</sup> The Act specifies several kinds of indorsements which will be found illustrated by forms in note (3) to s. 32.



<sup>2</sup> These provisions are "That the payee (indorsee) must be named or otherwise indicated with reasonable certainty," (s. 7.) See also s. 8. Sec. 34.

<sup>3</sup> This is usual in banks where bills or notes are discounted for the benefit of the customer. It has been recognized as law since A.D. 1698. See *Clerk v. Pigot*, 12 Mod. 192. But in the Province of Quebec, indorsements in blank can only be validly made by bankers, brokers, and merchants: *Bank of Montreal v. Langlois*, 3 Rev. Leg. 88.

#### ILLUSTRATIONS.

If A. the drawer and payee of a bill indorse it in blank to B., who, without putting his own indorsement on the bill, writes over A's indorsement, a special indorsement as "Pay the contents to C.": B. cannot be sued as an indorser by a subsequent holder: *Vincent v. Hoolock*, 1 Camp. 442.

An indorsement in blank is an absolute assignment to the indorsee, and comprehends his assigns; and upon it the indorsee may write what he will, and may fill up the blanks as he pleases: *More v. Manning*, Comyns 311.

A bill indorsed in blank, was afterwards indorsed by A. specially to B. W. & Co., who carried on business under the firms of B. W. & Co., and the Eastwood Company, indorsed the bill in the name of the Eastwood Company. The bill was duly presented, but payment was refused for want of an indorsement by B. W. & Co.;—Held, that the bill having been indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement; and that the presentment was such as to render A. liable on his indorsement: *Walker v. McDonald*, 2 Ex. 527.

Where a bill is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes as against the acceptor any title which the intermediate indorsee possessed: *Fairclough v. Pavia*, 9 Ex. 690.

**35.** An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is indorsed "Pay D only," or "Pay D for the account of X," or "Pay D, or order, for collection:"

Restrictive indorsement defined. Imp. Act, s. 35 Ind. Act, s. 50.

2. A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so:

Rights of indorsee thereunder.

3. Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the

Rights of further transferees.

**Sec. 35.** same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement. <sup>1</sup>

<sup>1</sup> It was argued in the case of *Edie v. East India Co.*, 2 Burr. 1216, that the omission of the words "or order" in an indorsement rendered the bill non-negotiable as being restrictive of the indorsement; for the cashier of the Bank of England, who was called to give evidence as to the custom of merchants, said that "the Bank if they ever discounted bills not indorsed to order, did it only upon the credit of the indorser: but that otherwise they would not take them, not considering them as being negotiable." Other merchants gave similar evidence of the custom. But Lord Mansfield, although the jury sustained the merchants, held that he ought not to have admitted this evidence of usage, because bills so indorsed were negotiable. And he held that the words "or order" were as unnecessary to be inserted in an indorsement as the words "executors and administrators." It was queried in that case whether a negotiable bill could, by any words of restriction, be rendered non-negotiable; but it was considered that, for the convenience and course of trade, the intention, and not the form, was to be regarded. Where a bill is indorsed restricting its transfer, the relations between the indorser and the indorsee are substantially those of principal and agent; and the payer may, in some cases, be bound to see to the application of the money paid.

#### ILLUSTRATIONS.

"Pay to A. or his order, for my use" is a restrictive indorsement; and the proceeds of A. must hold the proceeds to the use of the restricting indorser: *Lloyd v. Sigourney*, 8 B. & C. 622, 5 Bing. 525. See also *Munro v. Cox*, 30 U. C. Q. B. 363.

"Pay J. S. or order, value in account with H." is not a restrictive indorsement: *Buckley v. Jackson*, L. R. 3 Ex. 135.

A. and B. made a note payable to C. without words of negotiability. C. transferred the note to D. with the following indorsement: Received of D. a note on E. for \$50 due Dec. 25, 1843. Now if D. does not collect this note, I am to account to him on E's note";—Held, that this indorsement gave no right of action to D. against the makers: *Latham v. Jones*, 6 Ark. 371.

How long a bill is negotiable. Imp. Act, s. 36 Ind. Act, s. 57

**36.** Where a bill is negotiable in its origin, it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment or otherwise; <sup>1</sup>

Overdue bill negotiated subject to title.

**2.** Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it: <sup>2</sup>

3. A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time for this purpose is a question of fact: <sup>3</sup>

Sec. 36.

When demand bill deemed overdue.

4. Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue: <sup>4</sup>

Presumption as to negotiation.

5. Where a bill which is not overdue has been dishonored, any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor, but nothing in this sub-section shall affect the rights of a holder in due course. <sup>5</sup>

Taking dishonored bill.

<sup>1</sup> A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if instead of suing the acceptor, he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor: *Callon v. Lawrence*, 3 M. & Sel. 95. A payment before a bill becomes due, does not extinguish it, any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes: *Burbidge v. Manners*, 3 Camp. 193.

<sup>2</sup> The equities attaching to an over-due bill are similar to those which ordinarily attach to *choses in action*, as between the original and subsequent parties. The overdue bill loses the rights and privileges which, by the law-merchant, attach to bills of exchange, and is relegated to the rights and privileges and equities which are usually incident to a *chose in action*. Payment and other discharges are sometimes spoken of as equities attaching to an over-due bill, but this seems incorrect; they are rather grounds of nullity. That which purports to be a bill, is, on proof of payment or some other acquittance, no longer a bill, but mere waste paper. The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason; he takes a bill which on the face of it ought to have got home, and to have been paid. He is therefore bound to make two inquiries: 1. Has the bill been discharged? 2. If not, is there any equity attaching thereto? *i. e.*, was the title of the person who held it at maturity defective? *Chalmers on Bills*, 107.

## Sec. 36.

## ILLUSTRATIONS.

The indorsee of an overdue bill or note, is liable to such equities only as attach to the bill or note itself, and not to collateral claims or debts due from the indorser to the maker, or indorsee to payee: *Wood v. Ross*, 8 U. C. C. P. 299.

Where an indorsee of a note payable on demand, had taken it two years after its date, with notice of an agreement between the holder and the maker, that it should be set off against a bond, of which the maker was obligee, and the holder obligor;—Held, a good defence: *Brooke v. Arnold*, Tay. U. C. 25.

An agreement not to negotiate the note after its maturity, is an equity attaching to an overdue note: *Grant v. Winstanley*, 21 U. C. C. P. 257. See also *Kerr v. Straut*, 8 U. C. Q. B. 82.

A valid agreement to give time is an equity which attaches to a bill as against a person taking it at maturity: *Britton v. Fisher*, 26 U. C. Q. B. 338.

A note given as collateral security for a mortgage for the same amount, may be indorsed over after it becomes due by the original holder and mortgagee, and the mortgagee may proceed to foreclose the mortgage: *Shaw v. Boomer*, 9 U. C. C. P. 458.

Where an agent of the holder disposes of a over due note without authority, though for good consideration, the person taking it obtains no title as against the real owner: *West v. MacInnes*, 23 U. C. Q. B. 357.

Where an overdue note is transferred, so much of the original consideration which fails cannot be recovered: *Rennie v. Jarvis*, 6 U. C. Q. B. 329.

A note of hand was transferred when overdue, and there was fraud proved in the transaction;—Held, that on slight grounds the law would presume that the indorser had knowledge of the fraud, if it appear that he omitted to satisfy himself as to the validity of the note: *Hunt v. Lee*, 2 Rev. Leg. 28.

A note payable on demand is, after demand of payment and refusal, to be treated as an overdue; and a note whereof payment has actually been made when demanded, cannot stand on a better footing: *Dougan v. Small*, 2 Kerr N. B. 89.

The general rule is that any person receiving a negotiable instrument after it is due takes it upon the credit of the person from whom he receives it, and subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it; but this does not apply to cheques: *London and County Banking Co. v. Groom*, 8 Q. B. D. 288.

In an action on a promissory note it was shewn that when overdue and while the payee was the holder, it was agreed that a board bill should be applied in reduction of the note;—Held, that a subsequent transfer of the overdue note could only be made subject to the claim of the maker for such board: *Ching v. Jeffery*, 12 App. R. 432.

A promissory note made by the defendant had been held by the Consolidated Bank, and after its maturity, the defendant transferred certain timber limits to the bank as collateral security for the payment of the note, which limits the bank sold. The plaintiffs subsequently became holders of the overdue note, and after the timber limits' transaction. The defendant claimed against the plaintiffs to set off against the note, the value of the timber limits sold by the bank without authority

and for an insufficient price, while holders of the note;—Held, not so entitled: *Canadian Securities Co. v. Prentice*, 9 Ont. P. R. 324.

Sec. 36.

<sup>3</sup> This clause affirms a new rule as to bills payable on demand. The old rule was that a bill or note payable on demand was not to be considered as overdue without some evidence of payment having been demanded and refused, although it should be several years old, and no interest has been paid on it: *Byles on Bills*, 131. The clause seems to have been taken from a decision in a Michigan State Court, which affirms that a promissory note payable on demand, unless transferred within a reasonable time, will be considered overdue and dishonored, and that the English rule must be held to be so far modified in the United States: *Carl v. Brown*, 2 Mich. 401. Hitherto it has been considered that what was a reasonable time for the presentation of a bill or note was a mixed question of law and fact for the determination of the Court and jury, and would depend upon the circumstances of each case: *Mullick v. Radakessen*, 9 Moo. P. C. C. 46. This clause makes it a question of *fact* simply; and in order to arrive at a proper determination of the question of reasonable time, the situation and interests not of the drawer only, nor of the holder only, but the situation and interests of both must be taken into consideration: *Mellish v. Rawson*, 9 Bing. 423. But the agreement of the parties may take their case out of the Act. Thus where a note dated 10th February, and indorsed, and though payable on demand, was not intended by the makers to be paid at an immediate or specific date, and was not presented until the 14th December;—Held, that as the note was meant to be a continuing security, the delay was not unreasonable: *Chartered Bank v. Dickson*, L. R. 3 P. C. 574. See further, notes ss. 20, 40 and 49. This clause does not apply to promissory notes; see s. 85, sub-s. 3.

<sup>4</sup> There is no presumption of law as to the time at which a bill or note has been indorsed or negotiated, other than that a bill or note is presumed to have been indorsed and negotiated within a reasonable time after its date, and before it becomes due; but these presumptions are rebuttable. See note 1 to s. 20, and note 8 to s. 21.

<sup>5</sup> This clause places dishonoured bills on the same footing as overdue bills, when a holder takes them with notice of dishonour. The question in such cases is, whether the holder acted in good faith in taking the bill. See *Raphael v. Bank of England*, 17 C. B. 161, and cases as to notice in the notes to ss. 29 and 38, as to the rights of a “holder in due course;” and note 1 to s. 89.

**37.** Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill,<sup>1</sup> but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable.<sup>2</sup>

Bill nego-  
tiated back  
to party.  
Imp. Act, s. 37  
Ind. Act, s. 51

May be  
re-issued.

**Sec. 37.**

<sup>1</sup> The power to negotiate a bill must be distinguished from the right to negotiate it. The *right* to negotiate it is an incident of ownership; the *power* to negotiate it is an incident of apparent ownership: *Chalmers on Bills*, 111. Or more properly, it is an incident in the authority of the agent to negotiate the bill. As to bills negotiated back to the drawer, see *Woodward v. Pell*, L. R. 4 Q. B. 55; to a prior indorser, see *Bishop v. Heyward*, 4 T. R. 470, and *Wilkinson v. Unwin*, 7 Q. B. D. 636; and to the acceptor, *Attenborough v. Mackenzie*, 25 L. J. Ex. 244.

<sup>2</sup> Where bills were drawn by a merchant on his debtor, and, in pursuance of a verbal agreement, were indorsed by the merchant to the father of the debtor, who was to be surety for the price of the goods in respect of which the bills were given; and the father thereupon re-indorsed them to the merchant:—Held, that although, as a general rule, the indorser of a bill subsequently becomes the indorsee, he can maintain no action against the intermediate indorser, because he would himself be liable to him by reason of his antecedent indorsement, the rule does not apply when such intermediate indorser has no right of action against such indorser, on his prior indorsation: *Wilkinson v. Unwin*, 7 Q. B. D. 636. Although under the general rule where a holder suing is liable over to the defendant by reason of a prior indorsement, he cannot recover; yet if he sue with others in another capacity, as an executor, he may: *Jenkins v. McKenzie*, 6 U. C. Q. B. 544.

**38.** The rights and powers of the holder of a bill are as follows:—

Rights of holder.  
Imp. Act. s. 38  
Ind. Act.  
ss. 8 & 46.  
May sue.

(a) He may sue on the bill in his own name; <sup>1</sup>

If holder in due course.

(b) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill; <sup>2</sup>

Effect of transfer if title defective.

(c) Where his title is defective, (1) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (2) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill. <sup>3</sup>

<sup>1</sup> The expression “may” is permissive. In the *Choses in Action* Act of 1872, 35 Vic. c. 12 (now R. S. O. (1887), c. 122), it was made imperative on the assignee of a *chose in action* to sue thereon in his own name. But it is competent for the holder of a bill or note to hand over the bill or note

to third person to sue upon it in the name of such third person, but on behalf of the holder of the bill. Sec. 38.

## ILLUSTRATIONS.

The law which permits the holder of a note or bill to sue all parties liable upon it in one action, does not affect the rights and liabilities of defendants as between themselves, but leaves them as if they had been sued separately: *Hamilton v. Phipps*, 7 Grant 483.

Where a bill is indorsed in blank it is competent to the holder to hand it over to a third person to sue on it on his behalf: *Law v. Parnell*, 7 C. B. N. S. 282; s. p. *Shepley v. Hurd*, 3 App. R. 549.

Where a note was made by a resident of Upper Canada, payable to P., who died in New York with the note in his possession;—Held, that his administrators appointed in that state might indorse the note so as to enable the indorsee to sue upon it in this country: *Hard v. Palmer*, 20 U. C. Q. B. 208.

One who held notes indorsed to him in blank, as his father's agent, could as such agent sue upon them in his own name: *Ross v. Tyson*, 19 U. C. C. P. 294.

A party though requested by the holder cannot sue on a bill in which he has no interest and of which he has no possession: *Essett v. Tottenham*, 8 Ex. 884.

If the holder of a note bring several actions against the indorsers, he will be entitled to his full costs in any one suit, and his disbursements in the other: *Shuter v. Dee*, 1 U. C. Q. B., 292.

But this rule does not apply where the holder sues on two notes one in the Superior, and the other in the County Court: *Geddes v. Rogers*, 5 U. C. Q. B. 1.

Nor does it apply where one of the parties to the note not sued with the other, is at the commencement of the suit out of the jurisdiction: *Bank of British North America v. Elliott*, 6 U. C. L. J. 16.

Where the holder sued separately the acceptor and indorsers and the acceptor paid the claim without the costs, and judgment was entered and execution issued against him for their amount and the costs against the indorsers, the execution was restrained to the costs against the acceptor alone: *Gillespie v. Cameron*, 3 U. C. Q. B. 45.

An action is maintainable by a person assuming to act as agent of the holder although without his knowledge; and if the holder subsequently adopts the acts of the assumed agent, that is a sufficient title, although such adoption is after action brought in his name: *Ancona v. Marks*, 7 H. & N. 686.

<sup>2</sup> The definition of a "holder in due course," is given in s. 29. The term "defect in title" is used in s. 29 sub-s. (b) and 2 and s. 36 sub-s. 5, and which may be said to partially define its meaning. See also the notes to those clauses. But the term "free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves," is too large; for the defences arising from want of capacity to contract, and therefore of the personal defence of non-liability; and want of authority on the part of agents who sign, accept or indorse, as such, or *per proc.*, to transfer or negotiate the bill or

**Sec. 38.** note, and assume to make their principal personally liable thereunder; as well as the defect of title arising from the forgery of some of the prior signatures necessary to the chain of title to the bill, may, notwithstanding the wording of this clause, be available against "a holder in due course." So the words "enforce payment against all parties liable on the bill," do not necessarily mean all parties whose names appear on the bill. It includes only those who are actual parties to the bill, and legally liable as such according to their several contracts with the holder. See also the notes to ss. 20, 22, 24, 29, 54 and 55.

#### <sup>a</sup> ILLUSTRATIONS.

A note intended as the renewal of another note, but not so used, having been left in the maker's hands with an indorser's name upon it, was received by the plaintiff from the maker for value before it became due. The indorser was held liable: *Larkin v. Ward*, 5 U. C. O. S. 661.

The articles of association of a company contained no provision as to the issue of negotiable instruments, but was implied from the objects of the company. The directors gave to H., for value, an instrument under seal, entitled "debenture," by which the company undertook "to pay to the order of J. H., on 1st July, 1867, £1 000, with interest half yearly, on presentation of the annexed interest warrants;"—Held, that it might be construed as a promissory note, but, in any event, the indorsee and transferee for value was entitled to prove on it against the company, free from equities between J. H., and the company: *In re General Estates Co.*, L. R. 3 Ch. 758.

Where a holder obtained from a partner in a firm of solicitors a note of the firm;—Held, that such holder was bound to inform himself whether the partner had the authority of his solicitor-partners to pledge their credit by the note, and that, not having done so, he was guilty of negligence, and could not recover against the firm: *Smith v. Coleman*, 7 Jur. 1053.

Negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft, or its proceeds, from one who has paid it or wrongfully obtained possession of it: *Arnold v. Cheque Bank*, 1 C. P. D. 578.

A creditor, by becoming executor of his debtor, does not extinguish the debt, although he cannot sue himself for it, and therefore, although executor, he may transfer a note due by his testator to him, so as to give a right of action on it to a transferee: *Lowe v. Peskett*, 16 C. B. 400; 1 Jur. N. S. 1049.

#### *General Duties of the Holder.* <sup>1</sup>

Presentment  
of sight bill.  
Imp. Act, s. 39  
Ind. Act,  
ss. 61 & 76.

**39.** Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument: <sup>2</sup>

Express  
stipulation  
as to pre-  
sentment.

2. Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the



drawee, it must be presented for acceptance before it can be presented for payment :<sup>3</sup> Sec. 39.

3. In no other case is presentment for acceptance necessary in order to render liable any party to the bill : No presentment in any other case.

4. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers. <sup>4</sup> When presentation is excused.

<sup>1</sup> The receipt of a bill implies an undertaking from the holder to every party to the bill, who could be entitled to bring an action against another party on paying it, to present the same in proper time to the drawer for acceptance, where acceptance is necessary ; and to the acceptor for payment, when the bill has arrived at maturity, and is payable ; to allow no extra time for payment to such acceptor, and to give notice without delay, and within a reasonable time, to every such person, of a failure in the attempt to procure a proper acceptance or payment of the bill. Any default or neglect, in any of these respects, will discharge every person from responsibility on account of non-acceptance or non-payment, and will make it operate generally as a satisfaction of any debt, or demand, or value, for which the bill was given : *Story on Bills*, s. 227. The general duties of the holder prescribed by this Act are not absolute duties ; but laches, or non-observance of these duties, without the use of reasonable diligence, will bar the right.

<sup>2</sup> It is absolutely necessary that all bills payable at sight, or at so many days after sight, or after any event not absolutely fixed, or after demand, should be presented to the drawee for acceptance, in order to fix the period when the bill is to be paid. But bills payable on demand (which are immediately on presentment), or payable at a certain number of days after date, or after any certain event, need not be presented at all ; but only for payment. However in practice, whenever the bill is payable at a certain number of days after date, it is usual, and certainly it is prudent, to present it for acceptance. If presented, the holder must conduct himself in the same way, and make protest, and give notice in the same manner as he would upon a bill payable so many days after sight : *Story on Bills*, s. 228.

<sup>3</sup> The two cases mentioned in the first two clauses of this section, are the only cases in which presentation of a bill for acceptance is necessary.

**Sec. 39.** The definition of a bill payable on "demand" will be found in s. 10, and of a bill payable at a "determinable future time" in s. 11. Where a bill is payable "at sight," or "on demand," or "on presentation," acceptance and payment are simultaneous, for such bills are not entitled to the three days' grace (see ss. 10 and 14); therefore presentation for acceptance is not necessary, but optional, except for the process of dishonor. But to charge the drawer of such a bill, some actual evidence of a demand on the drawer to accept must be proved; and also that such demand has been made within a reasonable time.

<sup>4</sup> The provision as to presentment "where a bill is drawn payable elsewhere than at the residence or place of business of the drawee," is new. The Act does not prescribe whether the presentment for acceptance of the bill is to be made at such place, or to the drawee personally. But as the determination of the place of payment is the act of the drawer, and not of the drawee, the presentment should be made personally to the drawee, at his place of residence or business. "Reasonable diligence," like "reasonable time," is a mixed question of law and fact; and is such ordinary diligence as a prudent business man would exercise in cases of urgency. He must, by the best means in his power, and by due and diligent inquiry, find out the proper place to present the bill to the drawee for his acceptance. The law assists those that are diligent, not those who sleep over their rights. The excuses for delay in presenting a bill for acceptance, are detailed in s. 41, sub-s. 2; and for payment in s. 46, sub-s. 2.

Reasonable time for sight bill. Imp. Act s. 40 Ind. Act, ss. 61 & 62.

**40.** Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time: <sup>1</sup>

Or drawer and indorsers discharged.

2. If he does not do so, the drawer and all indorsers prior to that holder are discharged:

What is reasonable time.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. <sup>2</sup>

<sup>1</sup> This clause is apparently a legislative recognition of a decision of the Judicial Committee of the Privy Council in a case where it held that, although there was no limited time fixed by statute for the presentment of a bill of exchange for acceptance, and no usage of trade to fix the time, yet such bill must be presented for acceptance within a reasonable time: *Mullick v. Ralakissen*, 9 Moo. P. C. C. 46. It may therefore be a reasonable presumption to draw from the wording of this clause, that the legisla-

ture intended to require the holder of a bill payable after sight to present such bill for acceptance "within a reasonable time." But the provision requiring him (and successive holders) to either do so, or *negotiate* such bill "within a reasonable time" is not very clear, although in *Fry v. Hill*, 7 Taunt. 397, it was intimated that if a holder does not circulate the bill, he must present it within a reasonable time. Such successive negotiations may operate against the intention of the legislature, and furnish sufficient evidence to excuse the non-presentation of such bill for acceptance within the reasonable time intended by this clause. Bank notes, or government notes, which are intended to pass from hand to hand, and are issued so that they may circulate as money, may be negotiated *ad infinitum*, without the holder incurring any liability for their non-presentation for payment.

## ILLUSTRATIONS.

A bill drawn by a banker in the country on a banker in town, in favor of A., payable after sight, was indorsed by A. to the defendant, who indorsed it to the plaintiff seven days after the date of the bill, who delayed presenting it for acceptance for four days; it will be left to the jury to say whether the plaintiff has been guilty of unreasonable delay; and in considering this, the jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them: *Shute v. Robins*, 3 C. & P. 80.

Whether due diligence has been used in the presentment of a bill of exchange to the drawee, is a mixed question of law and fact; and where the question has been properly left to the jury, the Court will not interfere with their verdict unless it clearly appears that they have come to a wrong conclusion: *Perley v. Howard*, 2 Kerr N. B. 518.

<sup>2</sup> Up to the decision of the Privy Council in the case cited in the previous note there was no "usage of trade" with respect to bills payable after sight. The presumption of law as to bills of exchange payable at a fixed or determinate date, is that they have been presented for acceptance, and accepted during their currency; and within a reasonable time after their date, and clearly before the days of grace, such being the regular and usual course of business: *Roberts v. Bethell*, 12 C. B. 778. See further as to reasonable time *Byles on Bills*, pp. 164, *et seq.*

## ILLUSTRATION.

A bill was drawn in Calcutta in February, 1848, on D. & Co., at Hong Kong, payable sixty days after sight, and indorsed to M. or order. M. in consequence of the depressed state of the money market, kept the bill for five months and nine days, and then sold it to R. who did not present it for acceptance at Hong Kong till the 24th October in that year, when D. & Co., refused to accept it;—Held that the presentation of the bill for acceptance was not made within a reasonable time, and that the drawers were discharged: *Mullick v. Radakissen*, 9 Moo. P. C. 46.

**Sec. 41.**

Rules as to  
presentation  
for accept-  
ance.  
Imp. Act, s. 41  
Ind. Act, s. 75.

**41.** A bill is duly presented for acceptance which is presented in accordance with the following rules:

Reasonable  
hour and  
business day.

(a) The presentment must be made by or on behalf of the holder<sup>1</sup> to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;<sup>2</sup>

Where  
drawees not  
partners.

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only;<sup>3</sup>

Where  
drawee dead.

(c) Where the drawee is dead, presentment may be made to his personal representative;<sup>4</sup>

Through  
P. O.

(d) Where authorized by agreement or usage, a presentment through the post office is sufficient;<sup>5</sup>

Excuses for  
non-present-  
ment.

2. Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill;<sup>6</sup>

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected;<sup>7</sup>

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground;<sup>8</sup>

When there  
is no excuse.

3. The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.<sup>9</sup>

<sup>1</sup> The duty of an agent of the holder of a bill is to be measured by considerations arising in particular cases. It is the duty of an agent to obtain acceptance of the bill if possible: but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that period of time which will preserve the right of his principal against the drawer: *Bank of Van Dieman's Land v. Bank of Victoria*, L. R. 3 P. C. 526.

<sup>2</sup> The direction here given is that the presentment for acceptance must be made "at a reasonable hour on a business day, and *before* the bill is overdue." But this direction is subject to the provision in sub-s. 2, as to excuses for non-presentment. The demand for acceptance must be clearly and unequivocally made and refused before an action will lie against the drawer. See s. 52, sub-s. 2, and s. 86; and as to "a reasonable hour," note 2, p. 158. Sec. 41.

## ILLUSTRATIONS.

It is not a sufficient presentment to produce a witness who went to a place described as the drawee's house, and was there told by a person unknown to the witness that he would not accept the bill: *Check v. Roper*, Esp. 175.

Presentation at the closed doors of the bank, after its usual office hours, is not such a presentation as is necessary for protest: *Walters v. Reiffenstein*, 16 L. C. J. 297.

Where a note was payable at a "store" and the only evidence was that when the holder went to present it, the store was closed; and the defendant objected that the presentment was not shown to have been made at a reasonable hour;—Held, that in the absence of any evidence of the nature of the business carried on at the store, it might be inferred that it was closed in the due course of business, and therefore that the presentment was not made at a reasonable time: *Patterson v. Tapley*, 4 All. N. B. 292.

<sup>3</sup> This sub-section may give rise to a difficulty in case one only of the drawee refuses to accept; for by s. 19 sub-s. 2 (e), "the acceptance of some one or more of the drawees, but not of all," is a qualified acceptance. The effect of a qualified acceptance, if taken by the holder, is to discharge the drawer and indorser (s. 44.)

## ILLUSTRATIONS.

Presentment to one only of the makers of a joint note is not sufficient to charge an indorser: *Blake v. McMillan*, 22 Iowa, 358.

The absence from his home of the drawee of a bill payable after date, when the holder of the bill or his agent calls with it for acceptance, is not a refusal to accept; but such absence when a bill is due, is a refusal to pay, and authorizes a protest: *Bank of Washington v. Triplett*, 1 Peters. U. S. 35.

<sup>4</sup> See the case of *Cosgrave v. Boyle*, 45 U. C. Q. B. 32; 5 App. R. 458; 6 S. C. R. 165; *Smith v. New South Wales Bank*, 8 Moo. P. C. N. S. 461, and *Massachusetts Bank v. Oliver*, 64 Mass. 557.

<sup>5</sup> The usage here referred to must mean some agreement or recognized practice between the parties to the bill; for there is no judicial decision affirming any established "usage of merchants" authorizing the presentation of a bill for acceptance "through the post office." See *Harvey v. Martin*, 1 Camp. 425. See further notes to s. 45, sub-ss. 6 and 7.

<sup>6</sup> The English Act has a special clause (41 (d)) providing for presentment to the trustee of a bankrupt in the case of the bankruptcy of the drawee.

Sec. 41. There is no law of Canada on bankruptcy or insolvency defining the expression "bankrupt;" but the liquidator of an insolvent bank or company, or the trustee or assignee of a drawer who has made an assignment for the benefit of his creditors, may be held to be sufficiently described in the words in the previous sub-section (a), as a "person authorized to accept or refuse acceptance on his behalf." As to "a fictitious person," see notes to ss. 5 and 7; and as to "a person not having capacity to contract by bill," see s. 22, and the notes thereto.

<sup>7</sup> See note 4 to s. 39, subs. 4, as to "reasonable diligence."

#### ILLUSTRATIONS.

A bill of exchange was drawn on the 27th August, and after passing through the hands of two intermediate parties, was presented by the holder on the 1st September, when it was refused;—Held, that presentation had not been made with due diligence: *Harris v. Schwob*, 3 Rev. Leg. 453.

A bill was drawn in duplicate on the 12th August, at Carbonear, in Newfoundland, payable ninety days after sight on S. & Co., in England, but was not presented for acceptance to S. & Co. until the 16th November. Carbonear was 20 miles from St. John's, with a daily communication between those places; and from St. John's there was an ocean mail three times a week to England, the average voyage being about eighteen days:—Held, that the jury properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay: *Straker v. Graham*, 4 M. & W. 721.

<sup>8</sup> This is a new provision, and is apparently intended to prevent drawees setting up an irregular presentment of the bill as an afterthought, or as a new excuse for that given on the first refusal of acceptance.

#### ILLUSTRATION.

A presentment of a bill to the acceptor on the street, is insufficient, unless he waive the irregularity by agreeing to pay or by refusing payment on some other specified ground: *King v. Holms*, 11 Pa. St. 456.

<sup>9</sup> Insolvency, or bankruptcy, does not constitute a breach of a contract so as to excuse the presentation of a bill for acceptance; and that a person has stopped payment is no proof that he would not accept a bill: *Re Agra Bank*, L. R. 5 Eq. 165.

**42.** When a bill is duly presented for acceptance and is not accepted on the day of presentment or within two days thereafter, the person presenting it must treat it as dishonored by non-acceptance; if he does not, the holder shall lose his right of recourse against the drawer and indorsers.<sup>1</sup>

<sup>1</sup> The English Act uses the words "within the customary time," which are rather vague. The rule hitherto allowed the drawee, if he required it, twenty-four hours to consider whether he would accept the bill or not,

Bill non-accepted within two days is dishonored. Imp. Act, s. 42 Ind. Act, s. 61.

and it was usual for the holder to leave the bills with him during that period. This clause fixes the limit of time for such consideration to be "the day of presentment or within two days thereafter," and if the bill be not then accepted, the person presenting it "must treat it as dishonored," or lose his right of recourse against the drawer and indorsers. The time here allowed is limited to "two days." The general rule for the computation of time fixed by a statute is, unless there is something in the statute to the contrary, to hold the first day excluded, and the last day included, as "within twenty days" of the execution: *Ex parte Fallon*, 5 T. R. 283. Thus where notice of an appeal from a conviction was required to be served "within six days after" the conviction, a notice of appeal served on Monday the 9th May, from a conviction made on the 2nd May was too late: *Regina v. Justices of Middlesex*, 7 Jur. 396. And where a statute prescribes a certain number of days to do an act, and the last day for doing such an act falls on a holiday, then such day is not excluded: *Wilkinson v. Britton*, 1 M. & Gr. 557. Where a claim must be made within a certain specified time, the right to make the claim will be forfeited by an omission to assert the right within the given time: *Doe Watson v. Jefferson*, 2 Bing. 118. Where the Legislature has fixed the time for doing an act, it would be preposterous for the Courts to countenance laches beyond the period within which it had been confined by Act of Parliament: *Smith v. Clay*, 3 Bro. C. C. 636. But by s. 91, of this Act, where the time for doing any act is less than three days, non-business days, (the holidays specified in s. 14 of the Act), are excluded. The two days here limited, will, therefore, be exclusive of non-business days, or holidays. Prior to the provision in this statute requiring the acceptance to be written on the bill, and when less formal acceptances were held binding, the retention of a bill by a drawee beyond the usual or customary time, was held to amount to an acceptance: *Harvey v. Martin*, 1 Camp. 425.

Sec. 42.

**43.** A bill is dishonored<sup>1</sup> by non-acceptance—

Dishonor by non-acceptance and its consequences

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained;<sup>2</sup> or—

(b) When presentment for acceptance is excused and the bill is not accepted:

2. Subject to the provisions of this Act, when a bill is dishonored by non-acceptance an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.<sup>3</sup>

Recourse in such cases.

<sup>1</sup> It is not easy to explain how the expressions "dishonor" and "honor," being, as they are, expressions relating to personal conduct rather than to

**Sec. 43.** personal rights, became technical words applicable only to those contracts between merchants which are known as bills of exchange and promissory notes. They seem to have been used from time immemorial by the merchants of various nationalities in a technical sense. They have now become words of known legal import, with reference to such contracts, and have been judicially construed by Courts, and recognized by legislatures, as having a certain meaning when applied to bills or notes; but they have no recognized or technical meaning or application to any other species of contract known to the law. "The Solicitor-General argues that the phrase 'duly honored,' means accepted; whether it does so or not has been left to the jury, and they have found that it meant due payment; which is the opinion that I should myself have formed:" *Per Park, J.*, in *Lucas v. Croving*, 7 Taunt. 164. A bill is, in the technical phrase, said to be honored, when it is duly accepted: when it becomes payable, by lapse of time, it is said to have arrived at maturity: and when acceptance or payment thereof is refused, it is said to be dishonored: *Story on Bills*, s. 126.

<sup>2</sup> Presentment for acceptance is regulated by s. 41, and the requisites for a valid acceptance are defined by ss. 17 and 19. By s. 17 a qualified acceptance is defined, and by s. 41, the holder of a bill may refuse such an acceptance.

<sup>3</sup> The excuses for non-presentment for acceptance are set out in s. 41, sub-s. 2. This may be read as subject to the provisions in ss. 15 and 64 as to an acceptance for honor, *supra* protest; but the holder is not bound to resort to the "referee in case of need," if such there be. His agreeing to take an acceptance for honor, suspends his right of action against the drawer and indorsers. The indorser, like the drawer of a bill, is liable to the holder, the moment the drawee has refused acceptance: *Ross v. Dixie*, 7 U. C. Q. B. 414. An action lies against an indorser immediately on the non-acceptance of the bill by the drawee, although the time for which the bill was drawn, has not expired: *Ballingalls v. Gloster*, 3 East 481. But a drawer may request that, in case the bill is not honored by the drawee, it be returned without protest, by substituting such words as "return without protest:" and such a condition would bind him, and perhaps the indorsers: *Chitty on Bills*, 120. See further s. 38.

Qualified acceptance may be refused.

**44.** The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance:<sup>1</sup>

If taken without authority.

2. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill;



The provisions of this sub-section do not apply to a Sec. 44.  
 partial acceptance, whereof due notice has been given; Partial acceptance.  
 where a foreign bill has been accepted as to part, it must  
 be protested as to the balance :

3. When the drawer or indorser of a bill receives notice What shall be deemed assent.  
 of a qualified acceptance, and does not within a reasonable  
 time express his dissent to the holder, he shall be deemed  
 to have assented thereto.<sup>2</sup>

<sup>1</sup> In all cases the holder of a bill is entitled to have an absolute unconditional and unqualified acceptance of the bill as drawn, and he is not bound to take any other : *Story on Bills*, s. 240. A man is not bound to receive a limited or qualified acceptance ; he may refuse it and resort to the drawer : *Gammon v. Schmoll*, 5 Taunt. 353. And he may refuse a special acceptance when the mode of payment differs in form from that required by the bill : *Boehm v. Garcias*, 1 Camp. 425. If a bill drawn by one merchant on another is presented for acceptance, the drawee has no right to alter the bill as drawn, or to strike out a word in it. He may refuse to accept, or may accept conditionally, or in a qualified manner : *Decroix v. Meyer*, 25 Q. B. D. 343.

<sup>2</sup> A qualified acceptance is a variation of the original contract, and should the holder agree to such a variation of the contract, without the assent of the drawer and indorser (if any), he discharges them from liability on the bill. If the holder intends to refuse the qualified acceptance offered by the drawer, he should note the bill for non-acceptance, and should give notice of dishonor to the antecedent parties. If he intends to acquiesce in it, he must give notice of the nature of the acceptance to all previous parties. Formerly the law required him to obtain the consent of such previous parties to his taking a qualified acceptance, or they were held to be discharged : *Rowe v. Young*, 2 Bligh 391. This clause retains the old rule of law, but authorizes the holder to give notice of such qualified acceptance to the drawer and indorsers, and throws upon them the onus of agreeing or disagreeing to the holder taking such qualified acceptance. If such qualified acceptance is taken, the holder should not protest the bill, or give a general notice of dishonor, for he would thereby preclude himself from recovering against the acceptor : *Byles on Bills*, 149. But where a holder takes a *partial* acceptance he should protest the bill for the balance, and give notice of dishonor to all prior parties.

**45.** Subject to the provisions of this Act, a bill must be Bill must be presented for payment.  
 duly presented for payment; if it is not so presented, the  
 drawer and indorsers shall be discharged :<sup>1</sup>

- Sec. 45.** 2. A bill is duly presented for payment which is presented in accordance with the following rules :—
- Rules as to presentment**
- When due.** (a) Where the bill is not payable on demand, presentment must be made on the day it falls due ; 2
- When payable on demand.** (b) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable ; 3
- Reasonable time.**
- Usage and facts regarded.** In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case ;
- Presentment at proper place to payer.** (c) Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place, as hereinafter defined, either to the person designated by the bill as payer or to his representative or some person authorized to pay or refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found ; 4
- Proper place is,—**
- Specified ;** (d) A bill is presented at the proper place,—
- (1) Where a place of payment is specified in the bill or acceptance, and the bill is there presented ; 5
- Address of acceptor ;** (2) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented ;
- Acceptor's place of business ;** (3) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known ;
- Other cases.** (4) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence :

3. Where a bill is presented at the proper place, and, Sec. 45.  
 after the exercise of reasonable diligence, no person auth- Where no  
 orized to pay or refuse payment can be found there, no person at  
 further presentment to the drawee or acceptor is required: 6 proper place.

4. Where a bill is drawn upon, or accepted by two or Where  
 more persons who are not partners, and no place of pay- several  
 ment is specified, presentment must be made to them all: 7 acceptors.

5. Where the drawee or acceptor of a bill is dead, and Where  
 no place of payment is specified, presentment must be made acceptor is  
 to a personal representative, if such there is, and with the dead.  
 exercise of reasonable diligence he can be found: 1

6. Where authorized by agreement or usage, a present- Post office.  
 ment through the post office is sufficient: 2

7. Where the place of payment specified in the bill or Where no  
 acceptance is any city, town or village, and no place there- place in city,  
 in is specified, and the bill is presented at the drawee's town, &c., is  
 or acceptor's known place of business or known ordinary specified.  
 residence therein, 3 and, if there is no such place of business  
 or residence the bill is presented at the post office, or  
 principal post office in such city, town or village, such  
 presentment is sufficient. 4

<sup>1</sup> It has been recommended by Judges, as a protection to bankers, who might inadvertently pay bills or notes on forged signatures, that they should require their customers to "domicile their bills" at their own offices or places of business, (*i. e.*, make them so payable), and then honor them there when presented for payment, by giving a cheque on their banker for the requisite amount: *Robarts v. Tucker*, 16 Q. B. 560. Presentment for payment, as well as for acceptance, are governed by different considerations. The presentment for acceptance should be *personal*, and made to the drawee himself, or to his agent, for he, or his agent, has personally to do what the Act requires,—write his signature, with or without additional words, on the bill; and the locality of presentment is immaterial, if the hour and day are proper. The presentment for payment should be *local*, and made where the money is, or ought to be, so that the acceptor, or his agent, or correspondent, or banker, may pay the money called for by the bill. Again, the day of the presentment for acceptance is immaterial so long as the day is "a business day," and the hour "a reasonable hour." But the day of payment is a fixed day (except in the

Sec. 45. case of sight or demand bills), and cannot be waived, or an extra day, or other indulgence as to time, given. Not only is this duty enforced by the law, by providing that the parties to the bill shall be discharged from liability by its non-observance; but the original debt may also be lost. For where a creditor takes a bill or note from his debtor in satisfaction of the debt, it will be presumed that the money was received, unless the contrary is shown: *Hebden v. Hartsink*, 4 Esp. 46. And if the creditor takes a bill from his debtor, as collateral security for the payment of his debt, and if he neglects to present it for payment, or, if dishonored, to give notice of such dishonor, and the bill consequently becomes worthless, he cannot afterwards sue his debtor either on the bill, or for the original consideration: *Peacock v. Purssell*, 14 C. B. N. S. 728; but see *Bottomley v. Nuttall*, 5 C. B. N. S. 315. In strict law no demand is necessary against an acceptor, but in practice a demand is usual: *McIntosh v. Heydon*, Ry. & Mo. 362. But see s. 52 sub-s. 2. The provisions of the Act, to which this section is made subject, are the clauses which define what are excuses for non-presentment for payment and delay. See also, s. 39, subs. 4; and notes to s. 46.

<sup>2</sup> In the section prescribing the rules for presentment for acceptance (s. 41), it is required that the presentment be made "at a reasonable hour on a business day." Prior to this Act, such was the rule and the custom of merchants, as to presentment of a bill for payment. What is a reasonable hour for presenting a bill for payment, may be illustrated as follows. If a bill is payable at a bank, the presentment should be during banking hours. If payable at a post office, then during the regular post office hours. If payable at an office or a place of business, then during the ordinary office or business hours. If payable at a private house, then at any reasonable hour up to about bed-time. What are reasonable hours, must be determined by the present customs of localities, and not by the earlier cases, for business hours are different now to what they were a century ago. The English Act repeats these words in clause (c); but though they are omitted in this section, it may be assumed that the old rule will still be applicable.

#### ILLUSTRATIONS.

A demand made the day before the bill matures is insufficient: *Henry v. Jones*, 8 Mass. 453.

Demand of payment of a bill made on the second day of grace, is a nullity: *Wiggen v. Roberts*, 1 Esp. 261.

The presentment of a note a few minutes before twelve o'clock at night, is not a reasonable hour, and not sufficient to hold an indorser: *Dana v. Sawyer*, 22 Me. 244.

A presentment of a bill at a counting house (where it is made payable), between six and seven o'clock in the evening is sufficient: *Morgan v. Davison*, 1 Stark. 114; or at eight in the evening, *Barclay v. Bailey*, 2 Camp. 527; s. p. *Triggs v. Newnham*, 1 C. & F. 631; *Wilkins v. Judis*, 2 B. & Ad. 188.

Where demand was not made until the fourth day after maturity of the bill;—Held, that the drawers were discharged: *Orear v. McDonald*, 9 Gill (Md.) 350.

Sec. 45.

When the maker of a note lived 200 miles from the holder, a demand made within six days of the maturity of the note, was held to be sufficient: *Freeman v. Boynton*, 7 Mass. 483.

A note dated 25th February (leap year) payable ninety days after date, does not fall due until 29th May, and a protest and notice before that date was held to be premature: *Craft v. State Bank*, 7 Ind. 219. See also *Kobler v. Montgomery*, 17 Ind. 220.

A bill drawn in Toronto, on the 6th August, upon a party living in New York, payable at sight, in favour of a party living in Illinois, was presented in New York on the 10th November following;—Held, that the delay could not, under the circumstances, be held to be laches on the part of the holder: *Boyes v. Joseph*, 7 U. C. Q. B. 505.

Before the statute it was held in Quebec, that if the holder of a bill of exchange locks it up for two years, he makes it his own, and cannot have recourse to the person from whom he received it: *Rouveau v. Pourangeau*, (1820), 2 Rev. Leg. 30; s. p. *Bridgford v. Simonds*, 17 La. An. 121.

<sup>3</sup> This provision applies to cheques, as well as to bills or notes payable on demand. It is always to be considered whether under the circumstances of the case, the cheque has been presented with reasonable diligence. This is what the law-merchant requires. Bankers would be kept in a continual fever if they were obliged to send out a cheque the moment it was paid in. It was a question at the time of the older cases, whether what was a reasonable time was not for the jury, but in the case of *Rickford v. Rudge*, 2 Camp. 537, it was settled to be for the Judge. The provisions of the Act now make it a mixed question of law and fact. Section 10 defines what is a bill payable on demand; s. 36, sub.s. 3, prescribes the rule for determining when such a demand bill is to be considered as overdue. See also s. 40, as to the presentment for acceptance or negotiation of a bill payable after sight; and also the cases as to reasonable time referred to in the notes to these sections.

#### ILLUSTRATIONS.

A demand made within seven days on the maker of a note payable on demand, is reasonable: *Seaver v. Lincoln*, 21 Pick. (Mass.) 267.

A delay of two weeks in presenting a demand note for payment, after it comes into the hands of a holder, is *prima facie* unreasonable: *Keyes v. Fenstermaker*, 24 Cal. 329.

A delay of five months and a half to give notice of a demand and non-payment, unexplained, was held to amount to gross negligence: *Ellis v. Dunham*, 14 Ark. 127.

So a delay of eight months: *Field v. Nickerson*, 12 Mass. 131. See also *Thayer v. Brackett*, *Ibid.* 350; *Jerome v. Stebbins*, 14 Cal. 457. *Sed contra*: *Vreeland v. Hyde*, 2 Hall. (N. Y.) 429.

A note or cheque received about noon on one day, it is a reasonable time to go for the money the next morning; but if the party receiving it keep it for several days without demanding payment, and the payee become insolvent, he must bear the loss: *Ward v. Evans*, 2 Ld. Raym. 928.

## Sec. 45.

<sup>4</sup> The bill must be presented by the holder or his agent, who must exhibit the bill to the person from whom he demands payment and be ready to give it up on receiving payment, (s. 52, sub-s. 4). Presentment for payment must be such a presentment as would be sufficient to charge the indorsers, or other persons collaterally liable on the bill: *Griffin v. Weatherby*, L. R. 3. Q. B. 767. Formerly a demand of payment of a foreign bill by a banker's clerk was not sufficient. "The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a public officer:" *Per Buller, J.*, in *Leftley v. Mills*, 4 T. R. 175.

## ILLUSTRATIONS.

The holder of a bill accepted payable at a bankers, impliedly agrees to present it for payment within the usual banking hours: *Parker v. Gordon*, 7 East 355.

But presentment of a bill after the usual hours is sufficient, provided there is somebody at the place, who sees the bill or gives an answer; otherwise it will not be sufficient: *Henry v. Lee*, 2 Chit. 124.

A presentment at a banking house after hours when the house is shut, is not sufficient to charge the drawer; and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before presented within banking hours: *Elford v. Teed*, 1 M. & S. 28.

The acceptor of a bill paid the amount to his bankers, (part of which he had borrowed from the holder of the bill) the day before the bill fell due. On the morning of the day it was due, the acceptor died, and the bankers refused payment. The holder then sued the bankers, but it was held that there was no privity between them, and the action was dismissed: *Hill v. Royds*, L. R. 8 Eq. 290.

<sup>5</sup> Formerly it was held that an acceptance of a bill payable at a particular place was a qualified acceptance, and that presentment at such place was absolutely necessary. But later legislation (7 Wm. IV. c. 5; C. S. U. C. c. 42; R. S. C. c. 123), provided that an acceptance payable at a particular place should be held to be a general acceptance, unless the acceptor or maker stated on the bill or note that it was to be payable there only and not otherwise or elsewhere. This provision, requiring the words "only and not otherwise or elsewhere," to be stated in the bill or note, has not been re-enacted in s. 19, although such a provision is contained in the similar clause in the English Act. The result of this change in the law is to import a noticeable peculiarity and difference respecting the effect of designating on a bill of exchange, or a promissory note, the place of payment. In the case of a bill, an acceptance to pay at a particular specified place is defined, by s. 19, to be neither conditional nor qualified, and therefore a general acceptance; which, under the former law, authorized the holder, at his option, to present the bill, either at the particular specified place, or to the acceptor personally. But there is nothing in this Act as to whether this option is continued or not. The proceedings in this section regulate the mode and procedure of present-

ment for payment. In the case of a note, the promise to pay at a particular specified place is made part of the contract, and there is no statutory provision (as there was in the case of a bill), altering the effect of that condition, or giving the holder any option as to the place of presentment for payment. The effect is the same as if the note were made payable at the designated place, "only and not otherwise or elsewhere." There is an agreement in the law as to what presentment will make the primary debtor in each case liable. A bill need not be presented on the day it matures in order to render the acceptor liable, unless there is an express stipulation on the bill to the contrary (s. 52). Similarly, if a note is not presented on the day it matures, the omission does not discharge the maker, (s. 86). See note 2 to s. 18, p. 75, and note 4 to s. 40, p. 148, and notes to s. 89.

## ILLUSTRATIONS.

Where a bill is made payable at a particular place, presentment there for payment on the day it falls due, is sufficient to charge the drawer: *Richardson v. Daniels*, 5 U. C. O. S. 671.

Where A. had guaranteed certain advances of goods and money, to be made to B. by the plaintiff, and the plaintiff took B.'s note, payable at a particular place, for the amount;—Held, that he could maintain no action against A. without proving presentment there, and notice of non-payment to A.: *Driggs v. Waite*, 6 U. C. O. S. 310.

Held, that a note made payable at the residence of the maker, at Strathroy, "only and not otherwise or elsewhere," did not require any special form of presentment, it having been on the day it matured, at that place with the maker: *Harris v. Perry*, 8 U. C. C. P. 407.

A memorandum at the foot, or in the margin, of a note indicating a particular place of payment, forms no part of the contract, though shewn to be contemporaneous with the note itself: *Williams v. Waring*, 10 B. & C. 2. See now s. 86, sub s. 3.

A drawer's acceptance of a bill payable at his bankers is tantamount to an order to the banker to pay the bill to any person who according to the law-merchant can give a valid discharge for it: *Robarts v. Tucker*, 16 Q. B. 560. The bankers cannot charge their customers with any other payments than those made in pursuance of that authority: *Per Parke, B., Ibid.*

Where a note was presented for payment on the day it fell due at the place where the maker had previously carried on business, and a person was there whom the jury found was an agent of the maker;—Held, a sufficient presentment: *Fitch v. Kelly*, 44 U. C. Q. B. 578.

## 4 ILLUSTRATIONS.

It is not necessary that payment be demanded by a notary; any agent of the holder may make such demand: *Taylor v. Davidson*, 2 Cranch C. C. 434.

A demand of payment made on the assignee of an insolvent firm is not a sufficient demand to hold the indorser: *Armstrong v. Thurston*, 11 Md. 148.

A presentment of a bill by a notary to the acceptor on the street is not a sufficient presentment: *King v. Holmes*, 11 Pa. St. 456.

Where a note is drawn payable at the house of Y., and the notary does not present it to the maker A. there, nor inquire whether he had left

**Sec. 45.** funds to pay it, but presents it to Y., and demands payment of him :—Held, not sufficient to hold the indorsers : *Mechanics Bank v. Lynn*, 2 Cranch C. C. 217.

An averment in pleading that the bill, when due, was presented for payment, is supported by proof that the holder went to the place named to present it, but found the house shut up, and no one there : *Hine v. Alvely*, 4 B. & Ad. 624.

If the makers of a note who had become insolvent, have shut up and abandoned their shop, this is evidence of a declaration to all the world of their refusal to pay their note there : *Howe v. Bowes*, 16 East 112.

A note was made by one A., payable at no particular place, was left at the bank in C., where A. then resided, for collection; and the clerk who was to present it, stated that on its becoming due he went to the house in which A. had resided, but could get no information respecting him. He enquired of more than one person who had known A. well, but their answers as to where he had gone were conflicting. It was proved for the defence that the maker made no secret of his intended departure; that his furniture was advertised; and that persons could at any time have given correct information as to his place of residence;—Held, that at least application should have been made at the places to which A. was said to have gone; that due diligence had not been used to discover his residence. And semble, that the question of diligence is not wholly a question for the jury : *Browne v. Boulton*, 9 U. C. Q. B. 64; s.p., 10 U. C. Q. B. 129.

<sup>5</sup> There may be a difficulty in practically working out this clause where, after the making of the joint note, some one or more of the joint makers remove to distant localities, so that presentment to each on the day the bill matures, is impossible. In such a case s. 46 may be invoked to excuse the non-presentment.

#### ILLUSTRATIONS.

A joint and several note made payable at their separate dwelling houses, was presented to both makers in the yard of one of them, and no objection was made by either as to the place of demand of payment;—Held, sufficient : *Baldwin v. Farnsworth*, 10 Me. (Fair.) 414.

Presentment to one only of the makers of a joint note is not sufficient to charge an indorser : *Arnold v. Dresser*, 8 All. (Mass.) 435; s. p. *Taylor v. Davidson*, 2 Cranch C. C. 434; *Sed contra*, *Shed v. Brett*, 1 Pick. (Mass.) 401; *Harris v. Clark*, 10 Ohio 5.

Where a note is signed by several joint makers, who are chargeable on the same contract, and in the same capacity, the holder must prove a case against all of them : *Sifton v. McCabe*, 6 U. C. Q. B. 394.

<sup>6</sup> Formerly it was allowable, where a bill was accepted, payable at a particular place, and the acceptor had died before it became due, to prove presentment at the specified place; and it was not necessary to show presentment at the house of the deceased's representatives : *Philpott v. Bryant*, 4 Bing. 717. But where a bill was presented at the house of the acceptor, and the drawer, to whom it was shown, said that the acceptor was dead, and that he was his executor, and asked that it might stand over for a few days, such presentment was held sufficient : *Caunt v. Thompson*, 7 C. B. 400.



<sup>7</sup> It cannot be said that a general usage of presentment through the post office had been adopted in Canada prior to this enactment, except in places where there had been no banking facilities. But in England such a mode of presentment is a recognized practice; and the custom of bankers there is, when a foreign cheque is deposited with a banker by a customer, to forward it by post direct to the drawees: *Heywood v. Pickering*, L. R. 9 Q. B. 432. A presentment through the post office is a reasonable mode of presentment: *Prudeau v. Criddle*, L. R. 4 Q. B. 461. The rule which convenience requires should be adopted: *Rickford v. Ridge*, 2 Camp. 539.

#### <sup>8</sup> ILLUSTRATIONS.

An acceptance of a bill drawn and payable to the drawer's order in London is a general acceptance, and a special presentment is not necessary: *Fayle v. Bird*, 6 B. & C. 531.

Proof of presentment of a bill so drawn payable in London, or excuse for non-presentment is not necessary: *Selby v. Eden*, 3 Bing. 611.

<sup>9</sup> This clause is new, and there is no corresponding clause in the English Act. The prior clause authorizes the presentation of a bill for payment through the post office, *i. e.*, sending it by post to the acceptor for payment. This clause provides for presentment for payment being made at the post office. It may be said to have been the more general practice of bankers and notaries, in the cases mentioned in the clause, to present the bill at a bank, the most appropriate place for an acceptor to place the money so as to have it ready on the appointed day to meet the bill. It is no part of the duty of a postmaster to act as banker, or bailee, for the acceptors of bills or makers of notes, and he may reasonably refuse such a responsibility. "The postmaster receives no hire, and enters into no contract with individuals, and carries on no commerce or merchandise; the post office is a branch of the revenue, and a branch of the police:" *Per* Lord Mansfield, C. J., in *Whitfield v. Lord Despencher*, 2 Cowp. 754. Besides he is not allowed any fee, nor required to give any security, for holding money for the convenience of such parties. Any other public officer in the city town or village, such as the mayor, clerk, or treasurer, or police magistrate or clerk, or the customs, or revenue officer would be equally appropriate. As every city and town, as well as every village of any importance, has a bank in it; the presentation of a bill or note at the post office instead of that most appropriate place, a bank, is somewhat anomalous.

**46.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence: when the cause of delay ceases to operate, presentment must be made with reasonable diligence: <sup>1</sup>

When delay  
in present-  
ment for  
payment is  
excused.  
Imp. Act, s. 46  
Ind. Act, s 76

## Sec. 46.

When such  
presentment  
is dispensed  
with.

2. Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;<sup>2</sup>

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment;<sup>3</sup>

(b) Where the drawee is a fictitious person;<sup>4</sup>

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;<sup>5</sup>

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented;

(e) By waiver of presentment, express or implied.<sup>6</sup>

<sup>1</sup> The holder of a bill is bound by his implied undertaking or duty to every other party to the bill, to present it to the acceptor at maturity for payment, to allow no extra time, and in case of non-payment to give notice, and do all proper acts required by law, without delay to every such party, of the dishonor of the bill. A default in any of these respects will discharge the party in respect to whom there has been any such default, and who otherwise would be bound to pay the same, from all responsibility on account of the non-acceptance or non-payment of the bill, and will operate as a satisfaction of any debt or demand for which it was given: *Story on Bills*, s. 112. But this clause provides for relief from this absolute rule, in cases of *vis major*, nor imputable to the holder's default, misconduct, or negligence. These terms are also used in s. 50, as to delay in giving notice of dishonor; and in s. 51, sub-s. 9, as to delay in noting or protesting a dishonored bill. Of each of these delinquencies there are degrees, and they are graduated according to such incidents as relationship, or duty, or results. They have entered into judicial consideration in cases affecting a trustee and his *cestui que trust*, principal and surety, bailor or bailee, principal and agent, master and servant. In some classes of relationship simple default, or simple negligence, will create a liability in one who, by himself or another, is held to be legally responsible for the result; while in other classes of relationship such default or negligence, though hurtful, will bring no penalty on the defaulting or negligent

one; the degree in such case must be wilful default, or culpable or gross negligence. And these, in their turn, may be affected by the incidents of concurring or contributory default or negligence or misconduct, on the part of the other party. The standard according to which the duties prescribed and defined by the Act, are to be performed, is, apparently from its frequent use throughout the Act, that of "*reasonable diligence*;" and it may therefore fairly be assumed, until judicial authority otherwise interprets, that the "default" and "negligence" (being what may be defined as *passive* delinquencies), described in the Act, may mean such degree of default or negligence as is the reverse of reasonable diligence, and which has been defined by Blackburn, J., in *Swan v. North British Australian Co.*, 11 W. R. 862, to be "the neglect of some duty cast upon the party who is guilty of it, and for which no excusable fact can be established;" and that "misconduct" (being what may be defined as an *active* delinquency), may receive its ordinary signification, and be applied accordingly, without any intervening *locus penitentie*. The law may be severe in laying so high a penalty on an omission; but an omission from incapacity or inability is one thing, an omission from negligence is another. The neglect of doing a particular act is an offence: a mere omission to do it, as in the case of prevention by superior force, is not an offence: *Per* Lord Denman, C. J., in *King v. Burrell*, 12 A. & E. 467. Neglect is an omission to do that which it was in his power, and within his duty to do, without having any lawful excuse for the omission. Forgetfulness or carelessness is certainly not a sufficient excuse: *Per* Coleridge, J., *ibid.* Mistake of duty and honest intentions will not excuse: *Amy v. Supervisors*, 11 Wall. 136.

## ILLUSTRATIONS.

It is no excuse for non-presentment of a note for payment that it was indorsed when overdue: *Davis v. Dunn*, 6 U. C. Q. B. 327.

A bill drawn on Leghorn was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it:—Held, that it being afterwards presented for payment with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties: *Patience v. Powley*, 2 Smith 223.

A bill of exchange was drawn and indorsed in England, and was accepted by the drawee in Paris, and was payable on the 5th October, 1870. Before that date the Franco-Prussian war broke out, and the Government of France enlarged the time for the payment, and protesting of current bills of exchange from time to time, by which the bill did not become payable until the 5th September, 1871. On that day the bill was presented, and payment refused by the acceptors, and was then duly protested:—Held, that the presentment was sufficient to charge the indorsers: *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

Where A. on the 26th of December, received a bill payable in London, and due there on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at Lincoln, who duly forwarded it to London for presentment, and the bill was dishonored:—Held, that by keeping it in his hands until the 29th, he was guilty of laches: *Auderton v. Beck*, 16 East 248.

Sec. 46.

A note due at C. was sent to a bank there for collection, and a bank clerk made several ineffectual attempts to present, but failed to make the necessary presentment of the note, by which the indorsers were discharged. The bank had issued a notice which the holder had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that the bank would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities or mistakes, in respect of such notes;—Held, that the omission to present the note amounted to gross negligence, and that the bank, notwithstanding the above notice, was liable: *Browne v. Commercial Bank*, 10 U. C. Q. B. 129; s. p., 9 U. C. Q. B. 64.

A substantial distinction may be drawn between the entire omission to do an act indispensable to the collecting of a note, and an omission in the mode of doing that act; between the *modis operandi*, and the utter abstaining from doing anything. Therefore notwithstanding the limiting words of the notice, there was an undertaking to do any act indispensable to the collection of the note: *Per Draper, J.*, in *Ibid*, 137.

Where the drawee of a bill removes from his usual place of residence to another in the same state or kingdom, the holder is bound, in order to charge the indorsers, to use reasonable diligence in finding out whither he has removed, and if he succeed, to present the bill for payment. But if the drawee or maker has absconded, that circumstance will dispense with the inquiry: *Reid v. Morrison*, 2 Watts & Serg. 401.

A creditor who takes from his debtor's agent, the cheque of such agent is bound to present it for payment within a reasonable time, and if he fails to do so, and by his delay the position of his debtor is altered for the worse, the debtor is discharged, though he was no party to the cheque: *Hopkins v. Ware*, L. R. 2 Ex. 268.

#### 2 ILLUSTRATIONS.<sup>1</sup>

Where the maker of a note had absconded, and was absent from Canada when the note fell due;—Held, that the absence of the maker and the plaintiff's inability to find him, was a sufficient excuse for non-presentment: *Forward v. Thompson*, 12 U. C. Q. B. 194; s. p. *Lehman v. Jones*, 1 Watts & Sergt. 126.

Where a joint note was made payable at a particular place, and it was not shewn that it was presented there when due, but one of the makers afterwards promised to pay it;—Held, sufficient evidence of presentment: *Macaulay v. McFarlane*, U. C. T. T. 3 & 4 Vict.

A presentment of a note, payable at a bankers at G., where it is made payable, the maker being absent from G. when the note became due, is a sufficient evidence of a presentment to the maker at G.: *Hardy v. Woodraffe*, 2 Stark. 319

A note was made payable at the O. bank at P., but before maturity the O. bank ceased to do business at P.;—Held, that demand of payment was dispensed with: *McRobbie v. Torrance*, 4 Man. R. 426; s. p. *Roberts v. Mason*, 1 Ala. 373.

If the place at which the money due on simple contract is payable, ceases to exist, it is not necessary that demand for payment be made to enable the creditor to maintain an action: *Ibid*, 5 Man. R. 114.

<sup>1</sup> Not only is the belief that the bill will be dishonored, no excuse in law for the omission to give notice; but prior to this Act actual knowledge, that a bill has been dishonored, acquired by other means than a notice of

dishonor, will not excuse the holder giving due notice of dishonor of the bill, unless the parties affected do some acts, or make some admissions, which operate as a waiver of the notice. Such notice may be verbal or written; see s. 49. Sec. 46.

## ILLUSTRATIONS.

The fact that the drawer or indorser had been informed that the bill has been dishonored, but might be taken up on another day, does not dispense with the necessity of giving notice of dishonor. A notice given on Wednesday of a bill dishonored the previous Saturday, is too late: *Miers v. Brown*, 11 M. & W. 472.

Presentment to the acceptor is not excused as between the drawer's indorsee and the indorsee of such indorsee, by the mere fact that the drawer had not, at the time when the presentment should have been made, any effects in the hands of the acceptor: *Saul v. Jones*, 1 E. & B. 59.

<sup>4</sup> The effect where the drawee is a fictitious person is stated in s. 5. A reasonable effect must be given in favor of *bona fide* holders to the act of acceptance; and where it appears that although there was a named person, he was so completely fictitious or non-existing, that the acceptor could not have intended to restrict payment to such person or his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, is estopped from saying that the bill was not a bill payable to bearer: *Vagliano v. Bank of England*, 23 Q. B. D. 260. See further the notes to ss. 5 and 7.

<sup>5</sup> Where as between the drawer and drawees the drawees were not bound to accept, and the drawer had no reason to believe the bill would be paid, delay in presenting the bill, will not release the drawer: *Re Boyse*, 33 Ch. D. 612. Presentment of the bill for payment is dispensed with where the drawee is "a fictitious person;" but there is nothing in this section dispensing with presentment in the case of a person or corporation "having no capacity or power to incur liability on a bill." See s. 22.

## ILLUSTRATION.

P. and M. exchanged cheques for the accommodation of P., and agreed that they were not to be presented before a fixed date. Before that date M.'s bankers suspended payment, and M.'s cheque was never presented, and M., on the day of their suspension, brought an action for the amount in their hands;—Held, that although the suspension would not excuse non-presentment and want of notice of dishonor, the bringing of the action against the bankers operated as a countermand of payment, and presentation and notice were unnecessary: *Blackley v. McCabe*, 16 App. R. 295.

<sup>3</sup> ILLUSTRATIONS.

When a note payable in Montreal, fell due, the payee and indorser wrote to the holder waiving protest of note and agreeing to hold himself liable as if it had been presented for payment:—Held, that the waiver though good against the indorser, was not evidence against the maker: *McLellan v. McLellan*, 19 U. C. C. P. 109.

**Sec. 46.** Where a note was made payable at a particular place, although there was no proof of its being presented there for payment, but proof of a subsequent promise;—Held, sufficient: *McToer v. McFarlane*, Tay. U. C. 113.

Where the maker of a note, an absconding debtor, on the day the note became due, wrote to the holder stating his inability to pay, and requesting further time;—Held, that presentment was unnecessary, although the note was payable at a particular place: *McDonnell v. Lowry*, 3 U. C. O. S. 302.

Where there was no presentment of a note for payment, and no notice of dishonor, a subsequent promise to pay, is a waiver: *McCarthy v. Phelps*, 30 U. C. Q. B. 57.

Illness or other reasonable cause, not attributable to the misconduct of the holder, will excuse. But the holder must present, though the drawer may have desired the drawee not to accept: *Byles on Bills*, 141.

See also *Gaughan v. Fuller*, 2 Stra. 1246; *Hopely v. Dufresne*, 12 East 275; and *Reed v. Mercer*, 16 U. C. C. P. 279.

Dishonor by non-payment. Imp. Act. s. 47. Ind. Act. s. 92.

**47.** A bill is dishonored by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid:

Recourse in such case.

2. Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer, acceptor and indorsers accrues to the holder.<sup>1</sup>

<sup>1</sup> The provisions above referred to, are ss. 64 to 67 as to acceptance and payment for honor. But the holder's right of action accrues at the time notice of dishonor ought to be received, and not from the time when it is sent: *Castrique v. Bernabo*, 6 Q. B. 498. See also *Siggers v. Lewis*, 1 C. M. & R. 370. It is not too early to issue a writ on the day on which a bill is due, where the statute provides that protests for non-payment of bills or notes may be made at any time after three o'clock in the afternoon: *Sinclair v. Robson*, 16 U. C. Q. B. 211. (See s. 51, sub-s. 6 (c)). As to what is due presentment for payment, see s. 45, and the notes thereto. And as to when presentment is excused, see s. 46, and the notes thereto.

Notice of dishonor and effect of non-notice. Imp. Act. s. 48. Ind. Act. s. 93.

**48.** Subject to the provisions of this Act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; <sup>1</sup> Provided that—

(a) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission ;<sup>2</sup>

Sec. 48.  
Rights of a holder in due course.

(b) Where a bill is dishonored by non-acceptance and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment, unless the bill shall in the meantime have been accepted.<sup>3</sup>

Effect of notice on subsequent dishonor.

<sup>1</sup> As to indorsers, the considerations applicable to a drawer who draws without funds, or has no right to draw, do not necessarily or ordinarily apply to them : for the indorsers are entitled to strict notice. An indorser stands in a very different relation to the bill from the drawer ; for he is considered as in the nature of a surety or guarantor for its payment upon due presentment, and is not presumed to know anything about the engagements between the drawer and drawee. His engagement is therefore treated as strictly collateral and conditional, and due notice is one condition upon which his liability attaches : *Story on Bills*, s. 314. When the holder, on the default of the acceptor, means to sue prior parties to the bill, he must give them due notice of dishonor, unless there are circumstances to excuse it : *Berridge v. Fitzgerald*, L. R. 4 Q. B. 642. The provisions of the Act here referred to, are s. 50, as to excuses for non-notice, and delay in giving notice of dishonor.

#### ILLUSTRATIONS.

Where A. drew a bill on one C. in England, who had no effects, and did not accept, which bill was indorsed by B. for A.'s accommodation, and the bill was protested for non-acceptance and non-payment, and notices of non-acceptance and non-payment were duly given to the drawer ; but of non-payment only to the indorser B. ;—Held, that B. was discharged by the want of notice of non-acceptance, and that the facts of there having been no effects in the hands of the drawee, and of B. having indorsed for accommodation, made no difference : *Gore Bank v. Craig*, 7 U. C. C. P. 344.

When the intention of all parties to an accommodation bill was that it should be met by an indorser, the previous indorsers cannot be sued unless they have had notice of dishonor : *Turner v. Samson*, 2 Q. B. D. 23.

An omission to give notice of the non-acceptance of a bill of exchange, is not cured by notice of non-acceptance given with notice of non-payment : *Jones v. Wilson*, 2 Rev. Leg. 28.

The want of notice of dishonor to the indorser of an accommodation note, is no defence to an action against the accommodation maker of such note : *Grant v. Winstanley*, 21 U. C. C. P. 257.

In an action on a promissory note, payable at a particular place, it is not necessary to shew that there were not funds at the bank named, wherewith to retire the bill ; all that is necessary in such a case, as against an indorser, is to shew presentment, non-payment, and notice of dishonor : *McDonald v. McArthur*, 8 App. R. 533.

**Sec. 48.** When the drawer of a bill receives notice before it becomes due, that it was accidentally destroyed, and is called upon to give another in its stead, he is nevertheless entitled to notice of dishonor, though the drawer is insolvent : *Thackray v. Blackett*, 3 Camp. 164.

<sup>2</sup> The rights of a holder in due course, subsequent to the omission to give notice of dishonor for non-acceptance of a bill, are not clearly defined; except in so far as such rights are affected as indicated in the cases to the prior note 1. If a person takes a bill before maturity, but with notice that the acceptance has been refused, he takes it on the same footing as an overdue bill, and with the title of his indorser : *Crossley v. Ham*, 13 East 498. But a holder who takes it without such notice, acquires it free from all equities of which he has had no notice : *Goodman v. Harvey*, 6 N. & M. 372. Where a payee presented a bill for acceptance, which was refused, but he neglected to give notice to the drawer, by which he discharged the drawer as between the drawer and himself. He then indorsed it without notice of said dishonor to a holder for value : and it was held that the discharge of the drawer extended only to an action between the party guilty of the neglect, and that the same defence was not available against the new holder, as it was against his indorser : *O'Keefe v. Dunn*, 6 Taunt. 305 : 6 M. & S. 282.

<sup>3</sup> As illustrated by the cases to note 1, the omission to give notice of dishonor, on the refusal of the drawee to accept, operates as a discharge of the indorsers, and is not retrieved by a notice of dishonor for non-payment. But this clause makes the notice of dishonor for non-acceptance sufficient for the subsequent dishonor by non-payment, unless the drawee afterwards accepts the bill, and then, as acceptor, dishonors it again by non-payment.

Rules as to  
notice of dis-  
honor.  
Imp. Act, s. 49  
Ind. Act,  
ss. 93 & 95.  
By holder or  
indorser.

**49.** Notice of dishonor, in order to be valid and effectual, must be given in accordance with the following rules:—

(a) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill ;<sup>1</sup>

Notice by  
agent.

(b) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party is his principal or not ;

Notice  
enures for  
benefit of  
others.

(c) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers, who have a right of recourse against the party to whom it is given ;



(*d*) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given; <sup>2</sup>

Sec. 49.

Effect of notice by indorser.

(*e*) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonored by non-acceptance or non-payment; <sup>3</sup>

Written or personal notice sufficient.

(*f*) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor;

Return of dishonored bill.

(*g*) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication; a misdescription of the bill shall not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby; <sup>4</sup>

Mistake in notice.

(*h*) Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf; <sup>5</sup>

Notice by party or agent.

(*i*) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there is and, with the exercise of reasonable diligence, he can be found; <sup>6</sup>

Where drawer or indorser is dead.

(*j*) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others; <sup>7</sup>

Where several drawers, &amp;c.

(*k*) The notice may be given as soon as the bill is dishonored, and must be given not later than the next following juridical or business day; <sup>8</sup>

Notice not later than next day.

2. Where a bill, when dishonored, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal;

If dishonored bill in his hands, agent may notify.

Sec. 49. if he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder :

Notice to antecedent parties.

3. Where a party to a bill receives due notice of dishonor, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonor : <sup>9</sup>

What shall be sufficient notice of protest or dishonor.

4. Notice of the protest or dishonor of any bill payable in Canada shall, notwithstanding anything in this section contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place ; and in such latter case such notice shall be sufficiently given if addressed to him in due time at such other place ; and such notice so addressed shall be sufficient, although the place of residence of such party is other than either of such above-mentioned places ; and such notice shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on which such protest or presentment has been made, or on the next following juridical or business day ; such notice shall not be invalid by reason of the fact that the party to whom it is addressed is dead : <sup>10</sup>

Miscarriage by post office not to affect notice.

5. Where a notice of dishonor is duly addressed and posted, as above provided, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post office. <sup>11</sup>

<sup>1</sup> The object of notice of the dishonor is to apprise all parties liable on the bill or note, that the acceptor of the bill, or the maker of the note, has violated his contract to pay as he had agreed, and that the bill or note is thereby dishonored ; and also to notify them that their liability to pay the bill or note, according to their contract with the holder, has accrued. The

Act provides that the notice may be in writing, or by personal, or verbal communication; subs. (e) and (2). But the more usual and safest course is to give the notice in writing, so as to make sure of its being distinct, and sufficient in all particulars; and also that it may shew, if the original or a copy be produced, what was the actual notification given to the parties. As pointed out in note 3 to s. 46, knowledge of the dishonor of a bill, acquired through other sources than a formal notice, has been held insufficient. The term "notice of dishonor" must therefore be held to mean a formal notification that the bill has been dishonored by non-acceptance or non-payment.

Sec. 49.

#### <sup>2</sup> ILLUSTRATIONS.

Where a note payable at a bank is sent there for collection, the protest and notice may properly on their behalf: *Wilson v. Pringle*, 14 U. C. Q. B. 230.

The holder of a bill may take advantage of a notice of dishonor given by any party who is himself liable to be sued on a bill, and would on paying it be entitled to reimbursement, provided such notice is given in sufficient time: *Harrison v. Ruscoe*, 15 M. & W. 231; 10 Jur. 142.

A holder of a cheque is not bound to give notice of its dishonor to the drawer, for the purpose of charging the person from whom he received it; he does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of dishonor to those whom he seeks to make liable: *Rickford v. Lidge*, 2 Camp. 537.

Sending a verbal notice to a merchant's counting house is sufficient; and if no person is there in ordinary business hours, it is not necessary to leave or send a written notice: *Goldsmith v. Bland*, Bay. on Bills 224.

The holder's clerk called upon the drawee, and verbally informed him that the bill had been presented but the acceptor "could not pay it," to which the drawer replied he would see the holder about it; it was left to the jury to infer due notice of dishonor: *Metcalfe v. Richardson*, 11 C. B. 1011.

#### <sup>3</sup> ILLUSTRATIONS.

The following is an insufficient notice:—"This is to inform you that the bill I took of you, £15, 2s. 6d. is not took up, and 4s. 6d. expense, and the money I must pay immediately:" *Messenger v. Southey*, 1 M. & Gr. 76.

A notice of dishonor should inform the party either by express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment: *Solarte v. Palmer*, 1 Bing. N. C. 194. See also *Paul v. Joel*, 27 L. J. Ex. 384.

The holder of a bill on the day after it became due, called at the office of the drawer, and finding him engaged, wrote and sent him the following notice: "B.'s acceptance to J., £500, due 12th January, is unpaid; payment to Roberts & Co. is requested before four o'clock;"—Held, a sufficient notice: *Paul v. Joel*, 4 H. & N. 355.

#### <sup>4</sup> ILLUSTRATIONS.

What is a sufficient notice of dishonor, is a question of law; whether given is a question of fact: *Ferris v. Saxton*, 4 N. J. (1 South.) 2; s. p., *Bank of Upper Canada v. Smith*, 4 U. C. Q. B. 483.

A notice of dishonor incorrectly described the amount as £28, instead of £25;—Held, not a fatal objection: *Thompson v. Cotterell*, 11 U. C. Q. B. 185.

Sec. 49. A notice of dishonor headed with the name of the bank, which was holder of note, though not signed, is good: *Maxwell v. Brain*, 10 L. T. N. S. 201.

A notice of dishonor though dated on Sunday,—the note falling due on the Saturday, and the notice being delivered on the Monday,—is not invalid: *Blum v. Dixon*, 5 U. C. Q. B. 580.

Where the notice being dated 26th July, stated the note to have been on that day presented and protested, whereas it was on the 25th:—Held, not sufficient to mislead: *Cassidy v. Mansfield*, 20 U. C. C. P. 383; s. p., *Low v. Owen*, 12 U. C. C. P. 101.

A notice addressed to the firm stating the dishonor of a note indorsed by them, when the note was indorsed by one of such firm in his own name only, is not sufficient: *Bank of Montreal v. Grover*, 3 U. C. Q. B. 27.

A notice of dishonor is not vitiated by a misdescription of the bill which could not mislead the party receiving the notice, as to the bill intended: *Bromage v. Vaughan*, 9 Q. B. 608; 10 Jur. 992.

Where the notice wrongly stated the name of the acceptor, but the notice was correct in other respects;—Held, that it was a question for the jury: *Harpman v. Child*, 1 F. & F. 652.

It is sufficient if the name and address of the indorser are on the outside of the letter of notice, although not addressed to him on the face of the letter inclosed: *Denegre v. Hiriart*, 6 La. An. 100.

#### <sup>5</sup> ILLUSTRATIONS.

Where a bill has been lost or destroyed, the drawer of the bill is entitled to notice of dishonor, although he has refused to give a new bill according to the statute, and the drawee is bankrupt: *Thackray v. Blackett*, 3 Camp. 164.

If a man makes another his agent for the purpose of indorsing the bill, he also makes him his agent for the purpose of receiving notice of dishonor, and that a notice given to such agent will be good: *Firth v. Thrush*, S B. & C. 387.

Leaving a notice of dishonor with an out-door servant cutting fire-wood, not known or proved to have been an inmate in the family, is insufficient: *Commercial Bank v. Weller*, 5 U. C. Q. B. 543.

The defendant had a house in M., where his family lived, and where he resided in the winter, but during the rest of the year he carried on business at L., and resided at the house of B. there, where his notes had previously been presented for payment, and notices of dishonor had been left for him, and which notes he had paid. In January, a clerk in the bank, who had delivered the former notices at the same place, left a notice of dishonor at B.'s house in L., addressed to the defendant, which notice he never received, having left L. about three weeks before;—Held, that when reasonable diligence had been used to discover the place to which notice should be sent, and it has been sent accordingly, it is sufficient; but if the holder is unable to discover the indorser's residence, and that no notice of dishonor is given, the excuse should be pleaded: *Patterson v. Tapley*, 4 All. N. B. 529.

#### <sup>6</sup> ILLUSTRATIONS.

A notice of dishonor addressed merely "to the executrix or executor of the late Mr. Jones, Toronto," is bad: *Bank of British North America v. Jones*, 8 U. C. Q. B. 86.

Where notices had been addressed to the "administrators" of an estate at B, though the testator had resided at C, to which other notices had been sent, some of which the executors had received some weeks after;—Held, that the reasonable inference was that the notices had been received in due course: *McKenzie v. Northrop*, 22 U. C. C. P. 383.

Sec. 49.

A notice directed to the last place of residence of an intestate, though given after his death, is sufficient, there being no administrator; and no second notice need be given to the administrator after his appointment: *Gillespie v. Marsh*, 1 U. C. C. P. 453. See also *Brown v. Marsh*, 1 U. C. C. P. 438, and *Massachusetts Bank v. Oliver*, 64 Mass. 557.

The indorser, a married woman, having separate estate, died intestate during the currency of a note which she had indorsed as surety for her husband, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided in the house which was part of his deceased wife's separate estate. No letters of administration had been granted:—Held, that the notice was sufficient: *Merchants Bank v. Bell*, 29 Grant 413.

One S. discounted with a bank a note made by P. S. died, and his executor proved the will before the note matured. The note was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated. The indorsers subsequent to S., who knew of S.'s death before maturity of the note, took up the note from the bank, and, relying on the notice of dishonor given by the bank, sued S.'s executor;—Held, that the holders of the note, not knowing of S.'s death, and having sent a notice in pursuance of 37 Vic. c. 47, s. 1 (D.), (similar to s. 49, sub-s. 4 of this Act), gave a sufficient notice to bind the executor, and that the notice so given, ensured to the benefit of the other indorsers: *Cosgrave v. Boyle*, 6 S. C. R. 165.

#### 7 ILLUSTRATIONS.

Prior to this Act it was held that, where a note is payable to, and indorsed by, several persons not partners, notice to one is notice to all: *Bank of Michigan v. Gray*, 1 U. C. Q. B. 422.

Where there are two or more joint indorsers, not parties, notice must be given to all: *Gantt v. Jones*, 1 Cranch C. C. 210.

The fact that one partner of a firm indorsing a note had allowed judgment by default to be entered against him, does not operate as an admission of notice of dishonor as against his co-partner: *Penquet v. McKenzie*, 6 U. C. C. P. 308. See also, 1 *Parsons on Bills*, 502.

Notice of dishonor given to one member of a firm is notice to all, even though the firm is dissolved, or one of the parties is dead: *Boullin v. Page*, 54 Mo. 594; s. p. *Wojan v. Thompson*, 9 La. An. 300.

A bill was indorsed to a branch of a bank at Portmadoc, which sent it to the Pwllheli branch of the same bank, which indorsed it to the head office in London;—Held, that each of the branch banks was an independent indorsee, and each was entitled to notice of dishonor: *Clode v. Bayley*, 12 M. & W. 51; 7 Jur. 1092.

\* The English Act contains an additional clause requiring, in the absence of special circumstances, notice to be given, (a) where the parties reside in the same place, the notice is to be given or sent off in time to reach the proper parties on the day after the dishonor of the bill; (b) where the parties reside in different places, the notice is to be sent the day after the

Sec. 49. dishonor of the bill, or by the next post day. The provisions as to posting notice of dishonor are contained in sub-s. 4 *post*.

## ILLUSTRATIONS.

The general rule as to what will be reasonable notice seems to be, that with respect to persons living in the same town, the notice must be given by the next day : *Darbishire v. Parker*, 6 East 3.

And with regard to persons living at different places, notice must be given by the next post at which it would be reasonably practicable to give notice : *Williams v. Smith*, 2 B. & A. 496.

It is sufficient if the indorser receive notice sent by private hand, although if sent by post, he might have been delivered a day sooner : *Nassau v. O'Reilly*, U. C. H. T. 2 Vict.

A notice of dishonor, though delayed by misdirection, is sufficient if, being posted sooner than necessary, it has been received within the period allowed by law : *Bank of British North America v. Ross*, 1 U. C. Q. B. 199.

Plaintiff and defendant resided about three miles apart ; the mail ran between both places, and closed where plaintiff resided, on Monday, Wednesday, and Friday in each week ; the bill was presented for payment on Monday the 4th, being the last day of grace, and not paid ; there being no mail on the 5th, notice was served on defendant by a special messenger on the 6th, before it could have reached him, had it been mailed on that day ;—Held, in good time : *Chapman v. Bishop*, 1 U. C. C. P. 432.

Notice mailed in the proper post office between eight and nine in the evening of the day after protest ;—Held, sufficient, though the post mark upon it was of the following day : *Wilson v. Pringle*, 14 U. C. Q. B. 230.

An indorsee employed his solicitor to discover the indorser's address and give notice of dishonor. The solicitor discovered the address one day, consulted his client the second, and gave notice the third ;—Held, sufficient : *Firth v. Thrush*, 8 B. & C. 387.

A note was due at a bank on the 15th September, but owing to a change of managers, the new manager knew nothing of the note until the evening of the 16th, when he caused the note to be protested, and notice of protest to be put in the defendant's box at the post office before six o'clock the same evening ;—Held, sufficient presentment and notice of protest : *Union Bank v. McKilligan*, 4 Man. R. 29.

Notice given to an indorser on the day before a note is payable, is ineffectual : *Toothaker v. Cornwall*, 3 Cal. 144.

## 9 ILLUSTRATIONS.

The law that one clear day is to be allowed for each step in communication between parties in dealing with bills, cannot be extended, so as to allow any further time for communications between an agent and his principal, in reference to any step : *Re Leeds Banking Company*, L. R. 1 Eq. 1.

Where a notice of dishonor by the acceptor in London was sent by the post to the holder in M., and was delivered between eight and nine in the morning, and the post went out for Liverpool, where the drawer lived, between twelve and one, the holder sent notice to the drawer in a letter by a private person on the second day, who did not deliver it to the

drawer until two hours after the Liverpool post delivery;—Held, that the holder had made the bill his own by his laches: *Darbishire v. Parker*, 6 East 3. Sec. 49.

Where delay is caused by the party to whom notice is first sent, he cannot give an effectual notice so as to bind parties antecedent to him: *Shelton v. Braithwaite*, 8 M. & W. 254.

<sup>10</sup> The greater part of this clause is a re-enactment of C. S. C. c. 123, s. 5, originally 37 Vic. c. 47, s. 1, which has been construed in the case of *Cosgrave v. Boyle*, 45 U. C. Q. B. 32, 5 App. R. 458, and 6 S. C. R. 165. See note 6, *ante* p. 175. But compare this with sub-s. (i).

## ILLUSTRATIONS.

A notice of non-payment sent to an indorser through the post office, addressed to him in "York township," in which he resided, was held sufficient, there being no evidence as to whether there was one or more post offices in that township, nor that it ought to have been directed to any certain post office: *Bank of Upper Canada v. Bloor*, 5 U. C. Q. B. 619.

The agent of an indorser being asked by the agent of the holder where the indorser resided, gave an erroneous direction;—Held, that notice of non-payment sent to such place was sufficient: *Vaughan v. Ross*, 8 U. C. Q. B. 506. See also *McMurrich v. Powers*, 10 U. C. Q. B. 481, and *Bank of Upper Canada v. Smith*, 3 U. C. Q. B. 358.

The indorser of certain promissory notes resided at S., and his place of business was there. Notices of dishonor were posted, addressed to the defendant at S., at 1 o'clock p.m. on the day after which the notes matured, the postage on such notices being duly prepaid in both cases. There was no local delivery by letter carriers from that post office;—Held, sufficient notice of dishonor: *Merchants Bank v. McNutt*, 11 S. C. R. 126.

It is sufficient if the notice of dishonor was posted in such time as that, by the usual course of post, it would be delivered on the proper day: *Stocken v. Conlin*, 7 M. & W. 515.

The defendant had resided and carried on business for several years at a place called B.;—Held, that a notice of dishonor addressed to him at B. was sufficient, though he had changed his residence about that time, the holder not being aware of such change: *Bank of New Brunswick v. Millican*, 4 All. N. B. 254.

Where a place has been designated by a party on a bill or note as the address to which notice may be sent, the holder may send notice of dishonor to that place, even if he has reason to think that such place is not the place of residence or business of such party: *Hay v. Burke*, 16 App. R. 463.

<sup>11</sup> By the *Post Office Act*, R. S. C. c. 35, s. 43, it is provided that from the time any letter, packet, chattel, money, or thing is deposited in the post office for the purpose of being sent by post, it shall cease to be the property of the sender, and shall be the property of the person to whom it is addressed, or the legal personal representative of such person. A person putting into the post office a letter, properly directed, has done all that is necessary for him to do, and is not answerable for casualties occurring in the post office: *Dunlop v. Higgins*, 1 H. L. Cas. 380; *Shannon v. Hastings Mutual Ins. Co.*, 2 App. R. 81.

## Sec. 49.

## ILLUSTRATIONS.

A notice posted on the day on which the note is dishonored is good, although, by the mistake of the post office, it is not delivered to the party entitled to such notice until some time afterwards: *Taylor v. Greir*, 17 U. C. Q. B. 222; s. p., *Woodcock v. Houldsworth*, 16 M. & W. 124; *Dobree v. Eastwood*, 3 C. & P. 250.

The holder need not prove the notice to have been received. Putting a letter into the post office, though the post miscarry, is sufficient. Though there is a post-office in the township in which the indorser resides, the holder need not direct his notice to that office, if there be a nearer office in the adjoining township to which the indorser's letters are generally sent: *Bank of Upper Canada v. Smith*, 3 U. C. Q. B. 358.

When delay in giving notice of dishonor is excused. Imp. Act, s. 50 Ind. Act, s. 90.

**50.** Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence: when the cause of delay ceases to operate the notice must be given with reasonable diligence: <sup>1</sup>

When such notice is dispensed with. Cannot be given.

2. Notice of dishonor is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged; <sup>2</sup>

Waiver.

(b) By waiver express or implied; notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice; <sup>3</sup>

A\* regards drawer.

(c) As regards the drawer, in the following cases, namely:

(1) Where drawer and drawee are the same person;

(2) Where the drawee is a fictitious person or a person not having capacity to contract; <sup>4</sup>

(3) Where the drawer is the person to whom the bill is presented for payment;

(4) Where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; <sup>5</sup>

(5) Where the drawer has countermanded payment;



(d) As regards the indorser, in the following cases, Sec. 50.  
namely :

As regards  
indorser.

(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill ;<sup>6</sup>

(2) Where the indorser is the person to whom the bill is presented for payment ;

(3) Where the bill was accepted or made for his accommodation.<sup>7</sup>

<sup>1</sup> Where the drawer has sustained, and can sustain no loss or injury or prejudice by the want of notice of dishonor, he will be held liable, notwithstanding the want of such notice, if having funds in the hands of the drawee, he voluntarily withdraws them, or if having no funds in the hands of the drawee, but having them on the way to reach him, and to be applied to the discharge of the bill, he intercepts and stops them, or where before acceptance he orders the drawee not to accept the bill : *Story on Bills*, s. 313. Delay in the presentment of a bill for acceptance is excused, for causes mentioned in s. 41, sub-s. 2 ; delay in presentment for payment is excused for the causes mentioned in s. 46 ; and this section prescribes what are excuses for delay in giving notice of dishonor ; and they also apply to delay in giving notice of protest by s. 51, sub-s. 9.

#### ILLUSTRATIONS.

There must be reasonable diligence, such as men of business usually exercise when their interests depend upon obtaining correct information : *Palmer v. Whitney*, 21 Ind. 58 ; s.p., *New Orleans Canal Co. v. Bry*, 2 La. An. 303.

As the law-merchant respects the religion of different people, a Hebrew indorsee was held not guilty of laches, who neglected to give notice on the regular day, that day being a festival whereon he was forbidden to attend to secular business : *Lindo v. Unsworth*, 2 Camp. 602.

A state of war between the country of the drawer and that of the drawee, is an excuse for delay in giving notice : *Hopkirk v. Page*, 2 Brock 20.

The prevalence of an epidemic (as yellow fever) in a locality, is an excuse for delaying to give notice of dishonor : *Tunno v. Laque*, 2 Johns. (N. Y.) 1.

Sickness, to be an excuse for delay in presenting and giving notice, must be shown to have been not only sudden, but likewise so severe as to have prevented the holder or agent from employing another to make the presentment, and then it must be shown that the proper steps were taken as soon as the disability was removed : *Wilson v. Seuter*, 14 Wis. 386.

The question of diligence in giving notice of dishonor to the indorser, is a mixed question of law and fact : *Nash v. Harrington*, 1 Aik. (Vt.) 39.

**Sec. 50.**

The seasonableness of the notice of dishonor, so far as it effects the question of due diligence, is a question of fact for a jury: *Robertson v. Vogle*, 1 Dall. 253.

Where, by the law-merchant, the drawer of a bill is not entitled to notice of dishonor, the statutory diligence need not be observed: *Wood v. McMeans*, 23 Tex. 481.

Where the indorser resides in a different place from that in which it is payable, notice of dishonor must be sent to him in the place in which he is actually a resident: *Bank of Utica v. DeMott*, 23 Johns. (N. Y.) 432.

A note was presented for payment in D., and dishonored and protested. Notices of dishonor were posted to the indorser, addressed to C., but he lived in D., and the bank which held the note for collection, could have seen the mistake, in due time, from the protest which it received. The indorser was held to be released; but the bank was held liable because it neglected to rectify the mistake, and send a proper notice to the indorser: *Steinhoff v. Merchants Bank*, 46 U. C. Q. B. 25.

<sup>2</sup> The death, known bankruptcy, or known insolvency, of the drawee, or acceptor of a bill or maker of a note, or his being in prison, or the notorious stopping payment of a banker, constitutes no excuse, either in law or in equity, or in bankruptcy, for the neglect to give due notice of non-acceptance, or non-payment; because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves, and it is not competent to the holder to show, that the delay in giving notice has not, in fact, been prejudicial. It has been observed that it sounds harsh that the known bankruptcy of the acceptor should not be deemed equivalent to a demand, or notice, but the rule is too strong to be dispensed with, and the holder of a bill has no right to judge what may be the remedies over, of a party liable on a bill. It is no excuse that the chance of obtaining anything upon the remedy over, was hopeless; that the person or persons against whom the remedy would apply, were insolvents or bankrupts, or had absconded. Parties are entitled to have the chance offered to them: and if they are abridged of it, the law, which is founded on the custom of merchants, says they are discharged: *Chitty on Bills*, 482. Delay in presentment for payment is not excused in all the cases where delay is excused in giving notice of dishonor: but only in the following cases mentioned in sub-s. 2: (a) "reasonable diligence;" (b) "waiver;" (c 2) (d 1) "a fictitious person, or a person not having capacity to contract," (the latter person is not mentioned in s. 46); (c. 4) drawee "under no obligation to accept or pay;" and (d 3) "accommodation of that indorser." See further note I to s. 46.

## ILLUSTRATIONS.

When notice of dishonor reaches the drawer of a bill too late, having first, by mistake, been sent to a wrong person, and such mistake arose from the indistinctness of the drawer's writing on the bill, he is not discharged: *Hewitt v. Thompson*, 1 M. & Rob. 541.

It is the duty of the holder to give the notary full information as to the names and residences of the indorsers. Where the signature of an

indorser was so peculiar that it could not be deciphered, although the holder of the note was well acquainted with the signature, and of the party's residence, but omitted to communicate them to the notary, who when protesting the note made, or as near as might be, a fac simile of the signature, and so addressed the notice of dishonor to "Belleville P. O." but the indorser swore that the notice never reached him, though resident in Belleville;—Held, that the indorser was discharged: *Baillie v. Dickson*, 7 App. R. 759; s. c., 46 U. C. Q. B. 167.

The bank held a note made by A. and indorsed by B. for the accommodation of D., who discounted it with the bank, which had knowledge of the accommodation. On the note being dishonored, the bank handed it to D. who was the bank's solicitor for protest. D. did not protest or notify A. or B. of its dishonor, but delivered it to them, adding that he had paid it. After its maturity, D. became insolvent and absconded, and A. and B. were for the first time notified of the non-payment of the note;—Held, on equitable grounds, that by the laches of the bank's agent they were discharged: *Canadian Bank of Commerce v. Green*, 45 U. C. Q. B. 81.

A bill drawn on persons residing in Dublin, Ireland, was protested for non-payment on the 3rd November, 1841; notice thereof was received by the indorsers, who resided at St. John, N. B. (where the bill was drawn), on the 22nd December following, but was held not to be in due time, it appearing that the mails left Great Britain for New Brunswick, on the 4th and on the 19th November, and that a notice sent by the mail of the 19th, would have reached St. John about the 4th December: *Bank of New Brunswick v. Knowles*, 2 Kerr N. B. 219. But see *Tarratt v. Wilmot*, 1 All. N. B. 353.

The holder of an overdue bill went during business hours to the counting-house of the drawer, for the purpose of giving notice of dishonor, and, finding the counting-house shut, he knocked at the door, and no one answering, he came away, without leaving any notice;—Held, that these facts did not support an allegation of due notice, but were equivalent to a dispensation with notice: *Allen v. Edmundson*, 2 Ex. 719. See also *Crosse v. Smith*, 1 M. & S. 545.

Ignorance of the place of residence of the drawer is a sufficient excuse of the want of notice of dishonor, provided due diligence is used to discover his place of residence: *Browning v. Kinnear*, Gow. 81; and see *Williams v. Germaine*, 7 B. & C. 469; *Bateman v. Joseph*, 12 East 433, and *Beveridge v. Burgis*, 3 Camp. 262.

The time consumed in making necessary inquiries relative to the parties to a note, is not to be imputed as laches. Thus, where the plaintiff became acquainted with the dishonor on the 5th, and not knowing the parties, notice was not despatched to them until the 16th, the original indorser was still held liable: *Baldwin v. Richardson*, 2 D. & R. 285; 1 B. & C. 245.

A notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week afterwards, and there was some slight proof of his having applied to the plaintiff for further time for payment. The jury found for the plaintiff against the Judge's charge, and the Court refused to interfere: *Leith v. Neill*, 19 U. C. Q. B. 233. See *Commercial Bank v. Weller*, 5 U. C. Q. B. 433; *Reed v. Mercer*, 16 U. C. C. P. 279, and *Bank of Montreal v. Scott*, 24 U. C. Q. B. 115.

The indorser of a bill which had been dishonored, after a subsequent indorsee had made it his own by laches, paid the bill, and gave notice of

## Sec. 50.

dishonor to a prior indorser;—Held, that he could not recover, even though the defendant, in case of successive notices by the other parties on the bill, could not have received notice sooner: *Turner v. Leech*, 4 B. & A. 451.

<sup>3</sup> The waiver may be in the nature of admissions of liability, which are held to be evidence of due notice having been given; or admissions of liability where no notice has been given, and which are held to be evidence of waiver of notice; or admissions at the time the bill is due, such as that it will not be paid, and that notice need not be given. See the cases in note 6 on waiver, s. 46.

## ILLUSTRATIONS.

The duty of demand of payment and notice of dishonor, in order to hold an indorser, is not part of the contract, but a step in the legal remedy that may be waived at any time: *Barclay v. Weaver*, 19 Pa. 396.

Where ignorance of residence arises from the drawer, a few days before the bill was due, stating to the holder that he had no regular place of abode, and that he would call and see if the bill were paid, he is not entitled to notice: *Phipson v. Kneller*, 4 Camp. 285.

A person who has given a written guarantee of a note, is not entitled to notice of dishonor: *Palmer v. Baker*, 23 U. C. C. P. 302.

Nor is one who gives a guarantee for goods to be supplied to the acceptor of a bill: *Holbrow v. Wilkins*, 1 B. & C. 10.

A conditional promise by an indorser to pay in land, or see that the holder should lose nothing, made before or after action, waives any objection as to notice: *Burke v. Elliott*, 15 U. C. Q. R. 610. See also *McCuniffe v. Allen*, 6 U. C. Q. B. 377.

Asking for time and promising to pay, is a waiver of notice: *Bank of Upper Canada v. Cooley*, 4 U. C. O. S. 17.

Where there has been a subsequent unconditional promise to pay, with a knowledge of a default on the part of the holder, notice is dispensed with: *Bank of British North America v. Ross*, 1 U. C. Q. B. 199.

The drawer of a bill informed the holder on the presentation of a bill before the days of grace had run, that the bill would not be paid;—Held, further demand and notice were unnecessary: *Minturn v. Fisher*, 7 Cal. 573.

An indorser promising to pay, though aware that no notice had been given, is a waiver: *Shaw v. Salmon*, 19 U. C. Q. B. 512. See also *McMurrich v. Powers*, 10 U. C. Q. B. 481.

Where an indorser writes to the holder to make him believe it unnecessary to give him notice of non-payment, and stating that the maker is insolvent, it may be construed as dispensing with notice: *Beckett v. Cornish*, 4 U. C. Q. B. 138.

<sup>4</sup> For obvious reasons it would seem to be scarcely necessary to enact this clause. The drawee, in drawing the bill in the name of a "fictitious person," becomes a party to a fraud, and is entitled to no protection from the law. So in the case of a person having no capacity to contract, the drawer requires no security for his claim, should the drawee become an acceptor; while he becomes, practically, the primary debtor to the holder. See as to the names of fictitious or non-existing persons to bills, the notes to ss. 5, 7, 24 and 41.

<sup>5</sup> This is based upon the proposition that a party who cannot be prejudiced by want of notice of dishonor, shall not be entitled to receive it. Thus if the drawer knows that he has no effects in the acceptor's hands to answer the bill, he cannot be injured for want of notice: 2 *Smith's Leading Cases*, 50.

## ILLUSTRATIONS.

Nothing will dispense with the necessity of notice, but the circumstance of there being no effects of the drawer in the drawee's hands; it is not enough to show that the drawer has not been damnified: *Dennis v. Morrice*, 3 Esp. 158,

If the drawer has no effects in the hands of the drawee, and no reasonable grounds to expect that the bill will be honored, he is not entitled to notice: *Legge v. Thorpe*, 12 East 171. But see *Wilkes v. Jacks*, Peake 202.

The want of effects which will excuse notice of dishonor need not be a want of any effects; it is sufficient if there are no sufficient effects: *Carew v. Duckworth*, L. R. 4 Ex. 313.

Bankruptcy of the acceptor does not dispense with notice to the drawer: *Boulthée v. Stubbs*, 18 Ves. 21.

<sup>6</sup> The rule requiring notice on the dishonor of a bill or note is only applicable to the case of a fair transaction, where the bill or note has been given for value, and in the ordinary course of trade: *De Berdt v. Atkinson*, 2 H. Bl. 336. Notice of dishonor is dispensed with by this clause, where the "drawee" is a fictitious person, or a person not having capacity to contract, and the name was used to the knowledge of the indorser. But it has been held that a person who, without consideration, and without fraud, indorses a bill, on which both the drawer and acceptor are fictitious persons, is entitled to notice of dishonor: *Leach v. Hewitt*, 4 Taunt. 731. "It is a party's own fault if he has indorsed a bill of [fictitious] persons who cannot answer over to him, and he must be a sufferer thereby; he has placed himself in the common situation of an indorser." *Per* Lord Mansfield, C. J., *Ibid*, 732. But if for example A. draws on himself, payable to himself, and then accepts, and then indorses, a holder need not first demand of him as drawee, and then notify him of non-payment as drawer, and then notify him again as indorser: 1 *Parsons on Bills*, 521. See also *Cavnt v. Thompson*, 7 C. B. 400, and *New York Contracting Co. v. Selina Savings Bank*, 23 Amer. R. 552.

<sup>7</sup> The same strict and technical notice of dishonor is not requisite to charge a person liable on the consideration, as is requisite to charge a person liable on the bill. In the one case the liability is transferable, in the other it is not; and therefore all the defences between the parties can be inquired into: *Chalmers on Bills*, 159. A bill drawn, payable at the house of the drawer, must be presumed to be an accommodation bill, and the drawer is not entitled to notice of its dishonor: *Sharp v. Bailey*, 9 B. & C. 44. See also *Turner v. Samson*, 2 Q. B. D. 23, and the notes to s. 28.

**Sec. 51.**

Inland bill  
may be noted  
and pro-  
tested.  
Imp. Act, s. 51  
Ind. Act, ss.  
99-101.

Exception as  
to Quebec.

**51.** Where an inland bill has been dishonored it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment, as the case may be; but, subject to the provisions of this Act with respect to notice of dishonor, it shall not, except in the Province of Quebec, be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser; <sup>1</sup> but in the case of a bill drawn upon any person in the Province of Quebec, or payable or accepted at any place therein, in default of protest for non-acceptance or non-payment, as the case may be, and of notice thereof the parties liable on the bill other than the acceptor are discharged, subject, <sup>2</sup> nevertheless, to the exceptions in this section hereinafter contained:

Foreign bill  
must be  
protested.

**2.** Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor, except as in this section provided, is unnecessary: <sup>3</sup>

Protest for  
non-accept-  
ance, or non-  
payment.

**3.** A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment:

Noting on  
day of dis-  
honor.

Protest.

**4.** Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting: <sup>4</sup>

If acceptor  
suspends  
payment.

**5.** Where the acceptor of a bill becomes bankrupt, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers: <sup>5</sup>

6. A bill must be protested at the place where it is dishonored, or at some other place in Canada situate within five miles of the place of presentment and dishonor of such bill: Provided that—

Sec. 51.

Where dishonored bill must be protested.

(a) When a bill is presented through the post office, and returned by post dishonored, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day;<sup>6</sup>

Presented through P.O.

(b) Every protest for dishonor, either for non-acceptance or non-payment, may be made on the day of such dishonor at any time after non-acceptance, or in case of non-payment, at any time after three o'clock in the afternoon:<sup>7</sup>

When protest may be made.

7. A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify—

What notary's protest must specify,—

(a) The person at whose request the bill is protested;

Holder.

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found:<sup>8</sup>

Other facts.

8. Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof:<sup>9</sup>

If bill is lost, &c.

9. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.<sup>10</sup>

When protest, and delay, in noting, is excused.

Sec. 51.

No bank  
officer to act  
as notary.

10. No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed.<sup>11</sup>

<sup>1</sup> After presentment, the next step is to note the bill. This is a note or minute made upon the face of the bill, and has been called an incipient protest. It consists of the marking upon the bill the initials of the notary's name, and the true date of the dishonor: *Brooke's Notary*, 96. Although the noting of inland bills is not absolutely necessary, it is customary to get them noted; and there are advantages in doing so, because, as the noting is generally practised, the want of it would tend to render the other parties to the bills suspicious of irregularity, and more reluctant to take them up, and would most certainly raise a prejudice in the minds of a jury if the due presentment should be disputed: *Ibid.* 101. A bill is often "noted" where no protest is either meant or contemplated, as in the case of many inland bills. The use of it seems to be that a notary, being a person conversant in such transactions, is qualified to direct the holder to pursue the proper conduct in presenting a bill, and may, upon the trial, be a convenient witness of the presentment and dishonor: *Byles on Bills*, 202. This section of the Act applies to cheques (s. 72), and promissory notes (s. 88). The noting and protest are necessary before an acceptance or payment for honor (s. 64). By the law-merchant, inland bills were not liable to protest, like foreign bills, until the Act 9 & 10 Wm. III., c. 17, authorized their protest the day after the last day of grace. The statute 3 & 4 Anne, c. 9, placed promissory notes on the same footing as inland bills; so domestic notes, by analogy, are regularly protested on the fourth day, or the day after the last day of grace: *Bradbury v. Doole*, 1 U. C. Q. B. 442. See also, *Brough v. Parkings*, 2 Ld. Raym. 992, and *Barker v. McKay*, 2 How. U. S. 66. Knowingly causing bills of exchange, which had been duly accepted, to be protested for non-acceptance, is an injury to an acceptor's credit, and actionable: *Irvine v. Canadian Bank of Commerce*, 23 U. C. C. P. 509. Nor does the law of England require protest, or notice of protest, in the case of foreign promissory notes: *Bonar v. Mitchell*, 5 Ex. 415.

<sup>2</sup> This special provision relating to the Province of Quebec, makes a difference in the English law-merchant applicable to the other portions of the Dominion, as to the necessity of protesting inland bills and notes. This provision, however, is similar to articles 2298 and 2319 of the Quebec Civil Code, and is also in harmony with the French law, and with nearly all the commercial codes of Continental Europe. Therefore to hold all parties to their liability on the bill or note, it is imperative that all such bills and notes, whether inland or foreign, which are payable in the Province of Quebec, should be protested for non-acceptance or non-payment.



## 3 ILLUSTRATIONS.

## Sec. 51.

The indorser of a bill is in all cases entitled to notice of dishonor, whether the drawer has or has not effects in his hands : *Griffin v. Phillips*, 2 Rev. Leg. 30.

The plaintiff proved by a notary that verbal notice of protest had been given, but the action was dismissed : *Cowan v. Turgeon*, 1 Rev. Leg. 231.

If the notice of protest be premature, or if time be given by the holder to the maker of a note, the indorser is discharged : *City Bank v. Hunter*, 7 Rev. Leg. 171.

The omission to state in a notarial protest that it was made in the forenoon of the day of protest, is fatal, and the indorser is discharged : *Joseph v. Delisle*, 1 L. C. R. 244.

The non-exhibition of the note to the maker at the time of protest, the maker being notoriously insolvent, will not invalidate the protest : *Venner v. Futvoje*, 13 L. C. R. 307.

Where a bill is drawn and endorsed in Upper Canada, (Ontario), but payable in Lower Canada, (Quebec), the law of Lower Canada governs the time within which notices may be sent : *Matthewson v. Carman*, 1 U. C. Q. B. 259.

In an action on a note drawn and payable in Lower Canada, the law of Lower Canada, (Quebec), must govern as to the sufficiency of the notice of non-payment : *City Bank v. Ley*, 1 U. C. Q. B. 192. See also *Smith v. Hall*, 3 U. C. Q. B. 315.

A protest for non-acceptance of a foreign bill is necessary to enable the payee to recover against the drawer, and the want of it is not supplied by proof of a notice for non-acceptance, and a subsequent protest for non-payment. But notice to the drawer of the non-acceptance should be given : *Orr v. Maginnis*, 7 East 359.

A note drawn by a British subject in France, payable on demand, but dated Halifax, N. S., and intended to be used there, is not subject to the French law affecting promissory notes : *Merchants Bank v. Stirling*, 1 Russ. & Gel. 439.

A bill payable in France, though drawn in England, is a foreign bill, and notice of dishonor according to the French law, is sufficient. But if it is a contract governed by the English law, then notice of dishonor must be given : *Hirschfield v. Smith*, L. R. 1 C. P. 340.

A protest is the only legal notice of dishonor in the case of a foreign bill : *Salomons v. Stavely*, 3 Doug. 298.

<sup>4</sup> This clause is new law. Hitherto, although the noting of the bill has been done by the notary on the day of dishonor, it has not been compulsory to do so. The practice as to protesting is as follows : After the presentment and refusal, the next step is to note the bill. This is a minute made upon the face of the bill, and is called an "incipient protest," and consists of the marking upon it the fact of the presentment, and the answer thereto, the initials of the notary's name, the true date of the dishonor, and the other matters required by the forms (see form A). In practice, the presentment and noting are done on the one day, and the protest prepared on some subsequent one, and dated as of the true date, when the bill was dishonored or refused acceptance ; and this is not

**Sec. 51.** antedating the protest, but inserting the true date of dishonor. Although the noting of the bill is generally done on the day on which it is dishonored, yet the rule is not imperative; and in some cases, such as the lateness of the hour, distance and other causes, when it is very inconvenient, or attended with great difficulty, to note it on the very day of presentment and dishonor, the practice is to note it at the earliest convenient opportunity afterwards, stating in the noting, the true date of dishonor. It is not uncommon amongst merchants to cause the bill to be noted in the first instance; but to suspend the preparing a protest for a time, in order to allow an opportunity for the expected arrival of advices, remittances, or consignments, coming from the drawer abroad to the drawee: *Brooke's Notary*, 97. Noting was originally unknown in the law as distinguished from the protest; it was merely a preliminary step in the protest, and has now grown into a practice: *Lefley v. Mills*, 4 T. R. 170. Two forms of "noting for non-acceptance" are given in the First Schedule, Form A. But, except in Quebec, no fee is allowable. See note 4 to s. 93.

#### ILLUSTRATIONS.

A bill of exchange due on the 23rd September, was protested on the 25th, the notary noting the bill as protested on the 24th. The extended protest bore the true date, the 25th;—Held, that the noting dated the 25th was not a good warrant for the extended protest of the 25th, and was invalid: *McPherson v. Wright*, 12 Sess. Cas. 4th Ser. 942.

A mere noting of a foreign bill for non-acceptance, without an actual protest, will not be sufficient, and the want of it is not supplied by a protest for non-payment: *Orr v. Maginnis*, 7 East 359.

A document, purporting to be a protest, but which had in fact been drawn up after the commencement of the action, cannot be received as evidence of a protest: *Campbell v. Webster*, 2 M. & Gr. 258.

The notary who fills up and certifies the protest, must have presented the bill himself; it cannot be done by an agent: *Carmichael v. Pennsylvania Bank*, 5 Miss. (How.) 587; s. p., *Cribbs v. Adams*, 13 Gray (Mass.) 597. *Sed contra* *Sussex Bank v. Baldwin*, 2 N. J. L. (2 Harr.) 487.

<sup>5</sup> Protest for better security is where the acceptor becomes insolvent, or where his credit is publicly impeached before the bill falls due. In this case, the holder may cause a notary to demand better security, and on its being refused the bill may be protested, and no notice of protest may be sent to an antecedent party: *Byles on Bills*, 202. A bill may be protested for better security before the day of payment: *Mendez v. Carreroon*, 1 Ld. Raym. 743. After such protest for better security there may be an acceptance for honor: *Ex parte Wackerbath*, 5 Ves. 574. But after such a protest the bill must be only presented for payment at maturity in order to preserve the holder's rights against all proper parties.

<sup>6</sup> The latter part of this clause in the English Act, reads thus, after the word returned:—"and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day." As to presentment through the post-office,

see s. 45, sub-s. 7, and note thereto. As to business and non-juridical days, see ss. 14 and 91. Sec. 51.

<sup>7</sup> This clause is taken from 14 & 15 Vic. c. 91, s. 1, C. S. U. C. c. 42 s. 15, and R. S. C. c. 120, s. 22. An indorsee of a note payable at a bank, having taken there on the last day of grace, arrested defendant at five o'clock on the same day: Held, that under 14 & 15 Vic. c. 94, s. 1, he was entitled to sue at any time after three o'clock, had the note been payable generally: *Sinclair v. Robson*, 16 U. C. Q. B. 211. Immediate notice of dishonor for non-payment at eleven o'clock, after the acceptor has refused payment, is good, and the law does not impose the duty of enquiring again before a later hour of the day: *Ex parte Moline*, 19 Ves. 216.

<sup>8</sup> A protest is properly speaking, a solemn declaration on behalf of the holder, against any loss to be sustained by the non-acceptance or by the non-payment of the bill, as the case may be; though in a popular sense it includes all the steps after the dishonor of negotiable paper, necessary to charge a party to it. It is highly important that a copy of the bill should be prefixed to all protests, with the indorsements thereon *verbatim*, whenever practicable, and that the reasons given by the drawee for non-payment, should also be stated on the protest. The protest is required to be made out and drawn up by a notary public, if there be one in or near the place, when the bill is payable or the acceptance is to be made. It should be made out and drawn up in the form required by the law or usage of the place where it is made. So essential is the production of a protest for non-acceptance, that it cannot be supplied by mere proof of noting the bill for non-acceptance, and a subsequent protest for non-payment: *Story on Bills*, s. 276. The French Code contains more formal directions as to protest. Where there is no notary, a justice of the peace may protest the bill or note, under s. 93. See the forms for protests in the first schedule to the Act; and the tariff of fees, note 4, s. 93, p. 270.

<sup>9</sup> This clause provides for the "accidental" detention of a bill,—a provision which is not in the English Act. But such detention would, it is presumed, under the succeeding clause, be an excuse for delay caused by circumstances beyond the control of the holder.

<sup>10</sup> It may be a question whether this clause covers the case provided for in s. 48, which excuses non-notice in the case of a bill dishonored by non-acceptance, but which is subsequently accepted, and comes into the hands of a "holder in due course." See notes to s. 46 and to s. 50.

<sup>11</sup> This clause is a re-enactment of R. S. C. c. 123, s. 11; and has been law in Ontario and Quebec since 1850.

**52.** When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable:<sup>1</sup>

Liability of  
acceptor.  
Imp. Act, s. 52  
Ind. Act, s. 93.

**Sec. 52.**

As to place  
of present-  
ment.

2. When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court :<sup>2</sup>

No protest  
or notice  
necessary.

3. In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonor should be given to him :<sup>3</sup>

Presentment  
for payment.

4. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.<sup>4</sup>

<sup>1</sup> This differs slightly from the English Act which reads: "When a bill is accepted generally, presentment," &c. As to what is a general acceptance of a bill, see s. 19 and the notes thereto. The reason why it is not necessary to present the bill to the acceptor in order to render him liable, would seem to be, (1) his acceptance of the bill, without specifying a place of payment, is a contract to pay an unconditional order for a sum certain at the time agreed upon; and (2) his duty, by the common law, is to seek out his creditor if he be in the country, and tender him the money he has agreed to pay: *Co. Litt.* s. 340. The person to be discharged is bound to do the act which is to discharge him, and not the other party: *Cranley v. Hillary*, 2 M. & S. 120. And so where a party guarantees the payment of a note, he is liable on such guarantee, if the note is dishonored when due; and presentment of the note to him is not necessary: *Walton v. Mascall*, 13 M. & W. 452. This clause does not apply to promissory notes. See note 5 to s. 45, and note 1 to s. 86.

<sup>2</sup> This provides for the converse of the first clause, and is an improvement on the phraseology of the English Act. The "express stipulation," may mean the insertion of the old form of words "only and not otherwise or elsewhere; and may make presentment for payment a condition precedent to the acceptor's liability. Thus where an acceptor of a bill, or maker of a note, makes the bill or note payable at a specified bank or office, and adds such words as "only and not elsewhere," the holder must present the bill or note on the day it matures, at the place specified thereon, before he can commence an action against the acceptor or maker. And if such action be brought before such due presentment, the costs of the action are, by the latter part of the clause (which is not in the

English Act), in the discretion of the Court. And it may be a question Sec. 52. whether the provision of the law, whereby a cheque is made a bill of exchange payable on demand, may not import into the case of a demand note, the penalty which attaches to the non-presentment of a cheque within a reasonable time, by which, when such non-presentment has damnified the position of the drawer of the cheque, such drawer is discharged. If presentment be not made at a designated place on the maturity of the bill, the acceptor will still, according to the general law, remain liable to pay the same, whenever afterwards payment shall be demanded there; at least if he has not sustained any loss or injury by the delay: *Story on Bills*, s. 355. But in the United States, if the acceptor have funds at the designated place, and the bank has since failed, the acceptor will be discharged. *Ibid.* s. 356. An acceptance to pay at a banker's must be tendered for payment within the same time that a note must: *Bishop v. Chitty*, 2 Stra. 1194; s. p. *Serle v. Norton*, 2 Mo. & R. 401. But see *Mullick v. Radakissen*, 9 Moore, P. C. 70. There is a similar phrase: "omission to present the note for payment on the day that it matures," in s. 86, applicable to promissory notes made payable at a particular place.

## ILLUSTRATIONS.

Where a bill is accepted generally, presentment need not be alleged or proved, in order to bind the acceptor: *Fayle v. Bird*, 6 B. & C. 531.

The defendants were makers of a joint and several promissory note with one H., as sureties for him, payable to the plaintiff;—Held, that on default of payment at maturity, their liability to pay became absolute; and that it was no defence for them that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., who subsequently had become insolvent: *Wilson v. Brown*, 6 App. R. 87.

Where a bill is drawn payable generally, the holder is not bound to take an acceptance, by the acceptor, payable at a particular place and not elsewhere, because such an acceptance narrows the general liability of the acceptor: *Gummon v. Schmoll*, 5 Taunt. 344.

The maker of a promissory note is not entitled to notice of dishonor: *Pearse v. Pemberthy*, 3 Camp. 261.

<sup>3</sup> This is in harmony with the first part of s. 51, as to inland bills, except as to bills payable in the Province of Quebec. See notes to ss. 51 and 56.

<sup>4</sup> Presentment for payment, must mean presentment according to mercantile usage. The document itself must be present, though not the holder, so as to enable the person presenting it to give it up, if paid. It must be such a presentment as would be sufficient to charge indorsers or other persons collaterally liable on the bill: *Griffin v. Wetherby*, L. R. 3 Q. B. 760. The custom of merchants is, that the holder shall present the bill at its maturity, demand payment, and upon receipt of the amount, deliver up the bill: *Hansard v. Robinson*, 7 B. & C. 90. See further, s. 59.

## Sec. 53.

*Liabilities of Parties.*

Funds in  
hands of  
drawer.  
Imp. Act, s. 53  
Ind. Act, ss.  
7 & 33.

**53.** A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.<sup>1</sup>

<sup>1</sup> It was formerly held that a bill or cheque was an appropriation of so much money in the hands of the banker on whom it was drawn. "In one respect a cheque differs from a bill of exchange, for it is in the nature of an appropriation of money in the banker's hands, for the purpose of discharging a liability of a drawer to a third person:" *Per Byles, J., in Keene v. Beard*, 6 Jur. N. S. 1251. And this view seems to have been sustained by the case of *Hill v. Royds*, L. R. 8 Eq. 292, where the acceptor of a bill, before the bill fell due, paid the amount into his bankers, in order to meet it at maturity. He died the day the bill matured, and the bankers refused payment; but Sir R. Malins, V. C., said: "It was the duty of the bankers to have appropriated the amount in payment of the bill; and, in my opinion, they were wrongdoers in not paying the bill, but permitting it to be dishonored." Subsequently in 1874, when the question came up directly, Sir G. Jessel, M. R., dissented from *Keene v. Beard*, and came to a different opinion and said: "A cheque is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor his cheque when he has sufficient assets in his hands; if he does not fulfil his contract, he is liable to an action by the drawer, in which heavy damages may be recovered, if the drawer's credit has been injured:" *Hopkinson v. Forster*, L. R. 19 Eq. 74. This case has been followed in *Schroeder v. Central Bank of London*, 34 L. T. Rep. 735. The result established by the later cases is, that there is no privity of contract between the drawee of a bill or cheque, and the holder of such bill or cheque, until their relations are changed by the drawee's acceptance. But privity may be created by an agreement or representation, external to the bill or cheque, by which a liability may be created, which can be enforced by the courts. Nor is a letter of credit an equitable assignment, or specific appropriation, of moneys in the hands of the party to whom it is addressed. It is simply a statement by a banker that he has opened a credit, under instructions in favor of a particular person: *Morgan v. La Riviere*, L. R. 7 H. L. 432.

## ILLUSTRATIONS.

Where A. in writing authorized B. to draw a bill on him, which he agreed to accept; and a bank on the representation of such writing, advances the amount to B. on the bill so drawn, there is a clear equity in the Court to order A. to accept the bill, and if past due at the time of the action, to order him to pay it: *Bank of Montreal v. Thomas*, 16 Ont. R. 505. See further cases on pp. 80, 81.

Where A. consigned coffee to M. & Co., and drew bills on them, which they declined to accept, and then wrote to S. to realize the coffee and honor the bills, some of which were in K.'s hands, and S. having notified R. to that effect;—Held, that R. had an equitable charge on the proceeds of the coffee: *Ranken v. Aljaro*, 5 Ch. D. 786.

Sec. 53.

**54.** The acceptor of a bill, by accepting it—

(a) Engages that he will pay it according to the tenor of his acceptance;<sup>1</sup>

Contract of acceptor.  
Imp. Act, s. 54  
Ind. Act, ss. 32 & 121.  
Engages to pay.

(b) Is precluded from denying to a holder in due course—

Estoppels.

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;<sup>2</sup>

(2) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(3) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.<sup>3</sup>

<sup>1</sup> An acceptance admits the genuineness of the signature of the drawer, and his legal competence or capacity to draw the bill. It implies a contract on the part of the acceptor with the payee or lawful holder thereof, to pay the amount of the bill when it becomes due, and whether presented or not, according to the tenor of the acceptance. "The effect of accepting a bill, or making a note, is an absolute contract on the part of the acceptor of the one, or the maker of the other, to pay the payee or order, or bearer, as the instrument may require:" *Byles on Bills*, 2. The acceptor of a bill knows that, by his acceptance, he does an act which will render him liable to indemnify any indorser of it, who may afterwards pay it: *Duncan v. North and South Wales Bank*, 6 App. Cas. 1. This clause does not apply to promissory notes, as s. 87 prescribes the terms of the contract of the maker of a note.

<sup>2</sup> This clause may have to be taken with some qualification, for it does not pretend to define the contract liabilities of the other parties to a bill. As the clause reads, the acceptor of a bill is "precluded," *i. e.*, absolutely estopped, from denying as against a holder in due course, four facts respecting the bill: (1) the existence of the drawer; (2) the genuineness of his signature; (3) his capacity, and (4) his authority, to draw the bill. By ss. 5 and 7, the effect of a name on a bill being that of a fictitious or non-existing person, is defined. By s. 24, a forged or unauthorized signa-

“Sec. 54. *ture* to a bill is “wholly inoperative,” and no right “can be acquired through or under that signature.” By s. 22, want of *capacity* to contract, means freedom from liability. By s. 25, the signature by procuracy operates as a notice of a limited (and it may be of a want of) *authority* in an agent. But in emphasizing the three indefeasible qualities of a bill of exchange, or a promissory note, given in the Introduction, and in order to give absolute security and protection to a “holder in due course,” and to assure to bills and notes a ready circulation and extensive credit as part of the commercial currency of the country, the several provisions of the Act above quoted, are negatived as to their practical effect, so as to maintain the credit and confidence due to the instrument; making it equivalent to and as the representative of money, in the hands of the person specially favored and protected by the Act, a “holder in due course.” Thus in the case of a bill drawn in the name of an existing person, but whose signature is forged, the acceptor, who accepts in ignorance of the forgery, is, as to such holder, estopped from alleging that the drawer’s signature is forged; and that estoppel equally precludes him from denying the other three facts: the (1) existence, and (2) capacity, and if signed *per proc.*, the (3) authority of the agent, of such drawer. For an acceptor is bound to know the signature of his drawer, and “that the bill drawn upon him was the drawer’s hand:” *Per* Lord Mansfield, C. J., in *Price v. Neal*, 3 Burr. 1354; s. p. *Loudon and North Western Bank v. Wentworth*, 5 Ex. D. 96. Whatever neglect there is in such a case as that given above, the law imputes it to the acceptor; and he is therefore drawn within the penalty of the equitable doctrine, that where one of two innocent persons must suffer by the fraud of a third party, that one who was bound to do, or avoid, an act, or be diligent, or who, though innocently, enabled the fraud to be perpetrated on the other, must bear the loss. And so the acceptor of such a bill cannot set up any denial of the four facts specified in this clause, as a discharge of his liability to a *bona fide* holder for value. For the same reasons, where a bill is drawn in the name of “a fictitious or non-existing person,” and payable to the order of the drawer, the acceptor is similarly estopped as against a holder in due course; and he is considered as undertaking to pay to the order of the person who has signed as drawer: *Cooper v. Meyer*, 10 B. & C. 469. See also *Beeman v. Duck*, 11 M. & W. 251; *Fort v. Meacher*, Riley (S. C.) 248, and *Vagliano v. Bank of England*, 23 Q. B. D. 243.

<sup>3</sup> The distinction between “capacity” and “authority” is pointed out in note 2 to s. 22. Capacity in a person to draw a bill (other than those referred to in s. 22), necessarily includes capacity to indorse; and by s. 22, persons having no capacity or power to incur liability on a bill, are authorized to indorse bills. This clause does not use the expression “authority,” for authority to draw a bill as agent for another, does not necessarily include an authority to indorse on behalf of the principal: *Robinson v. Yarrow*, 7 Taunt. 455. But while the clause enables a holder in due course to have one fact, the capacity of the indorser, conclusively



presumed in his favor, he has to establish two other facts against the acceptor before he can obtain a verdict, viz., (1) the genuineness, and (2) the validity, of the indorsement. If the indorsement is in the name of a fictitious, or non-existing person, the bill is payable to bearer (s. 7). If the name of the drawer is forged, and the bill is payable to the order of the drawer, the holder may give evidence to show that the signatures of the supposed drawer to the bill, and to the first indorsement, are in the same handwriting: *Cooper v. Meyer*, 10 B. & C. 469. But a break in the holder's chain of title to the bill, may be shown by a want of authority in the person actually writing the indorsement on the bill, such as the forgery of the signature of the indorser, or the limitation, or absence, of authority in the person assuming to sign as agent. An acceptor of a bill is not liable to any one who claims a title to the bill, upon a forged indorsement of the payee (alleged indorser) of the bill; for he is not estopped from showing that the person demanding payment from him, has no title to the bill. But he is estopped from denying to a holder in due course the genuineness of the signature of the drawer of a bill, even although such signature be a forgery: *Ryan v. Bank of Montreal*, 12 Ont. R. 39, 14 App. R. 533.

Sec. 54.

**55.** The drawer of a bill, by drawing it—

Contract of  
drawer.  
Imp. Act, s. 55  
Ind. Act, ss.  
30 & 122.

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or any indorser who is compelled to pay it,<sup>1</sup> provided that the requisite proceedings on dishonor are duly taken;<sup>2</sup>

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse:<sup>3</sup>

Estoppels.

**2.** The indorser of a bill, by indorsing it—

Contract of  
indorser.

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken;<sup>4</sup>

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

Estoppels.

Sec. 55. (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he had then a good title thereto.<sup>5</sup>

<sup>1</sup> The contract of the drawer is an undertaking that the acceptor shall pay the bill at maturity. All the parties to the bill (subject to the provisions in ss. 5, 7, 22, and 24) are liable to the holder. The acceptor of a bill is the principal debtor; the drawer is secondarily liable, and the indorsers are sureties to the holder, who is the creditor of the principal debtor. But as the law-merchant has given technical titles to the contracting parties to a bill of exchange, different from the titles ordinarily used in other contracts, the relations of the several parties to the bill *inter se*, may be illustrated by the above analogy. The drawer, therefore, on the dishonor of the bill, is (1) liable to the holder; but in the event of the holder compelling an indorser to pay him, then the drawer becomes (2) liable to such indorser.

<sup>2</sup> As to dishonor of a bill, and the requisite proceedings to be taken by a holder on the dishonor of such bill, see the sections under the title, *General Duties of the Holder*, ss. 39 to 52.

#### ILLUSTRATIONS.

The contract which a person transferring for value the property in a bill, makes with the transferee is, that he warrants that the bill, having been accepted, shall on being presented at the time it becomes due, be paid; that is, he engages as surety for the due performance by the acceptor of the obligation which the latter takes upon himself by the acceptance: *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

Where the payee indorsed a note to A. upon an usurious consideration, and A. afterwards failed to recover against the maker upon the ground of usury;—Held, that such payee could recover against the drawer, and it was not necessary to prove a re-indorsement by the usurer A. to the payee: *Bidwell v. Stanton*, Tay. U. C. 366.

<sup>3</sup> The principles of equity are not less applicable to cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which if it is to be paid by the person who is not primarily liable, he has a right of reimbursement or indemnity, from the other. To this class of cases, the rights of an indorser against an acceptor of a bill may be most properly referred: *Duncan v. North & South Wales Bank*, 6 App. Cas. 13. This clause may be compared with clause (b) in s. 54. The drawer is by this clause, estopped from denying two facts in connection with the payee, (1) his existence; (2) his capacity to indorse. The acceptor of a bill payable to A., or order, intimates to all persons by his acceptance, that he considers A. capable of making an order, or an indorsement, sufficient to transfer the property in the bill. See *Drayton v. Dale*, 2 B. & C. 299.

<sup>1</sup> Subject to the observations in the several notes to ss. 16, 25 and 26, as to indorsements limiting or negating the liability of an indorser, the contract of an indorser with the holder, is an engagement by him that if the drawee or acceptor shall not pay the bill at maturity, he, the indorser, will on due notice, pay the holder the sum which the drawee or acceptor ought to have paid, together with such damages as the law prescribes or allows as in indemnity for the dishonor of the bill. The liability of an indorser to the holder is, by the law-merchant, conditional, and "only secondary;" but when the conditions required by that law are fulfilled, it becomes absolute, and is that of a principal; and the indorser's right, if he pays the holder, to recover over against the acceptor, is not founded on any agreement between him and the acceptor, (who is as likely as not to be a stranger, without any communication with him before the indorsement), but is a right established by the same law: *Duncan v. North and South Wales Bank*, 6 App. Cas. 13. The words, "accepted and paid according to its tenor," mean the tenor of the contract of acceptance and payment at the time of the indorsement, and not its tenor at the time the bill was drawn, nor its tenor if altered after such indorsement.

Sec. 55.

#### ILLUSTRATIONS.

The indorser of a bill is estopped from denying either the signature of the drawer, or her capacity (being a feme covert in this case), to draw the bill. He is in the capacity of a new drawer: *Ross v. Dixie*, 7 U. C. Q. B. 414. But see *Hanscome v. Cotton*, 16 U. C. Q. B. 98.

In an action by the holder against the last indorser of a note, it is no defence that the names of the maker and of the prior indorsers were forged: *Eastwood v. Westley*, 6 U. C. O. S. 55.

In an action against L. and A. as indorsers of a note payable to the order of L.;—Held, that A. must be taken to be the immediate indorsee of L., and could not deny L.'s indorsement: *Griffin v. Latimer*, 13 U. C. Q. B. 187.

The drawee of a bill may accept or pay it under protest, for the honor of the drawer or indorser, but if he discounts it before maturity, he stands in the position of an indorsee, as against all prior parties: *Swope v. Ross*, 40 Pa. St. 186.

The liability of an indorser to his immediate indorsee arises out of a contract between them; and this contract does not consist in the writing, popularly called an indorsement, but arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which the delivery was made and accepted, as evidenced by the spoken or written words of the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties: *Castrique v. Buttigieg*, 10 Moore P. C. C. 94.

If, for the purpose of raising funds, one of two joint owners of a vessel draws a bill, and the other indorses it, neither is liable to the other on the bill: *Gardiner v. Cleveland*, 9 Pick. (Mass.) 336.

When a promissory note is made payable to two payees, and one transfers his interest in it to the other, he cannot be charged as an indorser by the other payee: *Foster v. Hill*, 36 N. H. 526.

## Sec. 55.

If an indorsement is written with an understanding that the indorsing was not to give credit to the note, nor for value, but only to comply with the forms of the holder's business as auctioneers, the indorser is not liable : *Corcoran v. Hodges*, 2 Cranch C. C. 452.

<sup>6</sup> Whatever may have been the defects of title prior to that of the indorser's title, his contract with the holder estops him from any defence as to any irregularity or defect in his chain of title. His transfer is an implied covenant for a good and indefeasible title to the bill ; and under that covenant he is liable to the holder, even although, when he pays the bill, he finds his right of action against such prior parties defeated by forgery or by some other defect of title in his immediate transferor. See notes to s. 54. His indorsement is therefore a guarantee to all subsequent parties to the bill that *his title*, at the time of his indorsement, was indefeasible.

## ILLUSTRATION.

It is not competent for the indorser of a note to set up as a defence to an action against him upon it, that the signature of the maker is forged : *McLeod v. Carman*, 1 Han. N. B. 592.

When a stranger becomes liable as indorser, Imp. Act, s. 56 Ind. Act, s. 15.

**56.** Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers. <sup>1</sup>

<sup>1</sup> This section is apparently new law ; and it seems to settle, by a statutory declaration as to the liabilities of parties signing a bill otherwise than as drawers or acceptors, the conflict of decision referred to in note 6 to s. 23. The decisions there referred to, claim to derive their authority from either the rules of the law-merchant relating to parties to bills, or the clause in the Statute of Frauds relating to guarantees. The law-merchant, according to English law, recognizes no stranger-guarantors to bills or notes. The parties to them must hold some right in, or title to, or liability under, the bill or note, included within some one of the titles usually applicable to such securities ; and the simple signature of each of such parties imports into the security, the contract of that party according to his title or relation to the bill as defined by the law-merchant. The Statute of Frauds requires the liability, under a contract of guarantee to be evidenced in writing and signed by the party chargeable or his agent. And the Courts have held that where this latter contract of guarantee is written on the bill or note, the guarantor is subject to the liabilities of an indorser, but not to any of the rights, nor the protection, accorded by the law-merchant to indorsers. In many of the commercial systems of Europe, the intervention of a stranger-guarantor is recognized, where the guarantee of a bill is known, in France as *Aval*, and in Germany as *Avallum*. This guarantee is usually placed at the bottom of the bill, and it binds the guarantor as surety, and subjects him to the like obligations as the party to the bill

for whom he has given it. It amounts, therefore, in effect, to a guarantee that the party, for whom it is given, shall perform all the obligations which the bill or note itself imports on his part; and in France the name of the guarantor is usually preceded by the words, *pour Aval*. The law of Quebec alone has recognized this contract of guarantee in connection with bills and notes; and some of the cases there decided, are cited below as illustrations. The contract *pour Aval*, has not hitherto been recognized by the English law-merchant; but in struggling to give some effect to the signatures of sureties—usually on the back of the bill or note,—decisions of the Courts have not been harmonious. In some cases it has been held that the locality of the maker's signature on a note is not material; and a person putting his signature on the back of a note, intending thereby to become a surety for the maker, has been held to be a joint maker. In other cases the locality of the signature of such surety has been held to be material; and a signature on the back of the note prior to that of the indorser, has been declared to create no liability, because the party so signing, neither acquired nor transferred a title in the negotiation of the bill; and because, if such a signature was intended for a guarantee, the Statute of Frauds required the terms of the contract of guarantee to be in writing. This new section of the Act, in order to be intelligible, must apparently be read as enlarging the effect of s. 23: and if so, of doing away with the application of the technical rules of the law-merchant and of the Statute of Frauds, as to a contract of guarantee on a bill or a note. The section has been commented upon in somewhat similar terms in *Chalmers on Bills*, p. 177: "An indorsement, properly so called, must be made by the holder; but when a person who is not the holder of a bill or note, backs it with his signature, he is not an indorser, but a *quasi* indorser. The law annexes to his act, consequences similar to those which follow the indorsement of a bill by a holder. Formerly, when a stranger to the bill backed it with his signature, a pleading difficulty arose as to whether he was to be described as an indorser, or as a new drawer. The difficulty was, it is submitted, simply technical, for the consequences are identical. Now it would be sufficient to state the facts, or describe him as an indorser." The latter words of this section "and is subject to all the provisions of this Act respecting indorsers" are not in the English Act, and may be intended to assure to the persons signing as here described, the *rights*, as well as the protection, secured to indorsers under the Act.

## ILLUSTRATIONS.

A note payable to the order of A. was indorsed first by L. and Q., and then underneath their names by A. :—Held, that L. and Q. indorsed as *Avals*, and as security for the maker: *Latour v. Gauthier*, 2 L. C. L. J. 109.

A note was drawn by A. in favour of B. or bearer, and was indorsed by C. in blank :—Held, to be an indorsement *pour Aval*, and that C., the *donneur pour Aval*, could not set up want of notice of protest, or any other defence than might have been pleaded by the maker: *Merritt v. Lynch*, 9 L. C. R. 353.

**Sec. 56.**

Persons who have placed their signatures on the back of a cheque or promissory note, *pour Aval*, are not indorsers, but makers of *Aval*, and are not entitled to any other notice than the maker, and are liable with him jointly and severally. An engagement *pour Aval* is a mixed question of law and fact: *Pratt v. McDougall*, 12 L. C. J. 243.

An indorser of a note not negotiable, or, if negotiable, not endorsed by the payee, cannot be sued as indorser: *West v. Born*, 3 U. C. Q. B. 290.

Measure of  
damages on  
dishonored  
bill.  
Imp. Act, s. 57  
Ind. Act, s. 117

**57.** Where a bill is dishonored, the measure of damages which shall be deemed to be liquidated damages, shall be as follows:—

(a) The holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(1) The amount of the bill;

(2) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case; <sup>1</sup>

(3) The expenses of noting and protest; <sup>2</sup>

(b) In the case of a bill which has been dishonored abroad, in addition to the above damages, the holder may recover from the drawer or any indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. <sup>3</sup>

<sup>1</sup> The clause in the English Act provides that the interest, as damages, may be withheld wholly or in part; evidently to meet the contingency of a valid tender by the debtor, before action, of the amount due on the bill. But this protection has not been conceded to similar parties here. By R. S. O. 1887, c. 44, s. 86, interest is payable upon a debt or sum certain, and payable by virtue of a written instrument at a certain time, or in other cases from the time a demand of payment in writing stating that interest would be claimed. See further as to interest as part of the debt, s. 9, sub-s. 3. See further as to damages note 3 to s. 93.

## ILLUSTRATIONS.

Sec. 57.

Interest made payable by a note is part of the debt, and not damages for detaining it: *Crouse v. Park*, 3 U. C. Q. B. 458; s. p., *Howland v. Jennings*, 11 U. C. C. P. 272.

Though interest does not usually run until demand is made upon a note, yet where payments have been made on account, a demand may be presumed, and interest on the balance will then accrue: *Hurd v. Palmer*, 21 U. C. Q. B. 49.

Interest in the nature of damages may be allowed on a note at the statutory rate, from the maturity to the entry of judgment: *Montgomery v. Boucher*, 14 U. C. C. P. 45.

Interest at the rate allowed by our law is chargeable upon a note dated and made payable in the United States: *Griffin v. Judson*, 12 U. C. C. P. 430.

Interest is in practice more generally allowed by the juries in this country than English authorities would seem to warrant: *Spence v. Hector*, 24 U. C. Q. B. 277.

Interest cannot be claimed on a bill or note, except by express agreement, but interest may be given by a jury as part of the damages, but not as part of the debt: *Ex parte Charman*, W. N. (1887) 184.

Nothing but what arises from a contract, agreement, or demand of a debt, can give rise to claim of interest: *Boddam v. Riley*, 1 Bro. C. C. 238.

A promissory note was dishonored at maturity, but was not protested by the holders (a bank) because of a waiver by the indorsers of presentment and notice:—Held, that as there was no protest the indorsers were not liable to pay interest thereon as a debt. A habit of banks to charge interest on overdue debts, and to collect it if possible, does not establish a custom. The indorsers would be liable to pay interest as damages for breach of their contract, but such interest could not be recovered in insolvency proceedings: *Re McDougall*, 12 App R. 265.

Below the signatures to a note was written "when due, draw fifteen per cent."—Held, that the memorandum was no part of the note: *Knowles v. Hill*, 25 Ill. 288.

<sup>2</sup> The English Act leaves it optional to allow the expenses of protest, in cases where protest is necessary. This clause re-enacts part of the former law, (R. S. C. c. 123, s. 6), which provided that the damages to be recovered on a bill drawn in Canada or Newfoundland, should be the amount of the bill, the expense of noting and protest, and interest thereon, and exchange and re-exchange thereon. But it omits the allowance as to bills payable elsewhere, of an additional sum of two and one-half per cent. as damages.

<sup>3</sup> The rule in regard to exchange is that when the note is made payable abroad, the rate of exchange is governed by the rate prevailing between the *forum* in which the action is brought, and the place where the money is to be transmitted; and at the time the note is dishonored: *White v. Baker*, 15 U. C. C. P. 292, s. p. *Stevens v. Berry*, *Ibid.* 548.

## ILLUSTRATIONS.

In an action on a sterling bill, drawn by the plaintiffs in London upon the defendant living in Canada, accepted here payable in London, and returned to England;—Held, that no damages could be recovered, as the

**Sec. 57.** bill could not be said to have been negotiated in Canada, but only the value of the bill at the pound sterling: *Foster v. Bowes*, 2 U. C. P. R. 256.

A note drawn in Canada and payable generally at Glasgow, Scotland, does not give the holder a right to exchange: *Wilson v. Aitken*, 5 U. C. P. R. 376.

Damages which may be claimed on non-payment of a bill, cannot be claimed for its non-acceptance. *Bank of Montreal v. Harrison*, 4 U. C. P. R. 331.

The liability for damages on a foreign bill, dishonored abroad, is to be measured according to the law of the country where the broken contract was entered into. And the only damages recoverable are the amount of the re-exchange and interest thereon, but not interest on the amount of the bill: *Re Commercial Bank of South Australia*, 36 Ch. D. 522.

When four bills are payable here (England) the drawer is entitled to recover damages by way of re-exchange, which, by the law of the country, where the bills are drawn, the drawer is liable to pay to the holder of the bills: *Re Gillespie*, 18 Q. B. D. 286.

A custom as to allowing a fixed per-centage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonored, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange: *Willans v. Ayers*, 3 App. Cas. 133.

Re-exchange is the measure of the damages incurred by the holder of a bill by its dishonor, through his having to obtain funds in the country where the bill was payable. *Ibid.*

The foreign drawer of a bill accepted in England is entitled, upon the bill being dishonored and protested, to recover from the acceptor the amount of the bill with interest, and all such notarial and telegraphic charges as have been caused by the dishonor, including the re-exchange: *Re General South American Company*, 7 Ch. D. 637.

Transferer  
by delivery.  
Imp Act, s. 58  
Ind. Act, ss.  
14 & 47.

**58.** Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferer by delivery:"

Not liable.

2. A transferer by delivery is not liable on the instrument: <sup>1</sup>

Warrants,  
validity of  
bill.

3. A transferer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. <sup>2</sup>

<sup>1</sup> This, in legal language generally, is spoken of as a sale of a bill; and the transferor is for this purpose an ordinary vendor. The sending to market of a bill or note without indorsing it, is *prima facie* a sale of the



bill. Such a transfer of a bill or note payable to bearer, does not render the transferor liable on the instrument to the transferee. But where such bill or note is payable to order, and is transferred to a holder for value, without indorsement, the new holder acquires the rights of his transferor, and may be subject to equities between such transferor and the other parties to the bill or note. See s. 31, sub-s. 4. The transaction here referred to may be illustrated by the case of a party cashing a cheque, or a bank note of large amount, for other bank notes; and the warranty in either case is similar, in many respects, to that defined in the next clause. Where the transferee discovers that the bill or note does not comply with the terms of the warranty, he must repudiate the transaction with reasonable diligence. See further note 1 to s. 31. Sec. 58.

<sup>2</sup> The warranty is three-fold:—(1) That “the bill is what it purports to be,” or as s. 29 more accurately describes it, is “complete and regular on the face of it,” which is a warranty of the genuineness of the security. (2) That the transferor “has a right to transfer it.” And (3) that “he is not aware of any fact which renders it valueless.” Or in other words, that it is a valid security for its face value, and that the transferor has a good title to it; and that he is not aware of any fact affecting its true value. This last warranty may be equivalent to a guarantee that none of the parties to the bill or note are insolvent, or are persons not having a capacity to contract, or who are not liable for other causes. These points when the occasion arises, may have to be more fully considered. The rule of law, prior to this Act, has been thus stated: “It is conceived to be the general rule of the English law, and a fair result of the English authorities, that the transferor is not even liable on the consideration if the bill or note, so transferred by delivery, without indorsement, turn out to be of no value, by reason of the failure of the other parties to it. And there is no implied guarantee of the solvency of the maker or any other party.” *Byles on Bills*, 122.

#### ILLUSTRATIONS.

A vendor of a bill impliedly warrants that it is of the kind and description that it purports, on the face of it, to be: *Gompertz v. Bartlett*, 2 E. & B. 849; 18 Jur. 266.

A vendor of a bill, though not a party to the bill, is responsible for the genuineness of the instrument; and if the name of one of the parties is a forgery, and the bill becomes valueless, the vendee is entitled to recover the price: *Gurney v. Womersley*, 4 E. & B. 139; 1 Jur. N. S. 328.

Where A the holder of a note not then due, traded it with B for a coat, A warranting that the note was “as good as gold,” and it turned out to be valueless;—Held, that B was entitled to recover from A the amount of the note: *Miller v. Dandelin*, 24 L. C. J. 208.

#### *Discharge of Bill.*

**59.** A bill is discharged by payment in due course by or on behalf of the drawee or acceptor: <sup>1</sup>

Discharge by  
payment.  
Imp. Act s. 59  
Ind. Act, ss  
10, 78 & 82.

Sec. 59.

Payment in due course defined.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective :<sup>2</sup>

2. Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser, it is not discharged ; but—

Effect of payment by drawer.

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill ;<sup>3</sup>

Effect of payment by indorser.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer’s order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill :<sup>4</sup>

Accommodation bill discharged.

3. Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. <sup>5</sup>

<sup>1</sup> Payment is not a technical word. It has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that means in satisfaction ; but when by bill, that does not import satisfaction, unless the bill is ultimately taken up. You may support a plea of payment by shewing that a person agreed to accept a horse, or goods, from another in satisfaction, provided that the agreement was to take the articles as money : *Per Maule, J., in Mallard v. Duke of Argyll*, 8 M. & Gr. 45. Nothing will discharge the acceptor or the drawer except payment according to the law-merchant : that is payment of the bill at maturity. If a party pays it before maturity, he does not extinguish the debt, he purchases it, and he is in the same position as if he had discounted the bill : *Morley v. Culverwell*, 7 M. & W. 182. The law as to accord and satisfaction (strictly so called) is wholly inapplicable to bills of exchange ; because by the custom of merchants, to be found laid down, not only in the law of this country, but in the law of all commercial countries that deal with bills, a bill of exchange, even after breach, may be discharged without accord or satisfaction, by the assent of the holder. It is only necessary that he should assent to his having no longer any claim on the bill : *Per Willes, J., in Cook v. Lester*, 21 L.

J. C. P. 126. The Judicature Act, R. S. O. (1887) c. 44, s. 53, sub-s. 74, alters the old doctrine of accord and satisfaction, by providing that part payment of an obligation, before or after breach, if accepted by the creditor, extinguishes the obligation. The section defines the effect of payment by the principal debtor on the bill, (drawee or acceptor) and by the sureties (drawer or indorsers.)

Sec. 59.

#### ILLUSTRATIONS.

The marriage of the maker of a note with the payee and holder, discharges the note, and all liability of the maker thereon: *Curtis v. Brooks*, 37 Barb. (N. Y.) 476.

“If the holder of a bill accepts but 2d. from the acceptor, he can never afterwards resort to the drawer:” *Tassel v. Lewis*, 1 Ld. Raym. 744.

Payment by the maker of a note to one of two administrators, is a good discharge: *Truman v. Dixon*, 2 Pugs. & Bur. 33.

A. makes a note payable to B. or order; B. indorses to C., who indorses to D.; D., the holder, dies, leaving B. one of his executors; the executors of D. sue C.;—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against C., the subsequent indorser: *Jenkins v. McKenzie*, 6 U. C. Q. B. 544; s. p., *Feakley v. Fox*, 9 B. & C. 130. See also note on p. 146.

Where notes were given for the purchase of certain property, which were not to be acted upon if the property were given up, and default having been made, the property was given up and sold for less than the original price;—Held, that the notes were satisfied by the surrender of the property according to agreement: *Smith v. Judson*, 4 U. C. O. S. 134.

A promissory note for \$6,200, made by the partners in a syndicate formed for completing a street railway, in favor of O. and S., and others who were also partners, was indorsed to a bank. On the day it fell due, O. paid part and S. paid part; S. at the time directing the bank to indorse it to the plaintiff, who gave no value for it. The plaintiff as holder sued the other co-indorsers;—Held, that the plaintiff could not recover, for S., by his payment intended to satisfy the note, which was made for partnership purposes: *Small v. Riddel*, 31 U. C. C. P. 373.

Where the holder of a note accepts a draft or cheque in payment, he is not bound to give up the note before payment of the draft or cheque: *Smith v. Harper*, 5 Cal. 329.

A banker in London receiving bills to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a cheque on a banker for the amount, although it turns out that such cheque is dishonored: *Russell v. Hankey*, 6 T. R. 12.

Where a note overdue has been settled by a renewal note, it is cancelled, and cannot be put in circulation again, even by the payee who has taken up the renewal note out of his own funds: *Currier v. Fraser*, 5 U. C. Q. B. 152.

A. held B.'s note (not negotiable), for £500. In a transaction with one R., (a partner of B.), A. transferred it to R. for his note for £1000. for that and other transactions. In dissolving partnership, it was arranged that R.'s note for £1000 should be paid by B. R. being subsequently

Sec. 59. called upon for payment, obtained B.'s cheque for £500, and returned B.'s original note for £500 to A. in payment of the note for £1000;—Held, that the facts did not amount to a payment, and that B. was liable for the £500 note: *Booth v. Ridley*, 8 U. C. C. P. 464.

A. sold to B. certain goods, and a claim on one C. of £25, taking a horse in payment for the goods, and B.'s note for the claim. B. took from A. an order for the goods, but on presenting the order he was unable to obtain them;—Held, in an action by A. against B. on the note, that B. might set off the value of the horse: *Wright v. Cook*, 9 U. C. Q. B. 605.

In an action against the maker and indorser, the separate debt of the plaintiff to the maker or indorser cannot be set off: *Paterson v. Howison*, 2 U. C. Q. B. 139.

By consent of the payee of a note, the amount of it was paid to a creditor of the payee in extinguishment of his debt;—Held, that the note was discharged, although not delivered to or indorsed by such creditor: *Groves v. Brown*, 11 Mass. 334.

<sup>2</sup> Payment means payment in due course, and not by anticipation. If, therefore, the acceptor should pay a bill of exchange before it is due, to the holder, who should afterwards, and before its maturity, indorse, or pass the same to any subsequent *bona fide* indorsee, or other holder, the latter would still be entitled to full payment thereof from the acceptor at its maturity; for payment of the bill before it is due, is no extinguishment of the debt as to such person: *Story on Bills*, s. 417. This clause gives the party, whether debtor or surety, paying the amount of the bill to the holder, the same protection that is extended to persons paying money to trustees under an express or implied trust; such payment discharges them from seeing to the application of the money; and the only liability on the party paying the bill is to ascertain that the money is properly payable to the party demanding it. But this rule may not apply where, on the face of the note, the money is stated to be for the use of another. See *Munro v. Cox*, 38 U. C. Q. B. 363. The possession of the bill would, under the Act, be a sufficient identification of the holder. Such possession is *prima facie*, or presumptive, evidence, that he is the proper owner or lawful possessor of the bill. And indeed if this doctrine did not prevail, the acceptor would in many cases pay at his peril, where the true owner or holder is unknown to him; and endless embarrassment would grow out of the negotiations of bills, which, in a vast variety of cases, pass by mere delivery from hand to hand, where there is a blank indorsement by the lawful owner or holder thereof. It is therefore for the security of all persons that the rule is adopted to prevent innocent holders from being compelled to establish their titles, before the acceptor will be bound to pay the bill: *Story on Bills*, s. 415. See ss. 2 and 20 as to the terms "holder" and "possession."

#### ILLUSTRATIONS.

H. & Co. holding several notes of F., all overdue except one, take a mortgage for the total amount thereof;—Held, that the remedy on the notes was extinguished: *Fraser v. Armstrong*, 10 U. C. C. P. 506.

Held, that in taking a mortgage for \$1,300, and subsequently a note for \$1,333.75, there could be no merger: *Bank of Upper Canada v. Bartlett*, 12 U. C. C. P. 238. Sec. 59.

A note of a local judge (who was paid by fees) was placed in the hands of an attorney for collection, and he agreed to give the judge credit on the note for fees payable by him for business done in the Court, and did indorse part on the note as payment, and subsequently the whole amount was paid by such fees, but the attorney refused to credit more than the sum first indorsed, and he afterwards absconded;—Held, that as against the holder of the note, the judge could not claim the payment by fees as a discharge of the note: *Ketchum v. Powell*, 3 U. C. O. S. 157.

Unauthorized credits indorsed upon a promissory note, may properly be obliterated by a payee: *Burtch v. Dent*, 13 Ind. 542.

If two persons make a promissory note, and one of them afterwards obtains possession of it as his own property from the payee, the note is discharged: *Cox v. Hodge*, 7 Black. (Ind.) 146.

Payment of a joint and several note by one of the makers, is ordinarily a discharge of the debt: *Rockingham Bank v. Claggett*, 29 N. H. 292.

Where a note was assigned, on which a part payment had been made, and the assignor truly stated to the assignee the amount actually due on the note, the assignee cannot recover more than the actual amount due: *Buckner v. Curry*, 1 Bibb. (Ky.) 477.

Where stock had been purchased and notes given for \$5,500 to C, payable at different dates, who, after they had become due, indorsed the last one "without recourse," to M. During the currency of the notes, it was found that the value of the goods had been misrepresented, and C thereupon agreed to reduce \$500 from the face value of the notes;—Held, that M was bound by said agreement: *McGregor v. Bishop*, 14 Ont. R. 7.

Any moneys received as payment by the holder of a note from the indorser will operate as a valid discharge of the accommodation maker: *Lyman v. Dion*, 13 L. C. J. 166.

Where the indorsee, having sued the acceptor of a bill, receives from him a part payment, and takes a security for the remainder, with the exception of a nominal sum only, he discharges the indorser: *English v. Darley*, 2 B. & P. 61.

The acceptance, by the holder, of the terms of an assignment made by two joint debtors for the benefit of their creditors is a satisfaction of their joint liability on bills and notes, and precludes the holder from suing one of such joint debtors: *Whitney v. Wall*, 17 U. C. C. P. 474.

A merchant abroad drew upon certain persons in this country (England) a bill, and upon its becoming due paid the holder a part of the amount of the bill, both parties being at the time abroad; but such payment was made and received in full satisfaction; and was, according to the law of the foreign country where the bill was made, full satisfaction of the bill;—Held, that such payment operated as a discharge of the bill in this country: *Ralli v. Dennistoun*, 6 Ex. 483.

<sup>3</sup> By the mercantile law, if the drawer pays the bill, his indorsee is bound to hand the bill back to him, and then the drawer has a right to sue the acceptor, not as surety, but upon the original obligation between them as drawer and acceptor: *Per Lord Esher, M. R., in Baines v. Wright*, 16 Q. B. D. 330. The word "retire" as applied to a bill by

Sec. 59. mercantile usage, has two meanings and effects. If the acceptor "retires" a bill, the bill is in effect paid, and withdrawn entirely from circulation. If an indorser "retires" it, he merely withdraws it from circulation, so far as he himself is concerned, and he may hold the bill with the same remedies as if he had been called upon to pay, and had paid it in due course: *Elsam v. Denny*, 18 Jur. 981.

#### ILLUSTRATIONS.

A bill or note cannot be indorsed or negotiated after it has been once paid, if such indorsement or negotiation would make any of the parties liable who would otherwise be discharged: *Beck v. Robley*, 1 H. & Bl. 89, *n.* See *Bartrum v. Cuddy*, 9 A. & E. 275.

Where a payee discounts a note and afterwards takes it up, he may recover against the maker: *McNab v. Waystaff*, 5 U. C. Q. B. 588.

A bill which has been paid by the drawer in default of payment by the acceptor, may be re-issued by the drawer, and the acceptor will still be liable on it: *Hubbard v. Jackson*, 4 Bing. 390.

<sup>4</sup> This clause determines the rights of the indorser when he pays the bill as a surety or quasi surety for the acceptor. He may negotiate the bill as an overdue bill, or he may enforce it against the other parties liable to him. And he would also be entitled, on such payment, to all securities held by the holder as collaterals: *Ewart v. Latta*, 4 Macq. H. L. 983. Where the drawer or indorser pays the bill without its being delivered to the party paying, and the holder afterwards assigns it to a third party, such third party would take it as an overdue bill, and therefore like a *chose in action*, subject to the equities and rights of the party or parties who have paid the bill and are entitled to its possession. And such third party would take the title of his assignor, and be a trustee for such drawer or indorser; and should he collect the amount of the bill from the acceptor, he would be bound to account for the proceeds to the proper parties. And such proper parties could also compel the original holder or his assignee, to account for any securities held as collateral to the bill. And the holder or his assignee would not be allowed to vary the position of such drawer or indorser, with reference to such securities: *Pearl v. Deacon*, 24 Beav. 186. Every indorser who is called upon to take up a bill by the holder, should perfectly assure himself not only that the party applying for payment is the true and lawful holder of the bill, but also that there have not been any laches, either by such holder, or by any other party which will affect the merits of the claim against him: for if there have been such laches, by which the prior parties on the bill have been discharged, any indorser who shall unnecessarily pay the bill, will not thereby revive the liability of the prior parties, or be entitled to recover against them. Thus, if a bill has been refused acceptance or payment, and due notice thereof has not been given by the holder or other party to the bill, so as to bind the antecedent parties, payment by any subsequent indorser who has not received due notice, will not revive the liability of the antecedent parties, but they will remain discharged: *Story on Bills*, s. 423.

## ILLUSTRATIONS.

Sec. 59.

Where the indorsers of a note which had been made by their debtor and endorsed by them, and also by A. as surety for the debtor, took up the note, and struck out their prior indorsement, and re-indorsed it over A.'s indorsement, adding to their signature "without recourse," and then sued the surety;—Held, that A. was estopped from denying his liability: *Peck v. Phippen*, 9 U. C. Q. B. 73.

Where the drawer of a bill, payable to his own order, indorsed it to T., and T. to B.; and upon the bill being dishonored, paid the amount to B. who struck out his own and T.'s indorsements, and returned it to the drawer, who afterwards transferred it to the plaintiff;—Held, that the plaintiff might recover against the acceptor: *Callow v. Lawrence*, 3 M. & Scott 95; s. p. *Hubbard v. Jackson*, 4 Bing. 390.

It is no defence to an action by a second indorser against the maker and prior indorser on a note, that the note was given to one H., to whom the maker was indebted, and indorsed by the first indorser and plaintiff as sureties for the debt, and that the plaintiff paid the same, and thereby released all the other parties from their common liability: *Niblock v. McGregor*, 12 U. C. C. P. 566.

Where, in an action by the holder of a note against an indorser, it was proved that the note was made an item in the current account between the maker and such holder, and was charged to the maker in the account, and that the balance was in the maker's favour;—Held, that the note must be taken to have been paid: *McGillivray v. Keefer*, 4 U. C. Q. B. 342.

An indorser of a note made by A., who has given his own notes in discharge of the original note, may sue the maker of such note: *Latham v. Norton*, 6 U. C. O. S. 82.

Where the holder of a note recovered judgment against the maker and an indorser thereon, which the indorser paid and took an assignment of the judgment;—Held, that the indorser was entitled under R. S. O., c. 116, s. 3, to recover from the principal debtor, the whole of the judgment, including the costs: *Harper v. Culbert*, 5 Ont. R. 152.

The indorser of a promissory note payable to order, who has not paid the note himself, or become the holder of it, cannot bring an action against the maker for the amount of the note: *Maynard v. Renaul*, 12 L. C. J. 293.

The indorser of a bill is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities deposited with the holder by the acceptor; and this whether at the time he indorsed he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity attendant on the suretyship: *Duncan v. North and South Wales Bank*, 6 App. Cas. 1.

<sup>5</sup> An accommodation party to a bill, whether drawer, acceptor, or indorser, is a surety for the party accommodated, who is the principal debtor, and as such surety he is subject to the rules of the law respecting principal and surety. There have been some variations of decision in Ontario, respecting the rights and liabilities of accommodation indorsers *inter se*, as co-sureties. Prior to 1873, the Courts had held that successive accommodation indorsers on a note, like other co-sureties, were liable

Sec. 59. to mutual contribution *inter se*, unless their liability was controlled by an agreement to the contrary: *Mitchell v. English*, 17 Grant 303; *Ianson v. Paxton*, 22 U. C. C. P. 505. This latter case was reversed by the Court of Appeal, (23 U. C. C. P. 439) and it was held that the fact of the indorsers being co-sureties was not sufficient to vary the rules of the law-merchant: and that in the absence of an agreement to the contrary, the successive accommodation indorsers of a note, indorsed by them as co-sureties for the maker, must be held to be subject, in their contract of suretyship, to the ordinary terms which the indorsement of a promissory note are known to create, *i. e.*, a liability according to the order of their signatures on the back of the note; and that the first accommodation indorser, having paid the note, had no right, as a surety, to enforce contribution for the subsequent accommodation indorsers of such note. In *Fisken v. Meehan*, 40 U. C. Q. B. 146, the second indorser who had signed as surety, and had paid the note, was held entitled to recover the whole amount of the note from the first indorser who was also a surety; the Court of Queen's Bench holding itself bound by the decision of the Court of Appeal in *Ianson v. Paxton*, until reversed by the Privy Council as the final tribunal in colonial appeals. These cases settled the law in Ontario to be, that as the liabilities, *inter se*, of successive indorsers of a bill or note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant, whereby a prior indorser must indemnify a subsequent one, no different rule could apply where such indorsers were co-sureties. In Quebec a similar decision was given in *Macdonald v. Whitfield*, 26 L. C. J. 69, but on appeal to the Privy Council in 1883, that decision was reversed, and the judgment of the Privy Council, in that case carried with it the reversal of the cases of *Ianson v. Paxton*, and *Fisken v. Meehan*, (*supra*), and re-established the equitable doctrine of the earlier decisions in Ontario. And now the law of Canada is, that where parties mutually agree with each other to become sureties for the acceptor of a bill, or the maker of note, and indorse his bill or note as accommodation indorsers, they are entitled, in case they are compelled to pay the amount of the bill or note so indorsed by them, to equal contribution *inter se*, and are not liable to indemnify each other according to the priority of their indorsements on the bill or note. And in such a case, the whole circumstances attendant on the making, indorsing, and transferring of the bill or note, may be referred to for the purpose of ascertaining the true relation of the parties who have put their signatures to the bill or note as makers or indorsers; and reasonable inferences may be admitted to qualify, alter, or even invert the relative liabilities which the law-merchant would otherwise assign to them: *Macdonald v. Whitfield*, S App. Cas. 733. See further the note to s. 56.

#### ILLUSTRATIONS.

An accommodation acceptor, is entitled to be regarded in the light of a surety, and upon payment of the bill, is entitled not only to the benefit of all securities which the creditor has taken, but to have the bill itself transferred to him: *Sublett v. McKinney*, 19 Tex. 438.



## Sec. 59.

When the holder of an overdue note to which M. was a surety for the others, in consideration of a certain sum paid to such holder, gave time to the other parties without his, M.'s consent; and that plaintiff took the note after it became due, with knowledge of the premises;—Held, that M. was discharged: *Perley v. Loney*, 17 U. C. Q. B. 279. See also *Ex parte Wilson*, 11 Ves. 10.

But a mere forbearance to sue the principal debtor, and no binding agreement to give time, will not discharge the surety: *Thompson v. McDonald*, 17 U. C. Q. B. 304; s. p., *Philpot v. Bryant*, 4 Bing. 717; *Wood v. Brett*, 9 Grant 452.

And where the time complained of was given to the principal debtor, it was expressly understood and agreed that the holders should reserve all their rights against the acceptor as surety, he is not discharged: *Bank of Upper Canada v. Jardine*, 9 U. C. C. P. 332.

The giving of time, in order to release an indorser of a bill or note, must be by some party interested in the note: *Commercial Bank v. Johnston*, 2 U. C. Q. B. 128.

Where the holders of a note gave time to an indorser, knowing that defendant was only an accommodation maker, the maker was discharged: *Bank of Upper Canada v. Ockerman*, 15 U. C. C. P. 363. See also, *Bank of Upper Canada v. Thomas*, 11 U. C. C. P. 515.

Where a creditor takes from his debtor the note of a third party indorsed by such debtor, for a portion of the debt, and afterwards takes from the debtor a mortgage for the whole debt, and payable at a day beyond that on which the note was payable, his remedy against the debtor, as indorser of the note, is extinguished: *Mathewson v. Brouse*, 1 U. C. Q. B. 272.

The holder of a note, to which A., as one of the makers, was a surety, accepted a new note from the other makers without his knowledge or consent, and agreed not to proceed on the original note unless such new note was not paid at maturity;—Held, that A. was discharged: *Shepley v. Hurd*, 3 App. R. 549.

Where the holder of a note takes a chattel mortgage, as a collateral security for such note, his right to sue on the note is extinguished: *Parker v. McCrea*, 7 U. C. C. P., 124. But see *Fairman v. Maybee*, 7 U. C. C. P. 467.

An indorsement of the payment of interest on the back of a note, at a date beyond that of the maturity of the note, is, in the absence of evidence of mistake, to be deemed an extension of time, so as to discharge a party to the note who is a mere surety: *Ryan v. McKerrol*, 15 Ont. R. 469.

The holder of a mortgage security may take, in addition, a note from the mortgagor with an indorser; and the fact that the time mentioned for the defeasance of the mortgage is a period beyond the maturity of the note, is, in the absence of fraud, no defence to the indorser: *Bank of Upper Canada v. Sherwood*, 8 U. C. Q. B. 116. See also *Ross v. Winans*, 5 U. C. C. P. 185.

A married woman signed a note in blank, and gave it to her son, "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not aware of the circumstances under which it had been signed. It was renewed twice, without the married woman's name, the original note remaining in the plaintiff's hands;—Held, that the married woman was a surety in respect of the note for her son; and

**Sec. 59.** that the son had no authority to keep it afloat after maturity, without her knowledge; and that she had been discharged by the extension of the time: *Devanney v. Brownlee*, 8 App. R. 355.

Where the holders of notes duly indorsed, took from the maker a mortgage of certain steamboats, with a power of sale in case of default in the payment of the notes: and upon such default sold the boats to third parties for the amount of the notes, giving credit to the purchasers for the purchase money, and taking their notes and a mortgage on the same boats as security;—Held, that the indorsers were discharged: *Bank of British North America v. Jones*, 8 U. C. Q. B. 86; s. c. *Sherwood v. Bank of British North America*, 3 Grant 457.

The holder of a note recovered judgment against the makers and indorsers, which he registered against their lands; subsequently he accepted from the makers a composition of fifty per cent., and discharged their lands from the judgment, but retaining the right to go against their personal assets; and he then proceeded to enforce the judgment against the indorsers;—Held, that the indorsers were discharged: *Mellish v. Green*, 5 Grant 655.

The giving a mortgage by one of two sureties, does not of itself discharge the other surety: *Kerr v. Hereford*, 17 U. C. Q. B. 158.

Where the holder of a bill issued execution on a judgment against the drawer and accommodation acceptor, and was paid the debt by such acceptor, which the holder was about to credit on the execution, the Court ordered the execution to be enforced for the benefit of the accommodation acceptor: *Rigney v. Van Zandt*, 5 Grant 494.

Acceptor becoming holder at maturity. Imp. Act. s. 61 Ind. Act s. 90.

**60.** When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.<sup>1</sup>

<sup>1</sup> This clause is limited to the “acceptor of a bill becoming holder in his own right.” It has long been well settled law that where the acceptor of a bill, or the maker of a note, becomes the executor of the holder, the bill is held to be discharged, and the indorsers are released: *Byles on Bills*, 194. But the executor will have to account for the amount of the bill or note to the testator’s creditors and legatees in the administration of the assets: 2 *Williams on Executors*, 1310. But if the acceptor or maker is appointed administrator, the bill or note is not discharged, for his appointment is not the act of the creditor which, in the former case, operates as a voluntary gift of the debt to the executor: *Ibid*, 1313. The words of limitation in this section “holder in his own right” may however operate to exclude the operation of the rule under which, where the debtor is appointed executor by his creditor, the debt is discharged; the rule being founded on a plain proposition of law that the debt vests in the executor, and that where the same hand is, at once, the one to receive and pay, the right of action is suspended; and a personal action once suspended by the acts of the parties, is gone for ever: *Byles on Bills*, 41; although as has been already stated above, the debt, as assets, “cannot be screened” from the creditors and legatees of the estate. The follow-

ing may be taken as an illustration of an acceptor becoming a "holder in his own right." Where a bill was transferred to one of the acceptors before it became due, and he retained it until it was overdue, it was held that he could not sue the other acceptors. "The bill at the time it became due, was in the hands, and was the property, of one of the three acceptors who were liable to pay; and the present liability to pay, and the present right to receive the amount of the bill, concurring in the same person, operated as a payment and performance of the contract of acceptance." *Harmer v. Steele*, 4 Ex. 13.

Sec. 60.

**61.** When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged: the renunciation must be in writing, unless the bill is delivered up to the acceptor:

Holder's renunciation in writing. Imp. Act, s. 62 Ind. Act, s. 82.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of renunciation. <sup>1</sup>

The same.

<sup>1</sup>As pointed out in note 1, to s. 59, the common law doctrine as to accord and satisfaction has been modified by the *Ontario Judicature Act*; so that part payment operates as a discharge of a debt. That Act does not require the evidence of such part payment to be in writing; and prior to this Act a liability on a bill or note could have been discharged by parol, whether between immediate or intermediate parties: *Foster v. Dawber*, 6 Ex. 839; *Whatley v. Tricker*, 1 Camp. 35. But the provision in the Judicature Act must now be read with the above clause, so as to require the discharge of bills and notes, or the absolute and unconditional renunciation by the holder of his rights therein, to be in writing, whether by part payment, or otherwise, "unless the bill is delivered up to the acceptor." The discharge of the acceptor, is a discharge of all the other parties to the bill. The liability of some one or more of the other parties may also be renounced in the same way. But if the act of renunciation of the holder's claim against some of such parties, affects the rights of other parties, who are sureties, it may operate as a discharge of all; for there is nothing in this clause protecting the holder against the operation of the law of principal and surety. See note 5 to s. 59, as to the equities affecting the rights of a holder in due course who releases some of the parties to the bill or note.

#### ILLUSTRATIONS.

The holder of a note may discharge the indorser by a general release before the note is due, and such release will be a good defence to an action by a subsequent indorsee: *McLeod v. Carman*, 1 Han. N. B. 592.

**Sec. 61.**

The indorsement of a bill by a payee to the acceptor, operates to discharge the liabilities of all parties to it. Its negotiability is destroyed, and it cannot be revived by the acceptor indorsing it to a third person: *Beede v. Real Estate Bank*, 4 Ark. 546.

One of two or more joint assignees of a note may release it: *Weston v. Weston*, 33 Me. 360.

Cancellation  
of bill is a  
discharge.  
Imp. Act, s. 63  
Ind. Act, s. 82.

**62.** Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged:

Effect of  
cancelling  
any signa-  
ture.

2. In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case, any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged: <sup>1</sup>

Cancellation  
by mistake  
inoperative.

3. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. <sup>2</sup>

<sup>1</sup> The terms used in this Act to indicate the payment or satisfaction of a bill or note are, discharge of bill by payment in due course (s. 59); absolute and unconditional renunciation of holder's rights (s. 61); and cancellation of signature (s. 62). The proper and safe mode of cancelling a bill or note is to draw a pen through the name, so as to leave it legible: *Per Abbott, C. J. in Wilkinson v. Johnson*, 3 B. & C. 428. The cancellation of the acceptor's name by the holder is a waiver of the acceptance. Where a third person cancels, it is a question with the jury whether that cancellation was with the assent of the holder: *Byles on Bills*, 154.

## ILLUSTRATIONS.

Where the holder suing the indorser upon a note, produces it with the indorsement cancelled, not as if by any accident, but in the most unequivocal manner, the inference is, that the note had been satisfied by the defendant whose name is thus cancelled: *Peel v. Kingsmill*, 7 U. C. Q. B. 364.

Where a bill payable to A., is taken up by the drawer, and A.'s indorsement is erased, the bill becomes dead to all intents and purposes as a negotiable instrument: *Prie v. Sharp*, 2 Ired. (N. C.) 417; s. p., *Ballard v. Greenbush*, 24 Me. 336.

The holder of two joint and several notes of A. & B. one of which only is due, receives from A. a sum exceeding the amount of one of the

notes which is due, and exceeding A.'s moiety of liability on both notes, and gives up the note which is due, and erases A.'s name from the other note ;—A. is discharged, and B. also : *Nicholson v. Revill*, 4 A. & E. 675.

Sec. 62.

<sup>2</sup> If a banker with whom a bill is made payable by the acceptor, cancel the acceptance by mistake, without any want of due care, and return the bill so defaced, he does not thereby necessarily incur any legal liability. But if a banker, in so doing, be guilty of a want of due care, an action lies against him at the suit of the holder for the special damage actually sustained by the cancellation of the bill. Where an acceptance has been cancelled by mistake, it is the usage in the city of London to return the bill with the words "cancelled by mistake" written on it : *Byles on Bills*, 152. The presumption of law is that the cancellation was intentional.

#### ILLUSTRATIONS.

A. gave B. & C. a note signed by himself, which they discounted. When A. delivered it to the holder, by way of renewal, a note purporting to be made by himself, like the other note, and which such holder accepted, and delivered upon the old note. The renewal was not signed by A., but by another person of the same name, unknown to the holder, and resident of a foreign country ;—Held, that A. could not take advantage of this fraud, and that his liability in respect of the note, still existed in equity : *Irwin v. Freeman*, 13 Grant 465.

The mere fact of a bank cancelling the signature of the makers of a dishonored note, and writing "paid" on the note, when the payment was made by a new order on a branch of the bank, but which writing was corrected by a memorandum, "cancelled in error," is not sufficient to charge such bank with the receipt of the money : *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325. See also *Novelli v. Rossi*, 2 B. & Ad. 757.

One P. gave a bill to M. to get it discounted, but M. failing to do so, returned it to P., who thereupon tore it in two *animo destruendi*, and threw it into the street. M. picked it up and joined the pieces together, and negotiated it ;—Held, that though there was evidence of cancellation, P. acted negligently, and was therefore liable : *Ingham v. Primrose*, 4 Bing. 253.

**63.** Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers :<sup>1</sup>

Material alteration of bill avoids it. Imp. Act, s. 64 Ind. Act, ss 87 & 89.

Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor :<sup>2</sup>

Holder in due course not affected.

Sec. 63.  
What are  
material  
alterations

2. In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.<sup>3</sup>

<sup>1</sup> Any alteration of a bill or note which affects the *contract*, or which alters the business effect of the bill or note as a negotiable instrument, is a "material alteration." There are, however, two cases in which an alteration in a material part, will not vacate the instrument: First, where such alteration is made before the bill or note is issued, or becomes an available instrument; and secondly, when the bill is altered to correct a mistake, and in furtherance of the original intention of the parties: *Byles on Bills*, 255.

<sup>2</sup> This may be said to be a modification of the law of forgery, and the law of contracts. By the criminal law, a material alteration of a bill or note, is forgery; and by the common law such an alteration, by whomsoever made, whether by a stranger or a party, avoids and discharges the bill or note as a legal contract, except as against the party who made, authorized, or assented to the alteration. And such an alteration discharged the parties from all liability, not only on the contract, but the consideration also: *Alderson v. Langdale*, 3 B. & Ad. 660. The proviso to this section relaxes the strict rule of law as to the effect of the alteration of a bill or note in the hands of a *holder in due course*; frees it from the "act of spoliation," and restores the contract to its original terms. If a holder agrees to an alteration he is bound; and so are the subsequent indorsers, whose signatures indicate their assent to the alteration of the bill. The provision as to non-apparent alterations has been construed as follows: By the word "apparent" it is not meant that the holder only, should not have had the means of detecting the alteration. If the party sought to be bound, can at once discern by some incongruity on the face of bill or note, and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, the alteration is an "apparent" one, even if it is not an obvious one to all mankind: *Per Denman, J., in Leeds Bank v. Walker*, 11 Q. B. D. This clause also necessarily imports the question of negligence on the part of a person claiming to be a holder in due course. For if there be some "incongruity" on the bill or note, of the character pointed out above, the alteration would be held to be "apparent," and the holder could not therefore claim the benefit of the protection given by this proviso.

#### ILLUSTRATIONS.

An unauthorized and material alteration of a note, made without fraudulent intent, but under a mistake of facts, avoids the note: *Lewis v. Schenk*, 3 Green (N. J.) 459.

Where a party sues on an instrument which appears to have been altered, it is for him to show that the alteration has not been improperly

made : *Knight v. Clements*, 8 A. & E. 215 ; s. p., *Henman v. Dickenson*, 5 Bing. 183 ; *Bishop v. Chambers*, 5 C. & P. 55. Sec. 63.

Where a cheque was so carelessly drawn as to be easily altered by the holder to a larger sum, so that the bankers could not distinguish the alteration :—Held, that the loss must fall on the drawer, as it was caused by his negligence : *Young v. Grote*, 4 Bing. 253. See *Ex parte Swan*, 7 C. E. N. S. 400 ; 2 H. & C. 175 ; *Whitmore v. Wilks*, 3 C. & P. 364, and *Dorwin v. Thompson*, 13 L. C. J. 262.

Where in an engraved form of note the words “jointly and severally” were written over the place where they are intended to be read, but in the same handwriting as the other written portions of the note, and it was proved that such words had been inserted after the note had been signed, but before delivery :—Held, not notice of an apparent alteration : *Waterous v. McLean*, 2 Man. R. 279.

A person intrusted with a cheque absconded with it, and after altering the date from the 2nd of March to the 26th of March, passed it to the plaintiff for value. The plaintiff, who had not been guilty of any negligence in taking the cheque, sued the drawer :—Held, that the alteration was material and invalidated the cheque, and that the circumstances that the plaintiff had not been guilty of negligence in taking it, was immaterial : *Vance v. Lowther*, 1 Ex. D. 175.

<sup>3</sup> The above clause provides that any alteration in the (1) date, (2) sum, (3) time, or (4) place of payment, and (5) the addition of a place of payment, when the bill has been accepted generally, is a “material alteration” which will avoid the bill or note. When a bill or note is altered, it is no longer the instrument the party signed ; and it cannot be used to prove a new contract.

#### ILLUSTRATIONS.

The following alterations of the words of a bill or note have been held to be “material alterations,” which avoided it :—

Altering the date : *Stoman v. Cox*, 5 Tyr. 174 ; *Atkinson v. Hawdon*, 2 A. & E. 628 ; so as to postpone payment : *Outlwaite v. Lurtley*, 4 Camp. 179 ; *Walter v. Hastings*, *Ibid.*, 223 ; *Meredith v. Culver*, 5 U. C. Q. B. 218 ; *Hirschman v. Budd*, L. R. 8 Ex. 171 ; or to accelerate payment : *Master v. Miller*, 4 T. R. 320, 5 T. R. 637.

Altering the date of a cheque : *Vance v. Lowther*, 1 Ex. D. 176.

Altering “sight” to “date.” *Long v. Moore*, 3 Esp. 155n.

Altering place of payment : *Tidmarsh v. Grover*, 1 M. & S. 375.

Altering a joint note to a joint and several note : *Perring v. Hone*, 4 Bing. 28 ; *Samson v. Yager*, 6 U. C. O. S. 3. *Sed quere*, *Leslie v. Emmons*, 25 U. C. Q. B. 243.

Altering the numbers on bank notes, although not varying the contract : *Suffell v. Bank of England*, 9 Q. B. D. 555. But see *Leeds Bank v. Walker*, 11 Q. B. D. 84.

Erasing a condition respecting the conveyance of land : *Campbell v. McKinnon*, 18 U. C. Q. B. 612 ; s. p. *Benedict v. Cowden*, 49 N. Y. 396.

Erasing the signature of one of two joint makers : *Nicholson v. Revill*, 4 A. & E. 675.

Erasing a condition “the within note not to be sold.” *Swasiland v. Davidson*, 3 Ont. R. 320.

Sec. 63.

Adding: "Interest at six per cent. per annum:" *Warrington v. Early*, 2 E. & B. 763; or "with interest from date:" *Brown v. Jones*, 3 Port. (Ala.) 420; or "with interest:" *Kountz v. Hart*, 17 Ind. 329; but adding "with interest at seven per cent" by consent after signature, does not avoid the note: *Fitch v. Kelly*, 44 U. C. Q. B. 578.

Adding: "Payable at the Bull Inn Algate:" *Burchfield v. Moore*, 3 E. & B. 683; s. p. *Cowie v. Haswell*, 4 B. & A. 197; *Hanbury v. Lovett*, 16 W. R. 795.

Adding the payee's name to the foot of the note apparently as maker, but not his signature: *Reid v. Humphrey*, 6 App. R. 403. But see *Ex parte Yates*, 2 DeG. & J. 191.

Adding: "or order," which had been unintentionally omitted: *Lawton v. Millidge*, 2 Kerr N. B. 520. But see below.

Adding words required by foreign law, and the rate of exchange: *Hirschfield v. Smith*, L. R. 1 C. P. 340.

Placing the figure 1 before the figure 4 in the date, after it had become due: *Gladstone v. Dew*, 9 U. C. C. P. 439.

Adding what the consideration was for: *Knell v. Williams*, 10 East 431.

The addition of a new joint maker to a joint and several note, after it had been issued: *Gardner v. Wash*, 2 E. & B. 83.

The following alterations in bills and notes have been held *not* to be "material alterations:"—

Adding "or order:" *Kershaw v. Cox*, 2 Esp. 246; or "on demand," being only what the law would have supplied: *Aldous v. Cornwall*, L. R. 3 Q. B. 573.

Adding "months," omitted after "three": *Laine v. Clarke*, 3 Rev. Leg. 450.

Adding "hundred" between "eight" and "dollars," omitted by mistake: *Boud v. Brotherson*, 10 Wend. (N. Y.) 93; s. p. *Clute v. Small*, 17 *Ibid.*, 238.

Adding place of payment in blank space after "at": *Kitchen v. Place*, 41 Barb. (N. Y.) 465; s. p. *Jacobs v. Hart*, 6 M. & Sel. 142; *Stevens v. Lloyd*, M. & M. 292.

Adding "the order of E. P." over the words "Q. R. Co. or order," without erasing the latter words: *Granite R. Co. v. Bacon*, 15 Pick (Mass.) 239.

Altering "bearer" to "order": *Attwood v. Griffin*, 2 C. & P. 368; s. p. *Byron v. Thompson*, 11 A. & E. 31.

Altering "J. C. and Co." to "J. and C.": *Farquhar v. Southey*, 2 C. & P. 497.

Altering "I promise" to "we promise": *Bruckitt v. Mountford*, 11 Me. 115.

Altering the date of the year of a note given in January, and dated by mistake in the former year: *Brutt v. Picard*, R. & M. 37; *Fitch v. Jones*, 5 E. & B. 238.

Writing over in ink the words written in pencil: *Reed v. Roark*, 14 Tex. 329.



*Acceptance and Payment for Honor.*Sec. 64.

**64.** Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn :<sup>1</sup>

Acceptance for honor *supra* protest.  
Imp. Act, s 65  
Ind. Act, s. 108.

2. A bill may be accepted for honor for part only of the sum for which it is drawn :

Accepted in part.

3. An acceptance for honor *supra* protest, in order to be valid, must—

Requirements for validity.

(a) Be written on the bill, and indicate that it is an acceptance for honor ;

(b) Be signed by the acceptor for honor :<sup>2</sup>

4. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer :

5. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honor.<sup>3</sup>

<sup>1</sup> After one acceptance completely made and perfected by the drawee, no second person can intervene, and by a subsequent acceptance charge himself as acceptor, though he may as guarantor. But the like rule does not apply in cases of an acceptance *supra* protest, or for honor, to the same extent ; for although there cannot be more than one acceptance for the honor of any one party to the bill, yet there may be a succession of acceptances for the honor of different parties ; one may accept for the honor of the drawer, another for the honor of the first indorser, and another for the honor of the second indorser, and so on : *Story on Bills*, s. 260. See notes to ss. 51 and 65, as to the necessity of protest before an acceptance for honor, and note 5 to s. 51, as to protest for better security.

<sup>2</sup> These provisions, requiring the acceptance to be in writing on the bill and signed, are similar to those in s. 17, with this difference : that the acceptor must indicate in writing that it is an acceptance for honor,

**Sec. 64.** and should clearly state for whose honor the bill is accepted, otherwise, under the next sub-section, his acceptance will be deemed to be for the honor of the drawer.

<sup>3</sup> The presentment of the bill, and refusal to accept, as stated in the protest, indicate the date of the "sight" of the bill; and such bills are not entitled to days of grace. See note 1 to s. 10, page 55, and note 7 to s. 14, page 60; and the notes to s. 51 as to the procedure in cases of protest.

Contract of  
acceptor for  
honor.  
Imp. Act, s. 66  
Ind. Act,  
s. 111.

**65.** The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts: <sup>1</sup>

To what  
parties.

2. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. <sup>2</sup>

<sup>1</sup> If the acceptor for honor pay the bill, he is entitled to have recourse for re-payment to the person for whose honor he made the acceptance, and to all other persons who are liable to that person; but if he accepted for the honor of the drawer only, he cannot sue any of the indorsers. A person who accepts for the honor of an indorser, cannot sue a subsequent indorser; but the indorser for whose honor he accepted, and all the prior parties, the drawer included, are obliged to make satisfaction to such acceptor: *Brooke's Notary*, 112.

#### ILLUSTRATION.

An acceptance for honor is conditional only, and therefore presentment for payment must be made to the drawee at maturity; even in the case of a bill payable after sight: *Williams v. Germaine*, 7 B. & C. 468.

<sup>2</sup> This provision is similar to that contained in ss. 54 and 55. The acceptor for honor comes on to the bill under the same title, and subject to the same liability, as that of the party for whose honor he accepts; and he is bound by the same estoppels as those which bind an ordinary acceptor; and especially those which would bind the party for whose honor he is an acceptor.

#### ILLUSTRATION.

An acceptor *supra protest* of a bill for the honor of the drawer, is, like the drawer, estopped from denying the validity of the bill, and it is not competent in an action against him by an indorsee to show that the payee is a fictitious person, and that he was ignorant of that fact at the time when he accepted the bill: *Phillips v. im Thurn*, 18 C. B. N. S., 694; s. c. L. R., 1 C. P. 471.

**66.** Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need: <sup>1</sup>

Sec. 66.

Presentment to acceptor for honor, Imp. Act, s. 67 Ind. Act, s. 112.

2. Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him: <sup>2</sup>

Time for presentment

3. Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment: <sup>3</sup>

Excuses for non-presentment or delay.

4. When a bill of exchange is dishonored by the acceptor for honor, it must be protested for non-payment by him: <sup>4</sup>

<sup>1</sup> The "referee in case of need," is provided for in s. 15, p. 62. This and the prior clauses, 64 and 65, provide for an acceptance for honor after the protest for *non-acceptance* of the bill by the drawee. At maturity, the holder must again present the bill to the drawee for payment, and if payment be refused, he must again protest the bill for *non-payment* by the drawee; such presentment and protest must be made before he can present the bill to the acceptor for honor for payment by him. By s. 92 where a bill is required to be protested within a specified time, or before some further proceeding, is taken, it is sufficient if the bill is noted before such time or proceeding, and the formal protest extended thereafter, as of the date of noting.

<sup>2</sup> The procedure under this clause on the days indicated above, should be the same as that prescribed by s. 45. The words "must be presented," may be read as indicating that if the bill is not presented in due time to the acceptor for honor, he will be discharged; but the prior protest may preserve the holder's right against the other parties.

<sup>3</sup> The circumstances which excuse delay and non-presentment in the cases referred to, are defined in s. 47.

<sup>4</sup> This clause requires the formality of a third protest on the bill after it is dishonored by the acceptor for honor. The *first* protest is neces-

**Sec. 66.** sary before the bill can be accepted for honor, either by the referee in case of need, or a stranger, and will be necessary in case parties have indorsed it before dishonor. (See ss. 17, 51 and 64.) The *second* protest is when, after the acceptance for the honor of the drawer, or of some other party, the bill is again dishonored by the drawer, and is necessary before the bill can be presented to the acceptor for honor. And the *third* protest can only be necessary in case new parties have indorsed the bill, after it has been accepted for honor *supra protest*. "If the acceptor *supra protest* refuses to pay the bill, then the holder should cause it again to be protested for such non-payment, and due notice thereof given to the parties interested, as in other cases :” *Story on Bills*, s. 396.

Payment for honor *supra protest*. Imp. Act, s. 68 Ind. Act, s. 113.

**67.** Where a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn : <sup>1</sup>

If more than one offer to pay.

2. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference :

Notarial attestation.

3. Payment for honor *supra protest*, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor,<sup>2</sup> which may be appended to the protest or form an extension of it :

Basis of notarial act.

4. The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays : <sup>3</sup>

Liabilities and rights in such case.

5. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party : <sup>4</sup>

Delivery to payer for honor.

6. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. If the holder does not on demand deliver

them up, he shall be liable to the payer for honor in damages : Sec. 67.

7. Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right of recourse against any party who would have been discharged by such payment. <sup>4</sup> Effect of refusal to receive payment.

<sup>1</sup> The law-merchant as to payment *supra* protest does not apply to promissory notes ; which are not like bills of exchange intended for circulation all over the globe : *Byles on Bills*, 211. Whoever therefore pays a promissory note for honor obtains only a title to an overdue note ; and takes it therefore subject to all the equities attaching to it. Hitherto the prior clauses, 64-66, have dealt with the case of an acceptance for honor *supra* protest, for the non-acceptance of the bill. This clause deals with the case of a party intervening, after a duly accepted bill has been dishonored by non-payment, and paying the amount of the bill, for the honor of the person for whose account it was drawn. There is a material difference in the procedure to be observed, and the quality of title to be obtained by a "payee for honor," and the "transferee of an overdue bill." The former gets in the title of the original holder, and if the latter was "a holder in due course," he succeeds to his title. See notes to ss. 29 and 38, and *Re Overend Gurney & Co.*, L. R. 6 Eq. 344. But the procedure is attended with some formality : (see sub-s. 3 and 4). The transferee of an overdue bill simply gets the bill for what it may realize, subject to all equities between the prior parties ; but the procedure is without any formality, other than a simple purchase from the original holder.

<sup>2</sup> A "notarial act" may be described to be any written instrument under the signature and official seal of a notary, authenticating or certifying some document or circumstance ; and also any certificate or written instrument certifying some document or circumstance under his signature only, and without his seal. Any certificate without a seal is exceptional, for in general the seal is considered a material part of the ceremony. A date is inserted in almost all notarial acts, and is indispensably necessary in protests of bills, acts of honor, and various other instruments. The date of a notarial act must be truly and correctly given. It is commonly in words at length, and a false or incorrect date must never be inserted in it, on any pretext whatever : *Brooke's Notary*, 250.

<sup>3</sup> These formalities are apparently requisite to protect the payer for honor, on his becoming the holder of an overdue bill. No person can by simply paying money to the holder of a bill, and by a subsequent declaration, cause a payment so made, to assume the character of a payment for honor : *Geralopulo v. Wieler*, 10 C. B. 709. When any person intends

**Sec. 67.** to accept a bill *supra protest*, it is necessary by the law-merchant, to have an instrument called an act of honor, or an act for honor, prepared by a notary; which is a notarial certificate under the law and seal of a notary, declaring that the bill of which a copy is written on the back or prefixed to it, having been protested for non-acceptance, a third person, or the drawee, as the case may be, would accept the bill, either for the whole or a part of the amount, for the honor, or on account of, any party to it; and it commonly concludes with some general declaration that such party, and all other persons, are held responsible for the amount, and for all costs damages and interest; and sometimes with the addition of a few words to the effect that the notary accordingly grants the act of honor. By mercantile usage, the intended acceptor for honor, personally, or by a clerk or agent, declares his intention to accept the bill *supra protest*, after which the act of honor is prepared; in such a case the usage as to the mode of presenting a bill, and receiving the answer, is precisely similar to the common case of the presentment of a bill for acceptance. The act of honor is by the law-merchant, an indispensable ceremony; and it is in fact a kind of notarial certificate explaining the nature and objects of the acceptance *supra protest*: *Brooke's Notary*, 114. It may happen that, after a part payment of a bill has been made by one person *supra protest*, a further part, or the balance, is paid by another person; in that case another act of honor is necessary for the security of the latter: *Ibid.* 137.

<sup>4</sup> Prior to this Act it was held that the person who takes up a bill *supra protest*, for the honor of a particular party to the bill, succeeds to the title of the person from whom he receives it; but that "he could not indorse it over." There is nothing in the Act giving effect to this latter part of the decision, nor limiting the right of a payer to for honor to transfer the bill; while s. 10 sub-s. 2, p. 54, provides that when an overdue bill is "indorsed" it is to be deemed "a bill payable on demand:" *Per Malins, V. C.*, in *Ex parte Swan*, L. R. 6 Eq. 367.

<sup>5</sup> Without this provision there would be no penalty on the holder of a bill refusing to accept payment from a payer for honor. The right of a stranger to intervene and pay a bill for honor is not founded on the English common law, but is a provision of the general law-merchant: *Byles on Bills*, 291.

### *Lost Instruments.*

Holder's  
right to  
duplicate of  
lost bill.  
Imp. Act, s. 69

Indemnity.

**68.** Where a bill has been lost before it is overdue, the person who was holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again: 1

2. If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. <sup>2</sup> Sec. 68.

<sup>1</sup> This clause is similar in effect to s. 3 of 9 and 10 William III. c. 17 (extended by 3 and 4 Anne, c. 9, to promissory notes), which provided that in case any inland bill of exchange was lost before the time of payment, the drawer should be obliged to give another of the same tenor, on the person giving security to the drawer, if demanded, to indemnify him and all persons whatsoever in case the lost bill should be found again. In *Walmsley v. Child*, 1 Ves. Sen. 341, a case where goldsmith's notes had been lost, Lord Hardwicke, L. C., refused relief, as there was no affidavit of the loss, nor offer of indemnity; and he held that the plaintiff must seek his remedy by an action at law to recover the amount of the notes. But in *Rhodes v. Morse*, 14 Jur. 800, where a cheque had been lost, and the drawer had refused to give another, leave was given to file a claim to compel him to do so, on being indemnified. A person suing on a lost note should, before action, tender an indemnity to the maker. If he neglects this, it will be at the risk of costs to defendant: *Banque Jacques Cartier v. Strachan*, 5 U. C. P. R. 159.

<sup>2</sup> The relief administered by Courts of Equity was not confined within the letter of the statute of 9 and 10 William III. It has been afforded not only on such bills as are mentioned in the statute but on others; not only before they are due, but after; not only on bills, but on notes; not only against the drawer, but against the indorser, or the acceptor; not only may a new bill, be required, but payment. But the Court will not call upon a party to renew or pay a lost bill without providing him with a satisfactory indemnity: *Byles on Bills*, 302.

\* **69.** In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question. <sup>1</sup>

Action on  
lost bill.  
Imp. Act, s. 70

<sup>1</sup> There was a similar provision to the above in the Common Law Procedure Act 1856, which was re-enacted in C. S. U. C. c. 42, and R. S. O. c. 50, s. 143. But in the last revision of the Ontario Statutes, the clause is omitted as "unnecessary." The clause in the English Common Law Procedure Act, of which the Ontario clause was a transcript, has been retained, as it applies not only to bills and notes, but to all other negotiable instruments. The tender of indemnity should be made before action, otherwise the plaintiff may have to pay the costs: *King v. Zimmerman*, L. R. 6 C. P. 466.

Sec. 70.*Bill in a Set.*

Bills in sets,  
one bill.  
Imp. Act, s. 71  
Ind. Act,  
s. 132.

70. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill : <sup>1</sup>

Holder  
indorsing to  
different  
persons.

2. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills : <sup>2</sup>

Priority of  
title among  
holders to  
prevail.

3. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill ; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him :

Acceptance  
on one.

4. The acceptance may be written on any part, and it must be written on one part only :

Drawer  
accepting  
more is liable  
on each.

5. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill : <sup>3</sup>

Payment  
without  
delivery of  
proper part.

6. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof :

Discharge.

7. Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. <sup>4</sup>

<sup>1</sup> Bills in a set are commonly used for foreign remittances, and they are generally identified as "first of exchange," and "second of exchange," &c., so that if one be lost in transmission, another can be available. It is common for the drawer to draw, and deliver to the payee, several parts, commonly called a set, of the same bill of exchange, any one part of which



## Sec. 71.

being paid, the others are to be void. This is done in order to avoid delays and inconveniences, which might otherwise arise from the loss, or mislaying, or miscarriage of the bill; and also to enable the holder to transmit the same by different conveyances to the drawee, to ensure the most prompt and speedy presentment for acceptance and payment. Each part ought to contain a condition that it shall be payable only so long as all the others remain unpaid; in other respects all are of the same tenor: *Story on Bills*, s. 66, 67. An agreement to deliver up certain bills of exchange, which were foreign bills drawn in sets of three, is not performed by delivering up one only of each set: *Kearney v. West Granada, &c., Co.*, 1 H. & N., 412 (1856). But where only the first part of a foreign bill, drawn in a set, came into the hands of A., who endorsed it to B.; it was held that B. could not maintain an action for the other parts of the set against A., who never had them: *Pinard v. Klockmann*, 3 B. & S. 388.

<sup>2</sup> A drawee, (who was also payee) of a foreign bill drawn in three parts, accepted and indorsed one part to a creditor, under an agreement that it was to remain in his hands until some other security was given for it. He afterwards accepted and indorsed another part for value to a third person. The acceptor gave another security to his creditor for the part of the bill first accepted, whereupon it was given up to him;—Held, that the holder of the part secondly accepted was entitled to recover on the bill against the acceptor; and the acceptor would have been liable on the part secondly accepted, even if the part first accepted had been indorsed and circulated unconditionally: *Holdsworth v. Hunter*, 10 B. & C. 449.

<sup>3</sup> A banker indorsed for the benefit of a customer, two parts of a bill in a set, with the words "eight days" written sufficiently apart for the insertion of the letter "y";—Held, that he did not thereby constitute them two bills; and he was not estopped from setting up the alteration as a defence, nor proving a fraudulent sale of the two parts as separate bills: *Société Générale v. Metropolitan Bank*, 21 W. R. 335. A party can recover upon the second of a set of exchange without producing the first, or accounting for its non-production. It is not to be presumed, that a drawee will accept more than one bill of the set: *Commercial Bank v. Routh*, 7 La. An. 129.

<sup>4</sup> All the parts of a set of exchange constitute but one bill, and payment or cancellation of either of the set, extinguishes all; *Durkin v. Cranston*, 7 Johns. (N. Y.) 442; s. p. *Miller v. Hackley*, Anth. (N. Y.) 68; *Inghram v. Gibbs*, 2 Dall. 134.

### Conflict of Laws.<sup>1</sup>

¶ 1. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follow:—

Rules where  
foreign and  
home laws  
conflict.  
Imp. Act, s. 72  
Ind Act,  
s. 134.

**Sec. 71.** (a) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made : 2

Validity of bill how determined.

Proviso. Provided that—

Foreign stamp laws not recognized. (1) Where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue ; 3

Law of Canada to prevail. (2) Where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canada ; 4

Drawing indorsing of bill. (b) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made ; 5

Inland bill indorsed abroad. Provided, that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of Canada ; 6

Law of place governs duties of holder. (c) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored ; 7

Canadian currency. Exchange. (d) Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable ; 8

(e) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. <sup>Sec. 71.</sup> <sub>Due date.</sub> <sup>9</sup>

(f) If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonor, and a notarial certificate of the service of such notice, shall be received in all courts, as *prima facie* evidence of such protest, notice and service. <sup>Foreign protest prima facie evidence.</sup> <sup>10</sup>

<sup>1</sup> It has not been usual to define, by legislative enactment, the principles which are to guide the Courts in the interpretation of contracts which are controlled in their construction or effect by foreign laws. The municipal laws of a nation have no force extra-territorially; and foreign laws affecting contracts have been treated by the Courts as facts and circumstances of the same materiality to the determination of the rights of the parties, as are other facts which are required to be proved in litigation on a contract made within the jurisdiction. "It is difficult to conceive upon what ground a claim can be rested, to give to any municipal laws an extra-territorial effect, especially when those laws are prejudicial to the rights of other nations, or to those of their subjects. It would at once annihilate the sovereignty and equality of every nation, which would be called upon to recognize and enforce them, or compel it to desert its own proper interests and duty to its own subjects, in favor of strangers, who were regardless of both. A claim so naked of any principle or just authority to support it, is wholly inadmissible:" *Story on Conflict of Laws*, s. 32. Every nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals. It is not to be taken for granted that the rule of the foreign nation is right, and that its own rule is wrong. The true foundation on which the administration of international law must rest is, that the rules which are to govern, are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return: *Ibid.*, s. 35.

<sup>2</sup> This clause deals with the "validity as regards requisites in form" of a bill of exchange; and prescribes (1) that the law of the place of *issue* shall determine the requisites in form of the bill, and (2) that the law of the place (or places) of *acceptance* or *indorsement* shall determine the requisites in form of such acceptance or indorsement. By the second clause of the proviso, where a bill issued out of Canada, and therefore a foreign bill, conforms, as regards form, to the laws of Canada, it may be treated as valid between all persons who become parties to it in Canada;

Sec. 71. so that a foreign bill, although invalid in its own country, may, if otherwise in the Canadian form, be enforced against those who had become parties to it in Canada. Clause (b) deals with the contract of drawing accepting and indorsing a bill; and prescribes that the *contract* shall be interpreted according to the law of the place where such contract is made; but the proviso to this clause exempts from its operation inland bills indorsed in a foreign country. The opinion of jurists, which has been recognized in the decisions of the English and American Courts, is that the contract, in respect of the circumstances essential to its validity, and the rights and obligations which result from it, is governed by the law, either of the place in which it is made, or in that of which it is to be performed. The place in which it is made is presumed to be that in which it is to be performed; unless the contract expresses that it is to be performed in some other place. Hence the law of the country in which the contract is made is that by which it is to be entirely governed, unless its performance is to take place elsewhere. The jurists treat as the forms and solemnities of the contract, whatever formality or ceremony, either as to time or place, or manner of making the contract, or as to its form, whether it may be by parol, or must be in writing, its attestation or authentication, and whatever the law renders essential to the perfection and validity of the contract, and requires to be observed, as the condition on which it recognizes the existence of the contract: 3 *Burge on Colonial and Foreign Law*, 758. Thus if the law of the country where the contract is made, annuls a contract if made on a Sunday, or in a particular place, as a prison or a tavern; contracts made in violation of such law, would be void in whatever country they were sought to be enforced. So a contract made in Canada, which under the provisions of the Statute of Frauds, is required to be in writing and signed by the party to be bound, would be invalid in every other country. But a patrol contract made in a foreign country whose law authorizes a similar contract by parol, would be valid and enforceable in Canada. It does not appear to have been sanctioned as yet, that if both the parties to a bill are foreigners, they should be presumed to contract according to the law of the country with which they are acquainted, namely that of the place of their domicile, and not according to the law of the place with which they are unacquainted, though the contract may have been made there: 3 *Burge on Colonial and Foreign Law*, 776.

<sup>3</sup> The cases make a distinction between a contract void for want of a stamp, by the law of the country where made; and its rejection for want of a stamp, as evidence in the Courts of such country. If for want of a stamp, a contract made in a foreign country is void, it cannot be enforced here; but if for want of the stamp required by the revenue laws of the foreign state, it cannot be received in evidence there, it is nevertheless, admissible in evidence here: *Bristow v. Sequerville*, 5 Ex. 275. The rule is the same in the United States,—that if the stamp is required on a contract as a mere revenue imposition, the want of it will not be noticed in

foreign Courts. But where a contract, for want of a stamp is void by the law to which it is subject, it is void everywhere: *Wharton's Conflict of Laws*, s. 688. It has been laid down as a settled principle, that no nation is bound to protect, or to regard, the revenue laws of another country; and therefore a contract made in one country, by subjects or residents there, to evade the revenue laws of another country, is not deemed illegal in the country of its origin. This principle has been strongly argued against as being inconsistent with good faith, and the moral duties of nations: *Story on Conflict of Laws*, s. 257. Unfortunately from a very questionable subserviency to mere commercial gains, it has become an established formulary of the jurisprudence of the common law, that no nation will regard or enforce the revenue laws of any other country; and that the contracts of its own subjects made to evade or defraud the laws or just rights of foreign nations, may be enforced in its own tribunals: *Ibid*, s. 245. There would seem to be other reasons for not enforcing the revenue laws of a foreign country. Such laws are for the collection and enforcement of Crown or State dues, which are imposed upon the subjects of the foreign country for the support of their government. From necessity, it is the universal practice of nations to attach a penalty to a breach of their revenue laws; and it is a universally conceded maxim that the penal laws of one country are, under no circumstances whatever, to be executed in another; and even under our extradition treaties the "crime" must be one defined by Canadian law. Besides being penal, there is a variety of rules for the administration of the revenue laws of foreign nations. Some provide no relief against a breach; others give a limited time within which the duty or tax may be paid; others increase the quantum of the duty or tax, and allow it to be paid up to the time of trial. The forum of litigation would have no jurisdiction to grant relief, where such is permitted by the foreign law; and it has no machinery to enforce the original or increased duty or tax; for the foreign government has no revenue officer for the collection of such duty or tax within its jurisdiction. And if the forum recognized such revenue laws in general, it would have to enforce them in their details. The general words of this clause clearly exclude the rules of the foreign law as to evidence; but they are extensive enough to prevent the recognition or application of any rule of a foreign law which makes the contract in a bill or note void, as well as inadmissible as evidence, for want of a stamp.

## ILLUSTRATIONS.

A bill drawn by a domiciled Scotchman when in Paraguay upon a drawee in Scotland, who did not accept, in favor of a Frenchman residing in Paris, is an inland bill between drawer and payee, and the Court will not give effect to the law of Paraguay, that such bill is void for want of a stamp: *Stewart v. Gelot*, 9 Sess. Cas. 3 Ser. 1057.

A holder may recover in an English Court on a bill drawn in France on a French stamp, although, in consequence of its not being in the form required by the French code, he had failed in an action which he had brought on it in France: *Wynne v. Jackson*, 2 Russ. 351.

Sec. 71.

## Sec. 71.

<sup>4</sup> This clause of the proviso is a modification of the rule prescribed in subs. (a); and allows the Court, in an action on a bill issued out of Canada, and therefore a foreign bill, to exclude evidence of the foreign law; and to deal with the case as between the parties who had negotiated, held or become parties to it, as if it were an inland bill. It sometimes happens that the evidence of foreign experts, *peritus virtute officii*, as to the law of their own country, is conflicting; and in the case of *Re Marseilles R. & L. Co.*, 30 Ch. D. 603, the learned judge intimated that upon the evidence of French experts, he would have had great difficulty in saying what was the law of France, with regard to the facts before him. Such a case of difficulty was observed upon by Lord Langdale, M. R., in an earlier case as follows: If the utmost strictness were required in every case of proving foreign laws, justice might often have to stand still; and there may, therefore, be cases in which the judge might, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance, or want of clearness, in the testimony: *Nelson v. Bridport*, 8 Beav. 537. Where the foreign law differs from our law, it should be pleaded: *Hope v. Caldwell*, 21 U. C. C. P. 241; *Robertson v. Caldwell*, 31 U. C. Q. B. 402.

## ILLUSTRATIONS.

A bill was drawn and accepted in Paris, payable in England;—Held, that although the rule is that the validity and interpretation of a contract are governed by the law of the country where made, yet the consequences of non-payment are to be governed by the law of the country where the payment was contracted to be made; and the default having been made in England, interest was payable according to English, and not the French, law: *Cooper v. Earl Waldegrave*, 2 Beav. 282.

B. acted as agent in Malta for A., for the purpose of buying and remitting to him in England, bills on England, on account of money received by B. in Malta. In the course of the agency he purchased bills in Malta, and indorsed them to A. without any reservation in the indorsement as to his liability;—Held, that in the absence of special circumstances, shewing that any liability was intended by the general mercantile law, which must be taken to be in force in Malta, that B. was not liable to A. upon the bills being dishonored: *Castrique v. Buttigieg*, 10 Moore P. C. 94.

A bill of exchange was drawn in France by a domiciled Frenchman in the French language, but in the form of an English bill; it was accepted by an English company, to which it was addressed, and was then indorsed in France by the drawer to an Englishman, but in a form which was invalid according to the French law;—Held to be an English bill of exchange for all purposes: *Smallpage's and Brandon's Cases*, 30 Ch. D. 596.

<sup>5</sup> This clause deals with the interpretation of the contract of drawing, accepting, and indorsing, a foreign bill; but the proviso exempts from its operation, inland bills indorsed in a foreign country. The contract of the drawer and indorser of a foreign bill is not an engagement to pay the bill at the place in which it is drawn, but to guarantee that it shall be accepted and paid there by the person on whom it is drawn; and on his default, that they will re-imburse the holder the principal damages, in the place

Sec. 71.

where the contract is made ; that is where it was drawn in the one case, and in the other where it was indorsed : 3 *Burge on Colonial and Foreign Law*, 773. The *lex loci contractus* determines the rate of damages which are recoverable. The drawer is liable for those given by the law of the place where the bill is drawn ; but the indorser is liable for those given by the law of the place where he indorsed the bill : *Ibid.* But the case of indorsing an inland bill in a foreign country is appropriately made subject to the laws of Canada. An inland bill is, by its definition in s. 4 a home contract, and is not subject to foreign law ; and therefore all its incidents as to form, and the rights and liabilities of the parties to it, must conform to the law of its own country.

## ILLUSTRATIONS.

If a bill is drawn in one country and payable in another, and dishonored, the drawer is liable according to the *lex loci contractus*, and not the law of the country where the bill is made payable : *Allen v. Kemble*, 6 Moore, P. C. 31.

A bill drawn, accepted and payable in England, was indorsed in France according to English law, but not according to the law of France. The drawer who was the indorser, and indorsee were, when the bill was made and indorsed, subjects of France, resident and domiciled there ;—Held, that the contract of the acceptor must be governed by the law of England, and therefore the indorsee could maintain an action in England against the acceptor : *Lebel v. Tucker*, L. R. 3 Q. B. 77.

A bill was drawn in France upon and accepted by the drawee in London, and indorsed in France, but not so as to convey to the indorsee, according to the French law, any property in, or right to sue upon, the bill there in his own name ;—Held, that by the law of France such indorsement operated as a procreation, and entitled the indorsee to sue in his own name, and that therefore the acceptor was liable to an action in this country at the suit of such indorsee : *Bradlaugh v. De Rin*, L. R. 3 C. P. 538 ; L. R. 5 C. P. 473. See *Story on Conflict of Laws*, (8th ed.) p. 440n.

A bill drawn and indorsed in England upon French subjects, was accepted by them in Paris, and was payable on the 5th October, 1870. Before that date, the French Government in consequence of the Franco-German war, enlarged the time for the payment and protesting of bills of exchange, by which the bill did not become payable until the 5th September, 1871 ;—Held, that the enlargement of the time of payment did not release the indorsers : *Rouquette v. Overmann*, L. R. 10 Q. B. 520. But see the next case.

The rights and liabilities of the indorser and indorsee of a bill depend upon the law of the place where the contract of indorsement is made : *Horne v. Rouquette*, 3 Q. B. D. 514.

By the law-merchant a bill of exchange may be indorsed abroad, and the indorser undertakes some liability in respect of such indorsement abroad which raises a contract between the immediate indorser and indorsee : *Ibid.*

A. in England drew a bill on B. in a foreign country, which, after having been negotiated through another foreign country, was presented to B. who refused to pay because the law of the country in which he resided, prohibited such payment ;—Held, that the drawer was liable for the whole amount of the re-exchange between the different countries : *Mellish v. Simeon*, 2 H. Bl. 378.

Sec. 71. A note made here payable at a place in the United States, without limiting it "not otherwise or elsewhere," is payable generally, and the law and currency of the place of contract must govern: *Hooker v. Leslie*, 27 U. C. Q. B. 295. See also *Meyer v. Hutchinson*, 16 U. C. Q. B. 476.

A fixed law at the foreign place of drawing, as to the damages and interest for non-payment of a bill, binds the drawer as a part of his contract: *Re State Insurance Company*, 32 L. J. Ch. 300; 9 Jur. N. S. 298.

A. being a resident in Ontario, while temporarily in New York, drew a bill on B. in Toronto, in favor of a New York firm, which was refused acceptance, and protested:—Held, that the contract, notwithstanding that A. and B. are domiciled in Ontario, must be governed by the law of New York: *Story v. McKay* 15 Ont. R. 169.

In declaring on a note drawn in a foreign language, its meaning in English may be averred, as in this form: the sum of two hundred louis current money, meaning thereby the sum of two hundred pounds of lawful money of Canada: *Gibb v. Morissette*, 4 U. C. Q. B. 205.

Where a note made and payable in Ogdensburg, New York, matured before the United States made treasury notes a legal tender there, the plaintiff was held entitled to the sum made payable by the note at the time it matured, without reference to the rate of exchange existing between Canada and the United States, at the time of the trial: *Judson v. Griffin*, 13 U. C. C. P. 350.

<sup>6</sup> "The Law of Canada." The sources of the Canadian law have been various; and there has been as yet no judicial decision giving an exact and accurate rendering of the term "Law of Canada." In considering the general question, it must be remembered that part of the territory now within the jurisdiction of the Dominion, was acquired by settlement, and part by conquest. The parts, so separately acquired, have to be brought within the operation of clear and well recognized rules, by which the sources of their original laws may be ascertained and determined. These rules were promulgated by the Imperial Privy Council in 1722, as follows: (1) In countries originally settled by British subjects, the common and statute laws of England established at the settlement, and applicable to their situation and condition, are in force; but not the laws made after such country had been inhabited by the English, unless such later laws were made expressly applicable to the colonies: 2 *P. Wms.* 75. In countries so settled, there being no preceding laws in force, to contest the superiority with them, the common and statute laws of England applicable to their condition, are in force: *Clark's Colonial Law*, 7. (2) In countries acquired by conquest or cession, the former laws remain in force, until provision is made for their government by the Crown (which has the power of legislation by Order-in-Council), or by Parliament: *Mills on Colonial Constitutions*, 19. And there the conqueror may impose on the inhabitants what laws he pleases: 2 *P. Wms.* 75. (3) Until such laws are given by the conqueror, the laws and customs of the conquered country are to prevail: *Ibid.* The King, without the concurrence of Parliament, has full power of legislation in a conquered country: but such legislation is subordinate to the King's own authority in Parliament; and he cannot change fundamental princi-



## Sec. 71.

ples, which form part of the constitution. But where a local constitution is granted to a colony acquired by conquest, the Crown, by such grant, precludes itself thereafter from the exercise of the sole legislative authority over such colony, and such grant is irrevocable: *Chapman v. Hall*, 20 How. St. Tr. 239; s. c. Cowp. 204. The territory of Ontario and Quebec was acquired by conquest in 1760; and by a Royal Proclamation of 1763, a small Province, called Quebec, was established within that territory, and was granted a local legislature which was authorized to make laws "as near as may be agreeable to the laws of England." It was further provided that until such laws were made, the inhabitants were to have "the enjoyment of the benefit of the laws of England." "As soon as Canada ceased to belong to France the law of Canada ceased to exist, and the law of England came in:" *Per Smith, J., in Corse v. Corse*, 4 L. C. J. 314. In 1774, the Quebec Act, 14 George III., c. 83, provided that within what is now Ontario and Quebec, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada," (s. 8). The Constitutional Act of 1791, 31 George III., c. 31, which established the two Provinces of Upper and Lower Canada, authorized the local legislature of each province, to make laws for the peace, welfare and good government thereof. In Lower Canada, now Quebec, the French Canadian law has remained in force, except where it has been subsequently altered by Imperial legislation. The only English law introduced into Lower Canada (Quebec) was that relating to the tenure of lands: *Stewart v. Bowman*, 3 L. C. R. 211; the law relating to wills: *Migneault v. Malo*, L. R. 4 P. C. 123; and the law relating to bills and notes: *Macdonald v. Whitfield*, 8 App. Cas. 733. In Upper Canada, now Ontario, the French Canadian law was displaced; and by the Act 32 George III. c. 1, (now R. S. O. 1887. c. 93) it was enacted that in all matters of controversy relating to property and civil rights, the laws of England then (1792) existing, should be the rule for the decision of the same. The territories of New Brunswick, Nova Scotia, and Prince Edward Island were established as settlements, soon after their discovery in 1497: 1 *Burge on Colonial and Foreign Law*, xxxiv. The laws of Prince Edward Island are the laws of England, in force at the time of its acquisition: *Ibid*, 464. The whole of the English common law is recognized as in force in Nova Scotia, which originally included New Brunswick, excepting such parts as are obviously inconsistent with the circumstances of the country; while, on the other hand, none of the statute law is received, except such parts as are obviously applicable and necessary: *Uniacke v. Dickson*, James, N. S. 287. The English common law was introduced into Manitoba and the North-West Territories by the Charter of the Hudson's Bay Company in 1670: *Connelly v. Woolrich*, 11 L. C. J. 197. In 1862, and 1864 the laws of England were declared to be in force within what is now Manitoba: *Keating v. Moises*, 2 Man. R. 47. In addition to these original sources of Canadian law, it has been held that, where the English and colonial laws are the same, the decisions of the

**Sec. 71.** English Courts are binding on the Colonial Courts, as an authoritative construction of the law. And that, as a general principle, an Act of a Colonial Legislature, where the English law prevails, must be governed by the same rules of construction as prevail in England; and the English authorities upon an Act, *in pari materia*, are authorities for the interpretation of the Colonial Act: *Catterall v. Catterall, or Sweetman*, 1 Rob. Ecc. Rep. 580; 9 Jur. 951. And it is equally a general rule, that where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been construed by an English Court of Appeal, a similar construction of the colonial law should be adopted by the Courts of the Colony; it being of the utmost importance that in all parts of the Empire, where the English law prevails, the interpretation of that law by the Courts, should be, as nearly as possible, the same: *Trimble v. Hill*, 5 App. Cas. 342.

<sup>7</sup> It is generally required as to bills of exchange, in order to fix the responsibility of other parties, that upon their dishonor, they should be duly protested by the holder, and due notice given to such parties. And the first question which naturally arises is, whether the protest and notice should be in the manner and according to the forms of the place in which the bill is drawn, or according to the forms of the place in which it is payable. By the common law the protest is to be made at the time, in the manner, and by the persons prescribed, in the place where the bill is payable. But as to the necessity of making a demand and protest, and the circumstances under which notice may be required or dispensed with, these are incidents of the original contract, which are governed by the law of the place where the bill is drawn. They constitute implied conditions upon which the liability of the drawer is to attach, according to the *lex loci contractus*; and if the bill is negotiated, the like responsibility attaches upon each successive indorser, according to the law of the place of his indorsement, for each indorser is treated as a new drawer: *Story on Conflict of Laws*, s. 360. *Locus regit actum* is a canon of general jurisprudence, and in the absence of contrary evidence, applies to a system of foreign law; and the rule flowing from it is, that "the formal requisites demanded for a contract by the law of the place where it is made, are sufficient for it everywhere:" *Westlake on International Law*, s. 171.

#### ILLUSTRATIONS.

Where a foreign bill, payable in France, is dishonored, due notice of dishonor by the acceptor is parcel of the contract, and it is sufficient for the indorsee to shew that he had given the indorser such notice of the dishonor and protest as was required by the law of France: *Rothschild v. Currie*, 1 Q. B. 43.

Where in the case of a bill payable at a particular place in a foreign country, there is no evidence of presentment there, nor of the law of that country on the subject, the rules as to presentment must be determined by our own law: *Buffalo Bank v. Truscott*, U. C. M. T. 2 Vic.

## Sec. 71.

<sup>8</sup> By the par value of real moneys is meant the equality of the intrinsic value of the money of one country with another; and by the par of exchange, the proportion that the imaginary moneys of any country bear to those of another, so that the rise and fall of an exchange, must be attributed, either to the current price of the coins of one country, or to an extraordinary demand in one place for money in another; or it may be sometimes owing to both. The term "exchange" means a bartering, or exchanging, the money of one kingdom with another, which is always effected by the intervention of two or three lines of writing on a slip of paper: *Beaves, Lex Mercatoria*, 562. [A bill of exchange is the substitute for the actual transmission or exchange of money by sea or land: *Parsons v. Armor*, 3 Peters (U. S.) 413.

<sup>9</sup> The maturity, or due date, of a bill of exchange depends upon the number of days of grace allowed in the country where the bill is payable. In some countries, no days of grace are allowed; while in others, where they are allowed, they vary from three to fifteen days. See notes to s. 14.

<sup>10</sup> There is no similar clause in the English Act. Prior to this Act, it had been held in Ontario, that a protest of a notary of a foreign country was no evidence of the facts therein stated, as the statute C. S. C. 57, s. 6, making a protest *prima facie* evidence of those facts, only applied to protests made by notaries of the former Province of Canada: *Griffin v. Judson*, 12 U. C. C. P. 430. Nor was a protest of a foreign bill by a foreign notary, evidence of notice of dishonor, although the notary certified therein that he had given the parties due notice of dishonor: *Ewing v. Cameron*, 6 U. C. O. S. 541. But in England it was held that the dishonor of a foreign bill presented abroad, could be proved by producing the protest attested by a notary public: *Anon.* 12 Mod. 345.

## PART III.

## CHEQUES ON A BANK.

**72.** A cheque is a bill of exchange drawn on a bank, payable on demand: <sup>1</sup>

2. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. <sup>2</sup>

Cheque is a bill of exchange. Imp. Act, s. 73 Ind. Act, ss. 6 & 19. Certain provisions apply to cheques.

<sup>1</sup> Cheques on a bank are the modern substitute for the "goldsmith's notes" of former times. See p. 8, *ante*. The definition of a bill of exchange is given in s. 3; and of a bill payable on demand in s. 10.

**Sec. 72.** All cheques are inland bills of exchange, and are subject to the conditions attaching to them as such. But all bills of exchange are not cheques, nor subject to all the rules applicable to cheques. Thus an authority to draw cheques, does not necessarily include an authority to draw bills: *Forest v. Mackreth*, L. R. 2 Ex. 163. Further, a cheque is intended for prompt presentment and payment, while a bill payable on demand, is intended to be a continuing security. "Marking" a cheque is not necessarily an acceptance of the cheque, unless it is in the form prescribed by s. 17. The definition of a bill of exchange completely embraces in it a cheque. A cheque like a bill of exchange, is an unconditional order in writing addressed to a bank requiring it to pay a sum certain in money, at a fixed or determinable future time, that is on presentation; but it has not, like an ordinary bill, days of grace. Though it has not all the privileges of a bill, it is as much a negotiable instrument; and the holder to whom the property in it has been transferred for value, either by delivery or indorsation, is entitled to sue upon it, if, upon due presentment, it is not paid: *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95. This part III. does not apply to private bankers.

#### ILLUSTRATIONS.

Cheques, like bills, are negotiable instruments, generally payable to bearer, but sometimes to order, requiring as essentials, a drawer, drawee, and payee: *Hewitt v. Gooderich*, 10 Ala. 340.

A bank cheque is an inland bill of exchange; and, in general, is governed by the law applicable to bills of exchange and promissory notes: *Minturn v. Fisher*, 4 Cal. 35.

A cheque upon a bank, until accepted, is merely an order upon the bank. The bank is not liable upon it; and it may be revoked: *Schneider v. Irving Bank*, 1 Daly, (N.Y.), 500.

Where a cheque was drawn upon a banker, payable to bearer, and the person who received it wrote his name on the back of it, and passed it away to another; the person so indorsing was held liable as an indorser to the person to whom he had passed it: *Macdonald v. Union Bank*, 2 Sess. Cas. (Scot.), 3 Ser. 963; s. p. *Keene v. Beard*, 8 C. B. N. S. 372.

Banks are bound to know the signatures of their customers; and therefore a bank which has paid a cheque which has been forged, cannot recover back the money from the person to whom it has paid it: *National Bank v. Grocers National Bank*, 35 How. (N. Y.) 412.

Although the date of a cheque is not material to its validity, it is as to the period of its payment. Therefore the payment by a bank of a post-dated cheque before the day of its date, is a payment in its own wrong: *Godin v. Bank of the Commonwealth*, 6 Duer. (N. Y.) 76.

The reasonable and established usages and customs of banks, enter into and become part of the contracts made with them by persons having knowledge of such usages and customs, and must receive due weight in expounding such contracts: *Brent v. Bank of Metropolis*, 1 Peters, (U. S.) 89.

A bank is not bound to receive on deposit the funds of every man who offers them; but has the right to select its customers: *Thatcher v. Bank of the State*, 5 Sand. (N. Y.) 121.

## Sec. 72.

A cheque is not an assignment by the drawer to the payee of a debt or a chose in action; and the payee of the cheque has no right of action for its dishonor against the banker on whom it is drawn: *Schwoetler v. Central Bank*, 34 L. T. Rep. 735. See also *Hopkinson v. Forster*, L. R. 19 Eq. 74.

The bearer of a cheque is the person entitled to the money, and he may transfer it to any other person, and whoever has possession of it, as bearer, is entitled to the amount stated in it, and to maintain an action on it: *Ancona v. Marks*, 7 H. & N. 696.

The rule of law as to bills of exchange and promissory notes,—that an indorsee taking them after maturity, takes them upon the credit of, and can stand in no better position than, his indorser,—does not apply to cheques: *London and County Banking Co. v. Groome*, 8 Q. B. D. 288.

A banker cannot debit his customer with the payment made through a forged indorsement of a bill, unless there are circumstances amounting to a direction from the customer to the banker to pay without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, so as to preclude the customer from shewing it to be forged: *Roberts v. Tucker*, 16 Q. B. 500.

Where a bank, without the authority of its customer, counted out the amount of such customer's deposit, and handed it over to a sheriff, who held an execution against the goods and chattels of the customer, it was held that the amount so paid was the bank's money, and not the money of the customer: *Carroll v. Cone*, 40 Barb. (N. Y.) 220.

Where a draft in the usual form of a cheque, is made payable on a future specified day, it is *prima facie* but not conclusive evidence that the instrument is a bill of exchange, and as such entitled to days of grace: *Andrew v. Blachly*, 11 Ohio St. 89.

When, however, such an instrument is designed by the parties as an absolute transfer and appropriation to the holder of so much of an actually existing fund in a bank belonging to the drawer, it is nevertheless a cheque, and not a bill of exchange, and is not entitled to days of grace. *Ibid.*

A cheque post-dated seven days, cannot in substance be distinguished from a bill of exchange at seven days date: *Forster v. Mackreth*, L. R. 2 Ex. 163.

A cheque given in settlement of losses at matching coppers, is a note of hand given in consideration of a gambling debt, and such a security is void, even in the hands of *bona fide* holder for value: *Summerfeldt v. Worts*, 12 Ont. R. 48.

<sup>2</sup> These provisions are: s. 10, defining a bill payable on demand; s. 14, no days of grace; capacity and authority of parties, s. 22; and the general provisions as to acceptance, indorsement, negotiation, holder in due course, presentment for acceptance and payment, notice of dishonor, contracts of acceptor, drawer and indorser, and discharge of bill.

### 73. Subject to the provisions of this Act—

(a) Where a cheque is not presented for payment within a reasonable time of its issue,<sup>1</sup> and the drawer or the person on whose account it is drawn had the right at the time

Presentment  
of cheque for  
payment  
within rea-  
sonable time.  
Imp. Act, s. 74  
Ind. Act,  
ss. 72 & 73.

Sec. 73. of such presentment, as between him and the bank, to have the cheque paid,<sup>2</sup> and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid ;<sup>3</sup>

Usage and facts to govern.

(b) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case ;<sup>4</sup>

When holder is a creditor of bank.

(c) The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.<sup>5</sup>

<sup>1</sup> The usage recognized by the cases is, that when a party receives a plain or uncrossed cheque, drawn on a bank in the place where he resides, he should present it for payment not later than the day after he receives it. But if the cheque be crossed by the drawer before delivering it to the holder, such holder should deposit it in his own bank for collection not later than the day after he receives it ; and the bank, the day next following, present it to the bank on which it is drawn : *Alexander v. Birchfield*, 7 M. & Gr. 1061. In computing time, the non-business days mentioned in s. 14 are excluded (s. 91). In the former case, the drawer of the cheque is held to be responsible one day, and in the latter case, two days, for the solvency of the bank on which he has given his cheque. When the person taking a cheque, and the banker, do not reside in the same place, the person taking the cheque should send it to his banker, or agent, by the next business post to the town where the bank is situated ; and such banker, or agent, should present it on the next business day, in order to be able to hold the drawer liable in case the bank on which it is so drawn suspends payment. See further, as to "reasonable time," ss. 20, 36, 40 and 45, and notes thereto.

<sup>2</sup> A banker does not generally accept his customer's cheque ; the reason being that the banker is the debtor of his customer to the extent of the funds which he holds on his customer's account, with the obligation imposed upon him, arising out of the custom of bankers, of honoring his customer's cheques, to the extent of his customer's funds : *Foley v. Hill*, 2 H. L. Cas. 28.

#### ILLUSTRATIONS.

A bank is bound by law to pay a cheque drawn by a customer within a reasonable time, after the bank has received sufficient funds belonging to the customer ; and the latter may maintain an action of tort against

the bank, for refusing payment of a cheque under such circumstances, although he has not thereby sustained any actual damage: *Marzetti v. Williams*, 1 B. & Ad. 415. Sec. 73.

A. presented a cheque at a banking house. The cashier counted out the amount in notes, gold, and silver, and placed it on the counter. A. took it and counted it, and was in the act of counting it a second time, when the cashier (having discovered that the drawer's account was overdrawn) demanded the money back, and upon A.'s refusal, detained him, and took it from him by force;—Held, that the property in the notes and money had passed from the bank to the bearer of the cheque, and that the payment was complete, and could not be revoked. *Chambers v. Miller*, 13 C. B. N. S. 125; s. c., 3 F. & F. 202.

Where cheques drawn on the Bank of Montreal by the agent of the City Bank had been accepted by the manager of the former, who received the funds of the latter in return;—Held, that the Bank of Montreal was responsible for the acceptance of its manager by his initials, especially as it had adopted the acceptance by accepting the funds of the City Bank in consideration thereof: *Banque Nationale v. City Bank & Bank of Montreal*, 17 L. C. J. 197.

When a customer pays to his bankers a cheque drawn upon them by another customer, he must, in order to make them liable at all events, demand payment, or request that the amount may be placed to his credit: *Boyd v. Emerson*, 4 N. & M. 99; 2 A. & E. 184.

A cheque crossed in blank was deposited by the holder in his bank, which two days afterwards presented it for payment, when it was dishonored;—Held, to be presented within a reasonable time: *Stringfield v. Lanzzari*, 16 L. T. N. S. 361.

As between the drawer of a cheque and the holder, no time, within six years, is unreasonable for presentment to the banker for payment, unless some loss to the drawer is occasioned by the delay: *Laws v. Rand*, 3 C. B. N. S. 442.

The drawer of a cheque is responsible on it until it is outlawed, and is not entitled to notice or other privileges, not even of presentment, unless it be shewn that, from want of such diligence, he had suffered damage; as from the bank on which it is drawn having failed in the interim: *Pratt v. McDougall*, 12 L. C. J. 243.

<sup>3</sup> The latter part of this clause is new. Formerly the drawer was absolutely discharged, if the bank failed. Now, by the operation of this clause, and clause (c), the drawer is discharged only to the extent of the damage he suffers; and the holder is given the right of the drawer in recovering the amount from the bank, or proving the amount of the damages claimed against it in any winding up proceedings.

#### ILLUSTRATIONS.

If the holder of a cheque neglect to present the same for payment within a reasonable time, and the bank fails between the time of the drawing and the presentment thereof, the drawer is discharged from liability, *pro tanto* the loss he has sustained by such failure: *Daniel v. Kyle*, 5 Ga. 245.

In an action by a trader against his banker for dishonoring his cheque, he having funds to meet it, substantial damages may be recovered, with out proof of any actual damage: *Rolin v. Steward*, 14 C. B. 595.

## Sec. 73.

A "usage of trade and of banks" can only be established by evidence. A custom or usage would be binding and obligatory on all persons engaged in a certain trade, because long and universally acted upon by all persons in such trade, who may therefore be reasonably presumed to have made their contracts on the faith of it. The alleged custom could only be proved by a long, well known and acknowledged and universal usage and practice among bankers and traders to act in accordance with it: *Bellamy v. Marjoribanks*, 7 Ex. 387. See note 1 to this section, and the notes to ss. 26, 36, 40 and 45.

## ILLUSTRATIONS.

Greater diligence is required in presenting a cheque for payment, than in presenting a common inland bill of exchange for payment: *Gough v. Staats*, 13 Wend. (N. Y.) 549.

Where the parties reside in the same place, a delay of six days to present a cheque for payment, discharges the drawer: *Ibid.*

A cheque drawn in Boston on a bank in Boston, was sent by mail to Rochester, N. Y., and there bought by a bank four days after its date, and was presented for payment two days after, in all six days from its date;—Held, under the circumstances, no unreasonable delay, and that it was not subject to any equities between the original parties: *Bank of Rochester v. Harris*, 108 Mass. 514.

Where the holder of a cheque did not present it to the bank for two years after its date, and omitted to give any notice of non-payment to the drawer, but the drawer never had funds in the bank sufficient to meet it, except once, and then such funds were withdrawn immediately afterwards by himself, and the drawer sustained no loss by the delay in presentment;—Held, that the drawer was not exonerated from liability: *Hoyt v. Seeley*, 18 Conn. 353.

<sup>5</sup> This clause is new. Formerly it was held that there was no privity between the holder of a bill or cheque payable at a bank, and the bank which would give such holder a right of action against the bank. The holder of a cheque cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer: *National Bank v. Millard*, 7 Can. L. J. 44.

Revocation  
of bank's  
authority.  
Imp. Act, s. 75

**74.** The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by—

- (a) Countermand of payment; <sup>1</sup>
- (b) Notice of the customer's death. <sup>2</sup>

<sup>1</sup> The terms used in this section indicate that the drawing of a cheque by a customer imposes a "duty" on, and conveys an "authority" to, the bank drawn upon, to pay such cheque on demand. As stated in note 5 to s. 2, p. 25 *ante*, the ordinary relation of bank and customer in regard to moneys deposited, and cheques drawn for the payment of such moneys,



is that of debtor and creditor. A bank is not obliged to pay a customer's cheques at all hazards. It should not do so, if it has had notice of such an act of insolvency as an assignment to a trustee, or assignee, for the benefit of creditors, and when the trustee or assignee has given notice of such assignment to the bank: *Griffin v. Rice*, Hilt. (N. Y.), 184; *Beckwith v. Union Bank*, 9 N. Y. 211. But the trustee is not bound to notify the bank not to pay the cheque, as he might expose himself to the risk of an action by a *bona fide* holder of the cheque: *Ex parte Richdale*, 19 Ch. D. 489. So a bank may refuse to pay a customer's cheque which he knows has been drawn for the purpose of committing a breach of trust; as where the customer is an executor and intends to mis-apply the money, and the bank is privy to the intent: *Gray v. Johnston*, L. R. 3 H. L. 1. But it would be a most serious matter if banks were to be allowed, on light and trifling grounds, on grounds of mere suspicion or curiosity, to refuse to honor a cheque drawn by their customer, even although that customer might happen to be an executor or administrator: *Per* Lord Cairns, L. C., in *Ibid.*

## ILLUSTRATIONS.

A bank is bound to honor its customers' cheques to the amount deposited. And it is also bound to obey the orders of such customer countermanding the payment of, or "stopping," such cheques: *Clydesdale Bank v. McLean*, 10 Sess. Cas. 4 Ser. 719.

Where a person having funds in a bank drew cheques in favor of different persons, and he afterwards, before they were presented to the bank, forbade the bank to honor the cheques and drew out the whole fund;—Held, that the holder of a cheque which was presented to the bank after the drawer had countermanded payment, but before the fund was drawn out, was not entitled to claim the amount of the cheque from the bank: *Dykens v. Leather Manufacturers Bank*, 11 Paige (N. Y.) 612.

Where a bank was notified by the drawer of a cheque not to pay it, which the teller agreed not to pay, but afterwards paid it to the holder on presentation;—Held, that the drawer could recover from the bank the amount of the cheque so paid: *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500.

<sup>2</sup> This has been recognized as a rule in banking matters, although there has been no direct decision on the point, except in cases of *donatio mortis causa*. "A cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the bank or any where else. It is an order to deliver the money, and if the order is not acted upon, in the lifetime of the person who gives it, it goes for nothing:" *Per* Lord Romilly, M. R., in *Hewett v. Kaye*, L. R. 6 Eq. 198. But where a bank held a deposit of a customer, and charged against it a bill which fell due after the customer's death, but before it had received notice of his death, it was held entitled so to charge the amount of the bill: *Rogerson v. Ladbroke*, 1 Bing. 93. See further *Hill v. Royds*, L. R. 8 Eq. at p. 292. But where a bank held a customer's notes which fell due after his death, it was held that they were

**Sec. 74.** not entitled to charge them against the deposit of money standing to his credit at the time of his death, but must pay over the deposit to his executor, and share in the dividends from his estate with the other creditors: *Re Farmers Bank*, 48 Pa. St. 57. Nor can the bank so charge such notes, although the deposit is the proceeds of the discount of the notes sought to be charged: *Rogerson v. Ladbroke*, 1 Bing. 93. See also, note 1, p. 192.

### *Crossed Cheques.*<sup>1</sup>

**75.** Where a cheque bears across its face an addition of—

General crossing of cheques defined, Imp. Act, s. 76 Ind. Act, ss. 123 & 124.

(a) The word “bank” between two parallel transverse lines, either with or without the words “not negotiable;” or

(b) Two parallel transverse lines simply, either with or without the words “not negotiable;”

That addition constitutes a crossing, and the cheque is crossed generally:

Special crossing of cheques.

2. Where a cheque bears across its face an addition of the name of a bank, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that bank.<sup>2</sup>

<sup>1</sup> The custom of crossing cheques with the name of some bank, was originated by the clerks of the banks, when depositing cheques in the London Clearing House, writing across the cheques the name of the bank that deposited them, in order that the clerks of the clearing house, when making up the accounts, might know by which bank each cheque had been deposited. This practice had nothing to do with the restriction of the negotiability of cheques; for at the time it was done the cheques were in the course of payment, or presentation for payment, and their negotiability was at an end. The form was afterwards adopted by customers, and is said to have been originally intended as a direction to the bank drawn upon, to pay the amount of the cheque only to the bank so named. But in an early case (1828), it was held, that such crossing did not restrict the negotiability of the cheque; and amounted only to a direction to pay some bank, and not necessarily the bank originally named; and that the holder might substitute another bank. The effect of such crossing of cheques came more prominently before the English Courts in 1852, in a case where a cheque had been drawn by trustees, to be deposited to a trust account, and was crossed for the Bank of England; but the agent of the trustees struck out the crossing, and crossed it in the name of his own

bank, which collected the amount from the drawers' bank; by which means the agent misappropriated the trust fund. The drawers then brought an action against their bank, for improperly paying the cheque, in disregard to their crossing it for the Bank of England. Some evidence of a custom of banks in regard to such crossed cheques was given; but the Court held that no usage or custom regulating such crossing of cheques had been established; and that even if such a custom had been proved to have existed in fact, it would be incapable of being supported in point of law. Such crossing of a cheque would restrict its negotiability as a cheque, and would have the effect of rendering the instrument no longer a cheque, but by a mercantile artifice would make it of a higher nature as a security: *Bellamy v. Marjoribanks*, 7 Ex. 389, 16 Jur. 106. This decision was a surprise to the banks, and led to the passing of an Act, in 1856, which provided that a cheque bearing across its face the addition of "the name of any banker, or of the words 'and Company,'" should be payable only through some banker; thus making the payment of such crossed cheques, otherwise than through a banker, invalid in law. Under this Act, it was held that the "crossing" was no part of the cheque, and that its fraudulent obliteration was no forgery of the cheque; and that the payment by the bank, without negligence, of such a cheque with the crossing obliterated, to the holder, who was not a banker, was good as against the drawer: *Simmons v. Taylor*, 8 C. B. N. S. 528. This case led to the passing of another Act, in 1859, making the crossing of a cheque a material part of it, and the obliteration of such crossing, forgery. Then occurred a case which is said to have startled the commercial community. A crossed cheque was stolen after it had been crossed with the name of the holder's bank, and was transferred for value to a *bona fide* holder, who deposited it in the bank of which he was a customer. The customer's bank presented it to the bank on which it was drawn, which paid the cheque, although it had not come to it through the bank with whose name it had been crossed. It was held, that the negotiability of the cheque was not affected by the statutes, and that the law had imposed no liability on a bank which neglected the directions of the crossing, when the cheque had come through the hands of a *bona fide* holder; that the crossing operated as a mere caution; and that the original holder could not recover against the paying bank: *Smith v. Union Bank*, 1 Q. B. D. 31. In another case where a cheque crossed to the A. bank was stolen from the payee, and his indorsement forged, and ultimately came into the hands of a *bona fide* holder for value, who deposited it in his own bank, which sent it to the B. bank, to which the drawer's bank paid it, not perceiving or disregarding the crossing to the A. bank, it was held that the drawer's bank improperly, and without authority, had paid it to the wrong bank, and could not therefore charge it against the drawer's account: *Bobbett v. Pinkett*, 1 Ex. D. 369. Again Parliament was appealed to on behalf of the banking and mercantile community for relief, and passed the "Crossed Cheques Act, 1876," which contained nearly all the provisions of the present Act as to the

Sec. 75. mode and effect of crossing cheques, and providing for their being "non-negotiable" in certain cases.\* "No prudent banker should pay a crossed cheque otherwise than to a banker. If he did so he would run the risk of the bearer of the cheque having no title to it;" *per Parke, B., in Belamy v. Marjoribanks*, 7 Ex. 404. See also the notes to the other sections.

<sup>2</sup> The English Act provides for the crossing of a cheque by writing across its face the name of a banker, or the words "and company;" but the latter words are inapplicable in Canada, for the reason that they are not authorized by this Act, and any such crossing would not, therefore, be protected; and for the further reason that the banks in this country are corporations, while in England they may be either partnerships or corporations. The Bank Act R. S. C. c. 120, prohibits the use of the title "bank" by individuals or a firm, unless under certain restrictions. A crossed cheque differs from one not crossed, (1) in the restriction as to the character of the person to whom it must be presented; and (2) in the relief which is afforded to the person paying it into his bank, from responsibility for the negligence of the bank. The necessity, by reason of the crossing, of placing the cheque in the hands of a bank, will be found to oppose some impediment to a fraudulent holder in dealing with the cheque, and making it available for his own purposes. And it is reasonably clear that the practice of crossing cheques is primarily for the protection of the owner of the cheque; and secondarily for the protection of the drawer, and his bank. The Act provides for two kinds of crossed cheques. (1) Those "crossed *generally*," which must be deposited in *some* bank, and collected by such bank. (2) Those "crossed *specialy*," which must be deposited in the *particular* bank named on the cheque, and collected by such bank only; subject, however, to the power given by sub-s. 5 of s. 76. In the first case the *holder* of the cheque selects the bank; and in the second case the *drawer* of the cheque selects the bank, in which the cheque is to be deposited for collection. In crossing a cheque there must be either;—

(1) Two parallel transverse lines simply; or

(2) Written between such two transverse lines (a) the words "Bank;" or (b) the words "Bank, not negotiable;" or (c) "not negotiable."

Such transverse lines and words make the cheque "crossed generally."

Or (3) written between such transverse lines the words (d) "Bank

\* These conflicts between the legislative and judicial authorities in England have been made the occasion of some sarcastic observations from judicial functionaries, of which the following may be cited as specimens:

"The legislature has aimed at making certain limitations to the negotiability of cheques; but the statutes have been so framed and carried into effect that, whatever may have been the intention of those enacting them, they have done little, if anything, to restrict their negotiability." *Per Grove, J., in Mathiassen v. London and County Bank*, 5 C. P. D. 15.

"Cavillers may say that such nice distinctions look exceedingly like nonsense. I can only answer that if Judges seem to talk nonsense, it is because Parliament has written nonsense." *Per Brett, L. J., in Bradley v. Baylis*, 8 Q. B. D. 235.

of ——” (naming the special bank intended) ; or (e) “ *Bank of ——* Sec. 75.  
*not negotiable.*”

Such transverse lines and words make the cheque “crossed specially.”

**76.** A cheque may be crossed generally or specially by the drawer : Crossing by drawer or after issue. Imp. Act, s. 77

2. Where a cheque is uncrossed, the holder may cross it generally or specially : General or special.

3. Where a cheque is crossed generally, the holder may cross it specially : May be varied.

4. Where a cheque is crossed generally or specially, the holder may add the words “ not negotiable : ” Words may be added.

5. Where a cheque is crossed specially the bank to which it is crossed may again cross it specially, to another bank for collection : Re-crossing for collection

6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself : <sup>1</sup> Crossing by bank.

7. A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines, and initialling the same, the words “ pay cash.” <sup>2</sup> Uncrossing crossed cheques.

<sup>1</sup> This clause provides for successive crossings after the cheque has been issued by the drawer. If the cheque is uncrossed when it comes into the hands of a holder, he may cross it generally or specially ; or a bank receiving it may cross it specially to itself ; and if it is crossed generally the holder or a bank may cross it specially. But only in the case provided for in clause 5, can a specially crossed cheque be again crossed specially ; and then by the bank named on the cheque, and only for the purpose of collection.

<sup>2</sup> This clause is not in the English Act. But such a practice as above sanctioned, seems to have prevailed in England by which the drawer of a cheque may strike out a crossing at the request of the drawer, and write “ Pay cash ” on the cheque instead. Whether the words “ Pay cash,” mean that the cheque is to be presented direct to the drawer’s bank, or that it may be deposited in another bank in the usual way, is not clear. The original order in the cheque is a direction to pay cash, whether the cheque is crossed or not. The words must be written “ between the transverse lines,” and initialed.

**Sec. 77.**

Crossing is a material part of cheque.  
Imp. Act, s. 78

**77.** A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.<sup>1</sup>

<sup>1</sup> The effect of this clause is to make the provisions of the Act (s. 63) as to "material alterations" in bills of exchange, applicable, by analogy, to what is here defined to be the crossing of cheques.

Duties of bank as to crossed cheque.  
Imp. Act, s. 79

**78.** Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof:<sup>1</sup>

Liability for improper payment.

**2.** Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid:<sup>2</sup>

When liability does not accrue

Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be.<sup>3</sup>

<sup>1</sup> The words of this clause make it imperative on the bank on which the cheque is drawn, not to pay any cheque which has two or more special crossings on it, other than those authorized by sub-s. 5 of s. 76. This is

evidently a corollary to the plain intention of the Act in authorizing the crossing of a cheque. The use and object of crossing a cheque, is highly beneficial to the public, and is a protection and safeguard to the owner of the cheque, by securing payment through a banker, in order that it may be easily traced to whose use the money paid on a cheque was received: *Bellamy v. Majoribanks*, 7 Ex. 403.

Sec. 78.

<sup>2</sup> A bank disregarding the provisions as to (1) the duplicate or "special" crossings; (2) the "general" crossing to a bank; or (3) the "special" crossing to a bank, as well as that authorized by sub-s. 5 of s. 76, is liable to the true owner of the cheque for any loss he may have sustained by reason of the bank's disregard of the law.

<sup>3</sup> A bank paying a cheque under the circumstances set out in this clause may find itself on the border line of danger, if not within the lines, and subject to the penalties of negligence. An early case on crossed cheques, intimated that the crossing of a cheque was equivalent to a direction and warning to a banker, as to the mode of payment; and that where a banker paid a crossed cheque other than to a bank, it "would be strong evidence of negligence." If, on an inspection of the cheque, some alteration or incongruity is apparent on the face of it, then the bank is put upon inquiry; and it has been held that "an alteration may be an apparent one, even if it is not an obvious one to all mankind." This proviso corresponds with the proviso to s. 63, as to non-apparent alterations. See the notes and cases to that section.

**79.** Where the bank, on which a crossed cheque is drawn,<sup>1</sup> in good faith and without negligence pays it, if crossed generally, to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.<sup>2</sup>

Protection  
of bank and  
drawer  
where  
cheque is  
crossed.  
Imp. Act, s. 80

<sup>1</sup> The words "bank on which a crossed cheque is drawn," are scarcely accurate, and strictly might be held to include only a crossed cheque issued by the drawer. But the evident intention of the clause is to cover all cases of cheques crossed by the drawer, as well as the cases of original uncrossed cheques which subsequently to their issue, are crossed generally or specially by the holder, or a bank, as authorized by s. 76.

<sup>2</sup> This clause may be applicable to the payment of crossed cheques which have been lost by, or stolen from, the holder. The protection to the bank intended by this clause, depends upon whether it has acted in good

**Sec. 30.** faith, and without negligence, in paying a crossed cheque. The protection to the drawer depends upon whether the cheque has come into the hands of the drawee. If it has, then whatever casualties may have overtaken it, prior to its payment by the bank, the drawer is discharged from responsibility. See as to "good faith," note 1, p. 264.

Holder's  
title to  
crossed  
cheques.  
Imp. Act, s. 81

**80.** Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. <sup>1</sup>

<sup>1</sup> A cheque crossed "not negotiable," is still transferable; but its negotiable quality is limited. It is put on a similar footing with an overdue bill. A holder who has a good title can still transfer it, and the transferee is entitled to receive payment; but where the title of the transferor is defective, a subsequent holder for value is deprived of the protection ordinarily afforded to a holder in due course. Suppose a cheque payable to bearer, and crossed "not negotiable," is stolen, the thief gets a tradesman to cash it for him, and the tradesman gets the cheque paid on presentment through a banker. The banker who pays, and the banker who receives, the money for the tradesman are protected; but the tradesman would be liable to refund the money to the true owner, and assuming payment to have been stopped, he could not sue the drawer: *Chalmers on Bills*, 241. This is a new fashioned cheque altogether; and the Act says that if it is marked "not negotiable," the person who takes that cheque is to have no greater right than the person who gives it to him. The customer of the bank gets no better title than his transferor, not only when the cheque is marked "not negotiable," but when it is not so marked, if it is not an open, but a crossed, cheque: *Per Lindley, J., in Matthiessen v. London and County Bank*, 5 C. P. D. 16.

Collecting  
bank not  
liable to  
owner.  
Imp. Act, s. 82

**81.** Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment. <sup>1</sup>

<sup>1</sup> This clause reproduces one of the clauses in the "Crossed Cheques Act, 1876," under which *Matthiessen v. London and County Bank*, 5 C. P. D. 7, was decided, where it was held that when a banker, in good faith, receives from his customer a crossed cheque to which his customer has no title, or only a defective title, whether by reason of forgery of the indorsement, or otherwise, he is exonerated from liability. "When the bank has got the proceeds, and the true owner says to the bank, 'Hand me those proceeds,'



the legislature says : ‘ No ; if you (the bank) have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds where you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more ; if you have applied it to your own use, that is another matter. But if you have simply collected it through the clearing house, in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to the customer ; and he, and not you, must be responsible to the true owner for the proceeds : ’  
*Per Lindley, J., Ibid.* The first branch of the section (now s. 80), refers to *any person*, the second branch (now s. 81), refers to a *banker*. Therefore the section, having in the first part given a protection to those who put upon their cheque the words “ not negotiable,” by which a person taking it shall not have, or be capable of giving, a better title to the cheque than that which the person had from whom he took it, goes on in the second part to give a banker a further protection, whether he is included in the word person or not ; and a banker, if he has, in good faith and without negligence, received payment for a customer of a cheque crossed generally, or specially to himself, is not to incur any liability to the true owner of the cheque by reason only of having received such payment : *Per Grove, J., Ibid.* Where the cheque is indorsed *pro proc.*, the collecting bank will be held to have notice that the agent had but a limited authority ; and if it makes no inquiry as to the authority of the agent, such omission may be negligence, within the meaning of this clause, if it is found that the alleged agent had not the authority represented.

Sec. 81.

## PART IV.

### PROMISSORY NOTES.

**82.** A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer :<sup>1</sup>

Promissory note defined. Imp. Act, s. 83 Ind. Act, s. 4.

2. An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker :<sup>2</sup>

Indorsement by maker.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof :<sup>3</sup>

Collateral pledge does not invalidate.

**Sec. 82.**  
Inland and  
foreign.

4. A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note : any other note is a foreign note. <sup>4</sup>

<sup>1</sup> This is similar in effect to the definition given in s. 3 of a bill of exchange, varied only in respect of the form and character of the contract. The bill being drawn as an "order," to which there are three original parties, the drawer, the payee, and the drawee, who after acceptance becomes the acceptor; while the note is drawn as a "promise," and to which there are only two original parties, the maker and the payee. In a bill of exchange, the acceptor is the primary debtor to the payee, and the drawer is but collaterally liable. In a promissory note the maker is the primary debtor to the payee. The acceptor is not the creator of the bill, and his contract is supplementary, and may be conditional; while the maker is the creator of the note, and his contract is final, and must be unconditional. Then, if both classes of securities are negotiable, there are similarities in the relations of the persons who subsequently become parties to them as indorsers. The payee of a note by indorsing it, stands in the same relation to the subsequent parties as the drawer of a bill; and the maker of a note is subject to the same liabilities as the acceptor of a bill. Promissory notes payable to order, may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery, and the possession of such an instrument indorsed in blank, or made payable to bearer, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, nor even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder, supported by that evidence: *Brown v. Spafford*, 95 U. S. 478. There is no precise form of words requisite to constitute a promissory note. But it ought to have the essentials of a contract: *Brown v. De Winton*, 6 C. B. 356. Any words which will amount in law to a promise to pay, are sufficient: *Morris v. Lee*, 2 Ld. Raym. 1396. A note of a bank is a promissory note payable to bearer on demand, and passes by delivery. The transferor is not liable on it, by virtue of any contract in it, to which he is a party; but he warrants to his immediate transferee that the bank note is what it purports to be, that he has the right to transfer it, and that at the time of transfer, he is not aware of any fact which renders it valueless. (s. 55.) A bank note differs from an ordinary promissory note, in that it never becomes "overdue;" but may be re-issued from time to time, and is not subject to questions of title, or to rights arising out of any "equities" between the original or remote holders. Gold coins are very rarely used, and silver coins are used only in small quantities in daily business transactions, so that practically such bank notes form the ordinary commercial currency of Canada. A note though stolen, becomes the property of any person who gives value for it, and takes it *bona fide*, and without notice of the

larceny; even though such party had the means of knowledge of which he neglected to avail himself: *Raphael v. Bank of England*, 17 C. B. 161. In the early part of this century there was a conflict of decision as to whether an I. O. U. was or was not a promissory note. In *Fisher v. Leslie*, 1 Esp. 426, Lord Kenyon, C. J., (1795), held it was not a note. In *Guy v. Harris*, Chit. on Bills 345*n*, Lord Eldon, C. J., (1800), held it was a note. In *Israel v. Israel*, 1 Camp. 499, Lord Ellenborough, C. J., (1808), *dubitante*, decided it in the negative. The later decisions are that it is not a promissory note: *Childers v. Boulnois*, 1 D. & R. N. P. C. 8; unless it contain an agreement that it is to be paid on a certain day: *Brookes v. Elkins*, 2 M. & W. 74. "This is an instrument to which only two persons can be parties, namely, the person who produces it, and who answers to the description of 'U.,' and the person who makes it, who is therefore the 'I.' These little notes are only given on the spur of the occasion, and at the moment of some immediate loan:" *Per Tindal*, C. J., in *Curtis v. Richards*, 4 Jur. 508. See further the notes to the first part of s. 3, pp. 31, 38.

## ILLUSTRATIONS.

Due A. B. or bearer \$200.20 for value received, is a promissory note: *Russell v. Whipple*, 2 Conn. 536.

Good to R. C., or order, for thirty dollars, borrowed money, is a note: *Franklin v. March*, 6 N. H. 363.

I. O. U. £85, to be paid May 5th, is a promissory note: *Waithman v. Elsee*, 1 Car. & K. 35. See note to *Edis v. Bury*, 2 C. & P. 560, and *Brown v. Gilman*, 13 Mass. 158.

I. O. U. £45 13s. which I borrowed of Mrs. M., and to pay her 5 per cent. till paid, is not a note: *Melanotte v. Teasdale*, 13 M. & W. 216; s. p. *Smith v. Smith*, 1 F. & F. 539.

Held, in Quebec, that an I. O. U. is negotiable, like other mercantile paper: *Beaudry v. Laflamme*, 6 L. C. J. 307.

A note, by which is promised to pay "eight hundred and sixty eight, for value received," without designating the kind of money, is a note for 868 dollars: *McCoy v. Gilmore*, 7 Ohio 268.

The following instrument: "Borrowed of Mr. J. W. £200, to account for on behalf of the Alliance club, at \_\_\_\_\_ months' notice, if required," is not a note: *White v. North*, 3 Ex. 689.

An instrument promising to pay money, and deliver horses is not a note: *Martin v. Chantry*, 2 Stfa. 1271.

A note payable at a fixed date contained a proviso that if the defendant should sooner dispose of certain lands, described in a memorandum on the note, then that the note should be payable on demand;—Held, that the time of payment was certain: *Elliott v. Beech*, 3 Man. R. 213. "Certainty that the time of payment will arrive, appears to be the proper criterion; not certainty when it will arrive:" *Per Killam, J., Ibid.*

An instrument in the following terms is a note: "I have received the imperfect books, which together with the cash overpaid on the settlement of your account, amounts to £80 7s., which sum I will pay in two years:" *Wheatley v. Williams*, 1 M. & W. 533.

**Sec. 82.**

A promise in writing, made in Quebec, to pay £250 on a day certain to A. B. or order, with an engagement to pay in cash or in goods if the holder should choose to demand the latter, is a promissory note; for the engagement is no more than a power given to the holder to convert a promissory note into an order for merchandize if he see fit to do so: *McDonell v. Holgate*, 2 Rev. Leg. 29 (1818).

Where the promissory note is made payable to bearer, the maker must be held to have agreed to pay in the currency of the place where the bearer resides, and, consequently, that a tender of payment in U. S. greenbacks, was insufficient: *McCoy v. Dineen*, 8 L. C. J. 339.

An instrument by which the maker promises "to be accountable to J. S. or order" for a sum of money, is a note. It would be an odd construction of such an instrument, to expound the word accountable as "to give an account:" *Morris v. Lee*, 2 Ld. Raym. 1396.

A note made payable to a person or his order, or to the order of a person, means the same thing: *Meyers v. Wilkins*, 6 U. C. Q. B. 421.

"Six months after date, we promise to pay to J. B., or order, \$400. The above note is to be paid in merchantable lumber, to be delivered in Toronto at cash price, and an additional quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same is to be paid in cash." This memorandum was written on the face of the note when it was signed;—Held, not a note: *Boulton v. Jones*, 19 U. C. Q. B. 517.

Bank notes are in point of law promissory notes, and notice of dishonor is necessary: *Camidge v. Allenby*, 6 B. & C. 373. See *Leeds Bank v. Walker*, 12 Q. B. D. at p. 88.

A promissory note given for a gambling debt is void, although transferred to a third party in good faith before maturity: *Biroteau v. Derouin*, 7 L. C. J. 128.

The holder of a promissory note which has been transferred to him in good faith before maturity for value received, may recover the amount, even where the note has been given for an immoral consideration: *Dorais v. Chalifoux*, 6 Rev. Leg. 325.

<sup>2</sup> There must be at least two parties to every contract; and until there is another party designated in a document purporting to be a promissory note, either by name, or as bearer, there can be no contract. A note drawn payable to the maker's own order is not a promissory note, for in such notes there must be a promisor and a promisee; but such maker, by indorsing in blank a note so made, may give it the effect of a note payable to bearer, and give a right of action on it to a holder for value. The person to whom the money is to be paid ought, at least, to appear by implication: *Brown v. De Winton*, 6 C. B. 336; 12 Jur. 678. See further ss. 5-7, pp. 43-50.

## ILLUSTRATIONS.

An instrument in these words: "19 April, 1877, I acknowledge to have received from you the sum £400 stg., which I am to pay back with bank interest at Martimas, 1878," is indefinite, and not a promissory note: *Tenant v. Crawford*, 5 Sess. Cas. 4 Ser. 433.

An instrument in these words: "Two months after date I promise to pay to my own order £150, value received" and signed by the maker, is not a promissory note: *Hooper v. Williams*, 2 Ex. 13.

No man can make a contract with himself; there ought to be two parties to a contract: *Champion v. Plummer*, 5 Esp. 240; s. p. *Brown v. De Winton*, 6 C. B. 356.

Sec. 82.

A note made payable to the maker becomes a promissory note, after it is indorsed by him: *Muldrow v. Caldwell*, 7 Mo. 563.

<sup>3</sup> Banks and others may take collateral securities for any loan made to a customer. The Bank Act (s. 60) authorizes banks to acquire and hold as collateral security for any advance made by the bank, or for any credit or liability of any person, Dominion, Provincial, British, or Foreign, public securities, or the stock, bonds or debentures of municipal or other corporations, except the stock of its own, or other banking corporations; and may sell and dispose of the same to pay the debt. But the bank is entitled to a lien on the shares of a shareholder who is a borrower from it, and may realize on such shares when held by the bank as security for any pre-existing or maturing debt (s. 45). See further notes to s. 27, p. 116.

#### ILLUSTRATIONS.

An instrument in the following words, "On demand, I promise to pay H., or order, £500, for value received, with interest; and I have lodged with H. the counterpart leases, signed by D., for ground let by me to him, as collateral security for the £500 and interest," was held to be a note: *Fancourt v. Thorne*, 9 Q. B. 312; 10 Jur. 639.

Where it was stated on the margin of a note: "Given as collateral security with agreement," it was held that such a memorandum made the note non-negotiable: *Costelo v. Crowell*, 127 Mass. 293.

An agreement that certain shares are held as collateral securities for a bill, proves that any sum received by the holder therefor should be satisfaction *pro tanto*: *Malpas v. Clements*, 19 L. J. Q. B. 435.

A mortgage given with a proviso for payment according to the tenor of certain notes is collateral: *Murray v. Miller*, 1 U. C. Q. B. 353.

And such mortgage is not a merger: *Gore Bank v. Eton*, 27 U. C. Q. B. 332.

<sup>4</sup> This is similar in effect to the first part of the definition of an inland bill of exchange given in s. 4. The second part of that definition would be inapplicable to a promissory note. See further s. 4 and the notes thereto, pp. 41-43.

**83.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.<sup>1</sup>

Note  
inchoate  
until  
delivery.  
Imp. Act, s. 84  
Ind Act, s. 20.

<sup>1</sup> The meaning intended by the terms "inchoate and incomplete" is that the promissory note is not a valid contract, or a negotiable security, until delivery. By s. 2, delivery of a note means a transfer of possession, actual or constructive, from one person to another. See note 8, p. 29. The conditions of a valid delivery are prescribed in s. 21 and the notes thereto pp. 80-86.

**Sec. 84.**

Joint and  
several note.  
Imp. Act, s. 85

**84.** A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor: <sup>1</sup>

"I promise,"  
signed by  
several.

2. Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note. <sup>2</sup>

<sup>1</sup> Unless the note is expressed to be a joint and several promise to pay, the makers will only be liable jointly; and a judgment against one joint maker will be a bar to an action against the other: *King v. Hoare*, 13 M. & W. 494. A joint and several note, although it contains two promises in the alternative, is one contract and one instrument: *Gardiner v. Walsh*, 5 E. & B. 83. Where the note is the note of a partnership, the signature of the firm's name by one partner operates as the signature of the firm, for each partner represents the firm of which he is a member in such contract. But it is otherwise in the case of joint makers. Each of them must sign the note; and if the agreement between the parties intending to be joint makers, is that each is to sign the contract, the neglect to obtain, or the refusal of, the signature of one of the parties so agreeing, will render the contract incomplete, and therefore not binding, so that the payee cannot recover against those who have signed the note on the faith of such agreement: *Leaf v. Gibbs*, 4 C. & P. 466. And the addition of a new joint maker to a joint and several note after it has been issued, is a material alteration, and operates as a discharge to the original makers: *Gardner v. Walsh*, 5 E. & B. 83. In giving judgment, Lord Campbell, C. J., said: "It was argued that although the two contracts, one joint and one several, were written on the one piece of paper, and expressed in the same sentence, they might be treated as if they had been written on separate pieces of paper respectively, and signed by the defendant, and that the separate contract is not affected by the signature which made another person a party to the joint contract. But we must consider that a joint and several promissory note, although it contains two promises in the alternative, is one contract and one instrument, and that if it is designedly altered in any part by the payee, so as to alter the liability of the makers, it is entirely vitiated."

## ILLUSTRATIONS.

The directors of an unincorporated company made and issued a promissory note in these words: "We, directors of the R. Bank of N. for ourselves and the other shareholders of the said company, jointly and severally promise to pay," &c. ;—Held, sufficient to bind the partnership jointly, and that the shareholders were not bound severally: *MacLae v. Sutherland*, 3 E. & B. 1.

A judgment recovered against one of two joint debtors is a bar to an action against the other; but not when the debt is joint and several: *King v. Hoare*, 13 M. & W. 494.

## Sec. 84.

When a note was in these words; "I, J. C., promise to pay A. F. the sum of £50 with interest on the same, or his order at six months," and was signed "J. C. or else H. B.;"—Held, not a note of H. B. It operates differently as to the two parties. It is an absolute undertaking on the part of J. C. to pay, and it is conditional only on the part of H. B., for he undertakes to pay only in the event of J. C. not paying: *Ferris v. Bond*, 4 B. & Ald. 679.

A note apparently intended to be joint and several, binds the maker who puts it in circulation with only his own signature: *Dickerson v. Burk*, 25 Ga. 225; s. p. *Holmes v. Sinclair*, 19 Ill. 71.

"Due W. D. B. in six months," and signed by two persons, is a joint note: *Bacon v. Bicknell*, 17 Wis. 523.

A promissory note, purporting from the words "we promise," &c., to be the note of more than one person, was signed with the name of a single individual, and under his signature were written the initials of the defendant's name, in his own hand-writing;—Held, that the defendant was presumptively a joint maker; and also, that such presumption was not impaired by proof that the first signature was likewise in the defendant's hand-writing: *Palmer v. Stephens*, 1 Den. (N. Y.) 471.

Though a note is made in the singular number, one who signs after the maker, adding the word "surety" after his name, is thereby bound as a joint and several principal maker: *Dart v. Sherwood*, 7 Wis. 523; s. p. *Sayles v. Sim*, 73 N. Y. 551.

The payee of a joint and several note, made by two, can only be placed in the situation of treating one as a surety for the other, upon his express consent to do so at the time of taking the note: *Ball v. Gilson*, 7 U. C. C. P. 531.

An alteration of a note by the insertion of the words "jointly and severally;"—Held, that the note was not avoided, but might be sued upon in its original condition: *Waterous v. McLean*, 2 Man. R. 276.

"For value received, we jointly and severally promise to pay to W. P. O. or bearer, the sum of £50 cy.," &c. "As witness our hands and seals, this 29th day of April, 1856.—M. M. B.—[L. S.] E. H. G.—[L. S.] Signed, sealed, and delivered, in presence of R. S.;"—Held, not a note, but a speciality: *Wilson v. Gates*, 16 U. C. C. Q. B. 278.

An instrument in the following words: "We, the undersigned, do hereby severally promise and agree to pay to F. W. T., Esq., (the plaintiff), agent of the bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal Church and Rectory in the town of Goderich;"—Held, that the instrument was the several promissory note of each subscriber: *Thomas v. Grace*, 15 U. C. C. P. 462.

<sup>2</sup> The rule, where several persons sign a note as makers, is that, in the absence of anything contrary on the face of the note, such persons will be presumed to be joint makers, such as "we promise to pay," &c.: *Byles on Bills*, 6. But a note reading "I promise to pay," and signed by more than one person, has always been held to be a joint and several note of the parties signing: *Clerk v. Blackstock*, Holt, 474. The reason apparently is that each person signing such a note adopts the singular number indicated on the note, and therefore makes his contract a separate one to pay the whole amount of the note.

Sec. 84.

## ILLUSTRATIONS.

“I promise to pay,” signed by two, is joint and several: *Creighton v. Fretz*, 26 U. C. Q. B. 627.

A party who signs for a firm makes but one promise, and two promises cannot be made out of one: *Ex parte Buckley*, 14 M. & W. 469.

“I owe Mrs. G. £6, which is to be paid by instalments for rent,” is invalid as not specifying dates or amount of instalments: *Moffatt v. Edwards*, Car. & M. 16.

Demand  
note must be  
presented,  
Imp. Act, s. 86  
Ind. Act, s. 74.

**85.** Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement: if it is not so presented, the indorser is discharged;<sup>1</sup> if however, with the assent of the indorser it has been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security:<sup>2</sup>

Reasonable  
time.

2. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case:<sup>3</sup>

Not overdue  
in certain  
cases.

3. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.<sup>4</sup>

<sup>1</sup> This clause may be read with the provisions of s. 45, sub-s. 2, (b), which require a bill payable on demand to be presented within a reasonable time after its issue. Under this clause a promissory note payable on demand, after it has been indorsed, must also be presented within a reasonable time. As illustrated in note 1 to s. 82, the payee of a note by indorsing it, stands in the same relation to the note as the drawer stands in relation to a bill. Where there is an indorser, the rules as to presentment for payment of bills, are, in some respects, applicable to notes. See the notes to ss. 45 and 86.

<sup>2</sup> This latter part of the clause is new, and is not in the English Act. The rule it lays down is in harmony with the judgment of the Judicial Committee of the Privy Council in the case of the *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526; see also *Chartered Mercantile Bank of India v. Dickson*, *Ibid.*, 574. In the latter case it was held that the law with regard to time for the presentment of a note, payable on demand, requires that the presentment for payment should be made with-



in a reasonable time,—that is, a period reasonable with reference to the circumstances connected with each particular case. But that where a note dated the 16th of February, 1864, and indorsed, though made payable on demand, but the payment of which was not contemplated by the makers at any immediate or specific date, and it appearing that the note was meant to be, to a greater or less extent, a continuing security, the presentment on the 14th December, 1864, was not unreasonable, and the holders of the note were entitled to recover. Sec. 85.

<sup>3</sup> A common promissory note payable on demand differs from a bill payable on demand, or a cheque, in this respect: the bill and cheque are evidently intended to be presented and paid immediately, and the drawer may have good reason for desiring to withdraw his funds from the drawee without delay. But a common promissory note payable on demand, is very often originally intended as a continuing security, and may be afterwards indorsed as such. Indeed, it is not uncommon for the payee, and afterwards the indorsee, to receive from the maker, interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be that, though the holder may demand payment immediately, yet he is not bound to do so. It is therefore conceived that a common promissory note, payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received, in order to charge the indorser; and that when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the Judge or the jury, whether under all the circumstances, the delay of presentment was, or was not, unreasonable: *Byles on Bills*, 164. See notes to ss. 40, 45, and 73.

<sup>4</sup> This clause is in harmony with the rule that a reasonable time for the presentment of a note for payment, should receive a more liberal construction than in the case of bills, or cheques. It varies in respect of notes payable on demand, the provisions of sub-ss. 2 and 3, of s. 36; and is in harmony with the decision of *Brooks v. Mitchell*, 9 M. & W. 15, where the promissory note payable on demand, was indorsed some years after its date, and no interest had been paid on it for several years before its indorsement to the holder, who sued upon it; and it was held not to be overdue. But if there is evidence on the face of the note that it is overdue, as where it has been noted for protest, or where it has other apparent indications, the holder's title is subject to the rules applicable to overdue bills. See notes to s. 36; and as to "defects of title," notes to s. 29.

**86.** Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.<sup>1</sup> But the maker is not discharged by the omission to present the note for payment on the day

Presentment  
for payment  
at the place  
named.  
Imp. Act, s. 87  
Ind. Act, s. 61.

Sec. 86. that it matures.<sup>2</sup> But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.<sup>3</sup> If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable:<sup>4</sup>

Liability of indorser.

2. Presentment for payment is necessary in order to render the indorser of a note liable:<sup>5</sup>

What presentment will suffice.

3. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects shall also suffice.<sup>6</sup>

<sup>1</sup> The former law (R. S. C. c. 123 ss. 9 and 16) provided that in Ontario and Prince Edward Island, unless the bill or note expressed on its face that it was payable at a particular place "only and not otherwise or elsewhere," it was payable generally. And under that law, following the interpretation given to a general promise in a note, it was held to be sufficient if presentment were made either at the place named, or to the maker himself: *Commercial Bank v. Johnston*, 2 U. C. Q. B. 126. The English law did not, as did the Canadian law, place promissory notes under the same rule as to the effect of the words "only and not elsewhere;" and the English Courts have held that if a place of payment be specified in the body of a note, presentment for payment must be made there: *Vander Donckt v. Thellusson*, 8 C. B. 812. The old rule as to the effect of a general promise, seems, by this Act, to have been abrogated in Ontario and Prince Edward Island, and a stricter rule prescribed; so that where the note is made payable at a particular place, it becomes part of the contract; and the note must be presented for payment at such place, in order to charge the maker and indorsers: *Sanderson v. Bowes*, 14 East 500. The above clause may be construed according to the following rules: A note payable at a particular place, must be presented there for payment. As against an indorser it must be presented strictly according to its exigency, on the day it matures. As against the maker any subsequent presentment will suffice, unless the maker has suffered loss or damage by the delay: *Biggs v. Wood*, 2 Man. R. 272. In the English Act the remainder of the sentence reads: "in order to render the maker liable."

<sup>2</sup> This provision as to delay in presenting a note for payment is in harmony with the rule prescribed by s. 52, sub-s. 2, which provides that the omission to present a bill of exchange to the acceptor "on the day it matures," will not discharge such acceptor. The clause evidently refers to a note payable "at a fixed or determinable future time" after its date, and one on which there are no indorsers, although the clause contains no reference to them. Where there are indorsers, the note must be presented strictly according to its exigencies. There is no provision, as in the case of a note payable on demand, that presentment for payment of a time note must be made "within a reasonable time;" but such a condition may reasonably be inferred. The omission to present a note for payment on the day it matures would, as in the case of the non-presentment of a bill, discharge the indorsers. See note 2 to s. 53.

<sup>3</sup> This is similar to the provision in s. 52, sub-s. 2. The defendant in an action on a note payable on demand, but of which no demand has been made, deposited the amount of the note in Court without costs, and then demurred to the action on the ground of want of presentment. The demurrer was dismissed; but on the merits it was held that as no demand had been made, the defendant was not in default at the time of action brought, and the plaintiff should therefore pay his costs: *Archer v. Lortie*, 3 Q. L. R. 159.

<sup>4</sup> This is also similar to the provision in s. 52 as to the acceptors of bills; and it is consistent with the rule of the common law that the debtor should seek out his creditor to pay him: *Walton v. Mascell*, 13 M. & W. 458.

<sup>5</sup> This clause makes applicable to the case of a promissory note, payable on demand, or at a fixed date, and the liability of the indorsers of such note, some of the rules prescribed by s. 45 as to the presentment of bills of exchange for payment. Where such notes are payable at a particular place, presentment for payment must be made there; but if no place be specified, then presentment must be made to the maker, according to the rules prescribed by s. 45, (so far as applicable), and this section. It is not expressly stated, but it may be inferred, that the clauses in section 45, providing for presentment *through* or *at* the post-office, apply to promissory notes. But where there are no indorsers, it is not necessary to present a promissory note for payment "on the day it matures," in order to hold the maker liable. See the next note.

<sup>6</sup> A stipulation indorsed on the bill or note is not to be taken as part of the instrument so as to make it conditional, but as a marking for identification: *Brill v. Cock*, 1 M. & W. 232. But if an indorsement of a condition on a note is made before the note is signed, it is part of such note. If made after the signing, it will be merely as a memorandum to identify the note: *McKinnon v. Campbell*, 6 U. C. L. J. 58. It would perplex commercial transactions if paper securities, like bills and notes, were issued into the world incumbered with conditions and contingencies, and if the

## Sec. 86.

person to whom they were offered in negotiation, were obliged to inquire when these uncertain events would probably be reduced to a certainty: *Per* Lord Kenyon, C.J., in *Carlos v. Fancourt*, 5 T. R. 482. The latter words of the clause are not in the English Act. By s. 88, the provisions of the Act is relating to bills of exchange, are, subject to the provisions in this part of the Act, made applicable to promissory notes; and as this clause prescribes the procedure as to the presentment of notes, it must be held to vary so much of the procedure prescribed by s. 45, as to presentment of bills, as may be in conflict with it. The clause, if read according to the punctuation, may be construed as authorizing presentment according to the effect stated in the bill, *i. e.*, at the place indicated in the body of the bill; or if there be no place so specified, then either (*a*) at the place indicated in the memorandum; or (*b*) to the maker elsewhere. But if the clause is read without punctuation, it may be construed as authorizing presentment in any one of three ways: (1) at the place indicated (*a*) in the body of the bill, or (*b*) in the memorandum; or (2) to the maker elsewhere. In the Rolls of Parliament the sentences of the statutes are never punctuated: *Barrow v. Wadkin*, 24 Beav. 330. When the meaning of a clause is doubtful, the Court may insert punctuation to show of what construction the words are capable; and if by such aid, the Court is enabled to see that the language can bear an interpretation which is rational and self-consistent, it is bound to adopt that interpretation: *Re Denney's Estate*, 8 Ir. Eq. 447. Punctuation is a most fallible standard by which to interpret a writing. The Court will first take the instrument by its four corners in order to ascertain its true meaning. If that is apparent, on judicially inspecting it, the punctuation will not be suffered to change it: *Ewing v. Barnett*, 11 Peters (U. S.) 41.

## ILLUSTRATIONS.

A note in the following form: "Three months after date, I promise to pay to my own order the sum of £65—J. A. B." "Payable at Messrs. W. & P.'s," and indorsed; is not a note payable at a particular place. The words "payable at Messrs. W. & P.'s," written beneath the body of the note, constitute a memorandum only: *Masters v. Baretto*, 8 C. B. 433.

A memorandum put by an indorser at the foot of a promissory note without the maker's authority, declaring it to be payable at a particular place, does not effect the maker's liability, as it forms no part of his contract: *Cunard v. Tozer*, 2 Kerr, N. B. 365.

A stipulation indorsed on a note by the payee, is not to be taken as a part of that instrument, without evidence that it was written at the time the note was made: *Stone v. Metcalf*, 4 Camp. 217.

Contract of  
maker  
defined.  
Imp. Act, s. 88  
Ind. Act, s. 32.  
Estoppel.

**87.** The maker of a promissory note, by making it—

(*a*) Engages that he will pay it according to its tenor;

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. <sup>1</sup>

Sec. 87.

<sup>1</sup> This is similar to the second part of the contract of the drawer of a bill of exchange. Before the maker pays any note he should be entirely satisfied that the signature of the payee, or other indorser under whom the actual holder claims, is a genuine and not a forged signature; for if it be a forgery, then the payment to the holder will be a mere nullity. The maker by the payment of the note does not positively affirm the genuineness of the signature of the payee, or of any subsequent indorser (as the acceptor does the signature of the drawer of the bill by accepting it); for he is not presumed to know them; and if he pays the note under the supposition that the signatures are genuine, and they are not so, he pays under a mistake of fact: *Story on Promissory Notes*, s. 379. The maker of a note is primarily liable on it, and in this way stands in the same position as the acceptor of a bill. By making a note, the maker intimates to all parties that he considers the payee capable of making an order sufficient to transfer the property in the note. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, especially when he asserts, by the instrument which he issues to the world, that the other has such power: *Drayton v. Dale*, 2 B. & C. 299.

**88.** Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes: <sup>1</sup>

Application of part II to notes. Imp. Act, s. 89

2. In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order: <sup>2</sup>

Corresponding terms.

3. The following provisions as to bills do not apply to notes, namely, provisions relating to—

What provisions do not apply

(a.) Presentment for acceptance; (b.) Acceptance; (c.) Acceptance *supra* protest; (d.) Bills in a set: <sup>3</sup>

4. Where a foreign note is dishonored, protest thereof is unnecessary except for the preservation of the liabilities of indorsers: <sup>4</sup>

As to foreign note.

<sup>1</sup> The "necessary modifications" to the provisions of the Act respecting Bills of Exchange are suggested in general terms in the notes to the several sections 82-88 relating to promissory notes.

Sec. 88.

<sup>2</sup> The rule referred to in note 6, p. 137, that each indorser of a bill of exchange is in the character of a new drawer as to subsequent parties to the bill, does not apply to promissory notes, for otherwise he would become a party liable next after the default of the maker.

<sup>3</sup> The sections of the Act which do not apply to notes are the following : Presentment for acceptance ss. 39-43 ; Acceptance, ss. 17-19, and 44 ; Acceptance *supra* protest, ss. 64-67 ; Bills in a set 70. Nor do the following sections apply to promissory notes, ss. 3, 4, 5, 6, 21 sub-s. 1, 36 sub-s. 3, 52, 54, ss. 72-81 and the special clauses referred to in other notes.

<sup>4</sup> The last sentence to this clause is not in the English Act, and the effect of it is to make it compulsory on the holder of a foreign promissory note, which has been indorsed, and whether such indorsers are, or are not, residents of Canada, to have it protested for non-payment, according to the rules and procedure prescribed in s. 51.

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## PART V.

### SUPPLEMENTARY.

Good faith  
defined.  
Imp. Act, s. 90

**89.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.<sup>1</sup>

<sup>1</sup> The term "good faith," or *bona fides*, is restrictive, and is a legal technical expression to which the law has annexed a certain meaning. It signifies a thing done really, with a good faith, and with an honest, lawful purpose and intent. It is the condition of acting with sincerity, and without knowledge of fraud, and in ignorance of any right or claim of a third party, and without any intent to assist in a fraudulent or otherwise unlawful scheme. Its converse is "bad faith," or *mala fides*, which imports a guilty knowledge or a wilful ignorance, or is the condition of acting in a deceitful or fictitious manner, or in a colorable or fraudulent way. *Uberrima fides*, means the best faith, the severest good faith, or the condition of acting with the strictest good faith.

Negligence consists in doing that which duty, or common prudence and caution, forbid to be done; or the omission to do that which under the circumstances, prudence and caution would require to be done to prevent loss or injury. It is the want of proper care, caution or diligence: *Blyth v. Birmingham*, 11 Ex. 781. "Ordinary neglect" is understood to be the omission of that care which every man of common prudence takes of his own concerns: *Scott v. Depuyster*, 1 Edw. (N.Y.) 503. Practically negligence is the want, or absence, of the care and attention required by all the circumstances of each particular case. This care and attention is enjoined

and enforced by the law, in some cases as a social duty, merely in other cases on the ground that no particular trust was assumed or undertaken. It is doubtful whether the ordinary care and attention required of a party by the law, can free him from the charge of negligence in a particular case, and which cannot be defined otherwise than as to the care and attention which experience has found reasonable and necessary to prevent injury to others in like cases: *Wells v. New York Central R. Co.*, 24 N. Y. 187. Negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*: *Swan v. North British Australian Co.*, 2 H. & C. 184.

The test of *bona fides* as regards bill transactions, has varied greatly. Previous to 1820, the law was much as it now is under the Act. But under the influence of Lord Tenterden, due care and caution was made the test (*Gill v. Cubitt*, 5 D. & R. 324); and this principle seems to have been adopted by s. 9 of the Indian Act. In 1834, the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value, (*Crook v. Jallis*, 5 B. & Ad. 909). Two years later, Lord Denman stated it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it: *Chalmers on Bills*, 253. "I consider it to be fully established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness, in not suspecting that the bill was wrong, when there were circumstances that might have lead a man to suspect that. I take it that in order to make a defence to an action on a bill of exchange, it is necessary to show that the person who gave value for the bill, whether such value be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have had notice of what the particular wrong was. If a man knowing that a bill is in the hands of a person who had no right to it, should happen to think that the man had stolen it, when if he had known the real truth, he would have found not that the man had stolen it, but that he had obtained it by false pretences. I think that would not make any difference, if he knew there was something wrong about it, and took it. If he take it in that way, he takes it at his peril. But then such evidence of carelessness or blindness, as I have referred to may, with other evidence, be good evidence upon the question whether he did know there was something wrong in it. If he was, (if I may use the phrase), honestly blundering and careless, and so took a bill of exchange, or a bank note, when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer, but because he thought in his own secret mind, I suspect there is something wrong, and if I make further

**Sec. 89.** inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover; I think that is dishonesty:” *Per* Lord Blackburn, in *Jones v. Gordon*, 2 App. Cas. 629. This section is obviously founded on the distinction pointed out in *Jones v. Gordon*, by Lord Blackburn, between the case of a person who was “honestly blundering and careless,” and the case of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the transaction was a valid one, and that he was dealing with a good bill: *Per* Denman, J., in *Tatam v. Haslar*, 23 Q. B. D. 345.

Signature  
may be by  
agent.  
Imp Act, s. 91

**90.** Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority: <sup>1</sup>

As to seal of  
corporations.

2. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. <sup>2</sup>

<sup>1</sup> “By or under his authority.” This clause authorizes an agent to act for any of the parties to the bill or note, in any of the capacities that such person may become parties to such contracts. The general question of agency is discussed in the notes to ss. 25 and 26, pp. 100-108. See further, s. 3 as to the signature of the drawer of a bill; s. 17, the signature of an acceptor of a bill; s. 20 as to a signature on a blank paper; s. 23, the signature in a trade, or assumed, or firm’s name; s. 24, as to a forged signature; s. 25, as to a signature by procreation; s. 32, as to the signature of an indorser; s. 64, as to the signature of an acceptor for honor *supra* protest; s. 82, as to the signature of the maker of a promissory note.

#### ILLUSTRATION.

A firm of Hamburg merchants had an agent in Dundee, authorized to sign bills *per proc.* The power of attorney was lodged with the A. bank, and on 1st September, it was revoked, but the bank after that date recognized the agent’s acting for the firm, and acknowledged his signature *per proc.*:—Held, that as it is a duty devolving on a person discounting bills signed *per proc.*, to inquire into the extent of the agent’s authority, and as the bank had knowledge that the agency had ceased, the firm was not liable on bills so signed: *North of Scotland Banking Co. v. Behu*, 8 Sess. Cas. 4 Ser. 423.

<sup>2</sup> The determination whether a corporation is liable on a bill or note, involves three questions: (1) Has the corporation the legal capacity to



bind itself by a contract in the form of a bill or note? (2) Have the persons who sign such bill or note authority from the corporation to make such contracts? (3) Are the signatures of such persons on the bill sufficient in form to bind the corporation? The usual form of signature to bind a corporation is a signature by procuracy, as the directors and officers who sign its contracts, do so as agents of the corporation. The powers of corporations and companies incorporated by the Dominion Parliament, other than railway and banking companies, to draw, accept, or indorse, bills of exchange, and to make and indorse promissory notes, are regulated by R. S. C. c. 118, s. 35, and c. 119, s. 76. In Ontario, corporations and companies incorporated by the Provincial Legislature, may in like manner, become parties to bills and notes under R. S. O. c. 156, s. 33, and c. 157, s. 59. Municipal Corporations in Ontario are empowered by *The Municipal Act*, R. S. O. 1887, c. 184, ss. 413 and 414, to make promissory notes under the conditions therein stated. Prior to these clauses it had been held that municipal corporations had no power to make or issue promissory notes: *Attorney-General v. Corporation of Lichfield*, 13 Sim. 34. See also the cases in the notes to s. 22, and note 3 to s. 22, p. 89.

Sec. 91.

## ILLUSTRATIONS.

A building society, incorporated under the general law, may legally make notes under certain circumstances: *Snarr v. Toronto Permanent Building and Savings Society*, 29 U. C. Q. B. 317.

Municipal debentures, issued by authority of Quebec law, are negotiable securities, and pass from hand to hand by mere delivery, and the holder may declare upon them as promissory notes: *Eastern Townships Bank v. Municipality of Compton*, 7 Rev. Leg. 446.

Debentures or coupons of a corporation cannot be considered as promissory notes, where such company has no authority to make notes: *Geddes v. Toronto Street R. Co.*, 14 U. C. C. P. 513.

**91.** Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded: "non-business days," for the purposes of this Act, mean the days mentioned in the fourteenth section of this Act; any other day is a business day.<sup>1</sup>

Non-business days excluded in computation of time. Imp. Act, s. 92

<sup>1</sup> Part of this clause is taken from the English Act. See the notes to s. 14, pp. 60-64.

**92.** For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill or note has been noted for protest before the expira-

When noting is equivalent to protest. Imp. Act, s. 92

**Sec. 92.** tion of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.<sup>1</sup>

<sup>1</sup> This clause is in part a repetition of the provisions of s. 51, sub-s. 4, with a necessary provision making it applicable to cases of acceptance and payment for honor under ss. 64-67. A statute specifying a time within which a public officer is to perform an official act affecting the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time, must be considered as a limitation of the power of the officer: *People v. Allen*, 6 Wend. 488; *People v. Cook*, 14 Barb. 259; *Jackson v. Young*, 5 Cowen 269. Where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that, allowing it to be so done it may work an injury or wrong, nothing in the Act itself, or in other Acts relating to the same subject matter, indicating that the Legislature did not intend that it should rather be done after the time prescribed than not to be done at all; there the Courts assume that the intent was that, if not done within the time prescribed, it might be done afterwards. But when any of these reasons intervene, there the limit is established: *State v. McLean*, 9 Wis. 292. The time fixed for the performance of intermediate steps, after jurisdiction has been once acquired, should be regarded as directory only, and an omission to perform one or more of them in time, would not render the whole proceeding abortive: *United Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199.

J. P. may protest where no notary accessible. Imp. Act, s. 94

**93.** Where a dishonored bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored,<sup>1</sup> any justice of the peace resident in the place may present and protest such bill and give all necessary notices, and shall have all the necessary powers of a notary in respect thereto:<sup>2</sup>

Expenses allowed.

2. The expense of noting and protesting any bill or note, and the postages thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon:<sup>3</sup>

Fees chargeable by Notaries.

3. Notaries may charge the fees in each Province heretofore allowed them:<sup>4</sup>

Forms in Schedule.

4. The forms in the first schedule to this Act may be used in noting or protesting any bill or note and in giving notice thereof. A copy of the bill or note and indorsement

may be included in the forms, or the original bill or note may be annexed and the necessary changes in that behalf made in the forms :<sup>5</sup> Sec. 93.

5. A protest of any bill or note, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *prima facie* evidence of presentation and dishonor and also of service of notice of such presentation and dishonor as stated in such protest.<sup>6</sup> Protest  
*prima facie*  
evidence of  
presentation,  
dishonor  
and notice.

<sup>1</sup> The powers and responsibilities of notaries public in Ontario, are prescribed in R. S. O., c. 153. A notary is not a mere ministerial officer: *Brooke's Notary*, 16. The ordinary rule as to delegation is that a ministerial officer may appoint a deputy, but a judicial officer cannot: *Broom's Legal Maxims*, 840. A notary cannot delegate his authority or functions, or empower any stranger or third person to act, or note, or make protests, or notarial instruments in the name of the notary, except in the common case of a clerk or apprentice, acting on behalf, and in the office or actual employment, of the notary in the usual way of business. Any notary presuming so to attempt to delegate his powers or duties to a third person, or to note protests, in the name of a notary will be liable to be struck off the rolls. And any unqualified person performing any of the above acts or any act pertaining to the office or practice of a notary is liable to a penalty. A notarial document solemnized by an unqualified practitioner, pretending to act for himself or another, is utterly useless, and inoperative for all legal purposes: *Brooke's Notary*, 190. A protest without seal is admissible as evidence of the facts therein contained: *Russell v. Crofton*, 1 U. C. C. P. 428. The notary who protests a note need not use an official seal; any seal which he declares in the protest to be his official seal, is sufficient: *Commercial Bank v. Brega*, 17 U. C. C. P. 473.

<sup>2</sup> The authority of a justice of the peace to act in protesting a bill, depends upon two contingencies, (1) that the services of a notary cannot be obtained at the place: and (2) that the justice of the peace is a resident in "the place where the bill is dishonored." These two facts being established, the justice can do the three acts required, (1) present the bill for payment, and if dishonored, (2) note the bill for protest; and (3) extend the formal protest as prescribed in s. 92. These acts should be done within the limits of the jurisdiction prescribed; and must be done by the justice himself. The rules as to jurisdiction are that a magistrate can have no assistant or deputy to execute any part of the duties of his commission. The duty is personal to himself, and is a trust he cannot delegate to another: *Entick v. Cannington*, 19 How. St. Tr. 1063. Where an Act of Parliament establishes a tribunal for a particular local-

Sec. 93. ity, all acts which are to be done must be done within the jurisdiction, unless the Act expressly, or by necessary implication, enables them to be done elsewhere: *Ex parte O'Loughlin*, L. R. 6 Ch. 406. The English Act, (s. 94) authorizes "any householder or substantial resident of the place" to act where the services of a notary cannot be obtained. In Quebec a justice of the peace was authorized to act in protesting bills by Art. 2304 of the Civil Code. So in the United States, a justice of the peace may officiate as a notary public, in making demand and giving notice of protest of bills and notes: *Austin v. Miller*, 5 McLean 153. It is not expressly stated that the justice is to be entitled to charge the same fees as a notary, but such may be inferred from the next clause.

<sup>3</sup> This is supplementary to the clause as to damages allowed to the holder of the bill by s. 57.

<sup>4</sup> A tariff of notarial fees for certain notarial acts, was prescribed by R. S. C. c. 123, s. 25, for all the provinces except New Brunswick, British Columbia, and Manitoba. In New Brunswick the tariff is prescribed by a Provincial Act, 46 Vic. c. 11. Hitherto the only notarial proceedings taken in Ontario on the dishonor of a bill or note, were protest, and notice of protest. The notarial fees heretofore charged in each Province, are apparently continued in so far as they are allowable for the particular notarial acts specified. This Act authorizes further notarial proceedings, in addition to a "notice of dishonor," as follows: (1) Noting the bill or note for protest; (2) Notice of noting for protest; (3) Protest of the bill or note; (4) Notice of protest. But, except in Quebec, there are no notarial fees allowable for the first two proceedings authorized by the Act. The forms set forth in the schedule provide for duplicate protests, not mentioned in the Act. Where there are no prescribed fees for certain duties of an officer, the immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there is some evidence given of a contrary usage: *Shephard v. Payne*, 16 C. B. N. S. 132. The rule of law that no pecuniary burden can be imposed on the subjects of this country, by whatever name it may be called, whether tax, due, rates, or toll, except upon clear and distinct legal authority, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it: *Per Wilde*, C. J., in *Gosling v. Veley*, 12 Q. B. 407. The common law rights of the subject in respect of his property are not to be trespassed upon. Acts which infringe on the legal rights of the subject, or impose a tax, must be expressed in language beyond all reasonable doubt: *Regina v. Mallow Union*, 12 Ir. C. L. R. 35.

The tariff of notarial fees prescribed by R. S. C. c. 123, is as follows:

*Ontario, Nova Scotia, and Prince Edward Island.*

Protest of any bill, draft, note, or order.....	\$0 50
Every notice .....	0 25
Postage, the amount actually expended.	

Quebec.

Sec. 93.

Presenting and noting for non-acceptance any bill of exchange, and keeping the same on record . . . . .	1 00
Copy of the same when required by the holder . . . . .	0 50
Noting and protesting for non-payment, any bill of exchange, or promissory note, draft or order, and putting the same on record . . . . .	1 00
Making and furnishing the holder of any bill or note with a duplicate copy of any protest for non-acceptance, or non-payment, with certificate of service and copy of notice served upon the drawee and indorsers . . . . .	0 50
Every notice, including the service and recording copy of the same, to an indorser or drawer, in addition to the postages actually paid . . . . .	0 50

New Brunswick.

The tariff of notarial fees in this Province is prescribed by the Provincial Act 46 Vic. c. 11 (N.B.), as follows :

Presentment and noting of bill of exchange or promissory note, for non-acceptance or non-payment . . . . .	\$0 50
Protest of note or bill of exchange, when made, including presentment, noting, and notice . . . . .	1 00

<sup>5</sup> By the Interpretation Act, R. S. C. c. 1, s. 7, sub-s. 31, where forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them. The forms in the schedule provide for notarial acts and formalities connected therewith, not mentioned in the enacting clauses of the Act; such as duplicate protests (Forms B. C. E. and F.), and the attestation of a witness to the protest made by a justice of the peace (Form J.) Where the forms given in a schedule are repugnant to the statute, the statute is to govern: *Re Baines*, 1 Cr. & Ph. 46. See also *Dean v. Green*, 8 P. D. 89.

<sup>6</sup> There is a similar provision in the Ontario Evidence Act, R. S. O. 1887, c. 61, ss. 31-33. Section 31 provides that all protests of bills of exchange and promissory notes shall be received in all Courts as *prima facie* evidence of the allegations and facts therein contained. Sections 32 and 33 provide that the note, memorandum, certificate, and protest, made by a notary public in either Ontario or Quebec shall be *prima facie* evidence in the Courts of Ontario. A copy of the protest is also evidence.

**94.** The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.<sup>1</sup>

Dividend warrants may be crossed. Imp. Act, s. 95

<sup>1</sup> The term "warrant for the payment of dividend," is not defined in any statute; but it is a term used to designate the warrant or cheque issued by a bank, and addressed to its cashier or tellers, for the pay-

**Sec. 95.** ment of dividends to its shareholders. It is also applied to the warrant issued in London for the payment of dividends on Canadian government stock and loans. In England it is applicable to the Bank of England drafts upon their cashiers for the payment of dividends on government stock, which are commonly called "dividend warrants." By the modern usage of bankers and merchants, these documents were often passed from hand to hand, like notes of a bank, and paid to *bona fide* holders after a certain day. But it has been held that these dividend warrants, not being on the face of them negotiable by law, and the usage not being immemorial, so as to be considered as a custom binding upon every one, are not transferable, so as to defeat the title of the true owner: *Partidge v. Bank of England*, 9 Q. B. 396. Treasury notes issued by the government of the United States are promissory notes: *United States v. Hardyman*, 13 Peters (U. S.) 176. The provisions as to crossed cheques are contained in ss. 75-81.

Repeal.  
Imp. Act, s. 96

**95.** The enactments mentioned in the second schedule to this Act are hereby repealed, as from the commencement of this Act, to the extent in that schedule mentioned: <sup>1</sup>

Proviso.

Provided, that such repeal shall not affect anything done or suffered, or any right, title or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest:

Bank Act.

2. Nothing in this Act or in any repeal effected thereby shall affect the provisions of "*The Bank Act.*" <sup>2</sup>

Imp. Acts,  
15 Geo. III.  
c. 51, and 17  
Geo. III., c.  
30, not in  
force in  
Canada.

3. The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend to or be in force in any Province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders which have been or may be made or uttered therein. <sup>3</sup>

<sup>1</sup> The provisions of C. S. U. C. c. 42, relating to damages upon bills drawn out of Upper Canada, (now Ontario) seem to have been dropped out of the Revised Statutes in this way: In schedule A to the Revised Statutes of Ontario, 1877, p. 2437, the Revisers indicate an opinion that the clauses of the above Act, relating to damages on foreign bills, are within the Dominion legislative authority. In schedule A to the Revised Statutes of Canada, 1886, p. 2248, these clauses are scheduled for repeal; and on p. 2324, the clauses were recommended for repeal, but no special repealing statute was passed, unless schedule A can be so construed. In the "Table of Acts and parts of Acts consolidated," p. 2438, the Revisers appear to have omitted these clauses from the Revised Statutes. But the Act giving effect to the Revised Statutes, provides that the printed roll of statutes shall be held "to embody the several Acts and parts of Acts mentioned to be repealed in Schedule A annexed to the said roll." By s. 8, however, it is provided that, where the Revised Statutes are not the same as the repealed Acts, the provisions contained in the Revised Statutes, are to prevail.

Sec. 96.

<sup>2</sup> The *Bank Act* here referred to is R. S. C. c. 120. The *Bank Act* of 1890, 52 Vic. c. 31, is to come into force on the 1st July, 1891.

<sup>3</sup> Under the operation of the Act 32 Geo. III. c. 1 (U. C.) the English statutes then in force, were introduced into Upper Canada (now Ontario). They were also held to be applicable to some of the other Provinces: and several of the decisions in those Provinces declare that the statutes relating to bills and notes are in force in them. But this Act does not expressly repeal the English statutes so introduced, except the two here specially named, (and those only within the "Provinces"). It may be a question whether the other statutes relating to bills and notes are repealed, as there is no general repealing clause in this Act.

**96.** Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed and shall operate as if it referred to the corresponding provisions of this Act.

Construction with other Acts and documents. Imp. Act, s. 99

**97.** This Act shall come into force on the first day of September next.<sup>1</sup>

Commencement of Act.

<sup>1</sup> The general rule of law is that a statute is not to be construed as retrospective unless it contains express terms indicating that such was the intention of Parliament: *Thompson v. Lack*, 3 C. B. 510. It is a well settled rule that the Courts are not to construe an Act to be retrospective, so as to affect or alter existing rights of parties unless it appear from the Act that such was intended: *Quilter v. Mapleson*, 9 Q. B. D. 672. A Declaratory Act is in its principle retrospective as well as prospective: *Earl of Mountcashel v. Grover*, 4 U. C. Q. B. 23.

## THE BILLS OF EXCHANGE ACT.

## FIRST SCHEDULE.

## FORM A.

## NOTING FOR NON-ACCEPTANCE.

*(Copy of Bill and Indorsements)*

On the 18 , the above bill was, by me, at the request of , presented for acceptance to E. F., the drawee, personally (*or*, at his residence, office or usual place of business), in the city (town or village) of , and I received for answer, “ ; ” The said bill is therefore noted for non-acceptance.

A. B.,  
*Notary Public.*

(Date and place) 18 .

Due notice of the above was by me served upon { A. B., } the { drawer, } personally, on the day of (or, at his residence, office or usual place of business) in , on the day of (or, by depositing such notice, directed to him, at , in Her Majesty's post office in the city [town or village], on the day of , and repaying the postage thereon.)

A. B.,  
*Notary Public.*

(Date and place) 18 .

## FORM B.

## PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

*(Copy of Bill and Indorsements.)*

On this day of , in the year 18 , I, A. B., notary public for the Province of , dwelling at , in the Province of , at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the { drawee } thereof personally (*or*, at his residence, office or usual place of business) in , and, speaking to himself (*or* his wife, his clerk, *or* his servant, &c.,) did demand { acceptance } therefor; unto which demand { he } answered: “ .” { payment } { she }

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (*or* drawer and indorsers) of the said bill, and other parties thereto or therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of { acceptance } of the said bill. { payment }

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,  
*Notary Public.*



## FORM C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT  
A STATED PLACE.*Copy of Bill and Indorsements.*

On this        day of       , in the year 18   , I, A. B., notary public for the Province of       , dwelling at       , in the Province of       , at the request of       , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the { drawee } thereof, at       , being the stated place where the said bill is payable, and there, speaking to        did demand { acceptance } of the said bill; unto which demand he answered: “       .”

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (or drawer and indorsers) of the said bill, and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come, for want of { acceptance } of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,  
Notary Public.

## FORM D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED, FOR  
NON-ACCEPTANCE.

*If the protest is made by the same notary who noted the bill, it should immediately follow the act of noting and memorandum of service thereof, and begin with the words “and afterwards on, &c.,” continuing as in the last preceding form, but introducing between the words “did” and “exhibit,” the word “again,” and, in a parenthesis, between the words “written” and “unto,” the words: “and which bill was by me duly noted for non-acceptance on the        day of       .”*

*But if the protest is not made by the same notary, then it should follow a copy of the original bill and indorsements and noting marked on the bill—and then in the protest introduce, in a parenthesis, between the words “written” and “unto,” the words: “and which bill was on the        day of       , by       , notary public for the Province of       , noted for non-acceptance, as appears by his note thereof marked on the said bill.”*





## FORM I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR OF NON-PAYMENT OF A NOTE (*to be subjoined to the Protest.*)

And afterwards, I, the aforesaid protesting notary public, did serve due notice, in the form prescribed by law, of the foregoing protest for { non-acceptance } of the { bill } thereby protested upon { P. Q., } the { non-payment } { note } { C. D., } the { drawer } personally, on the            day of (*or, at his residence, office, or usual place of business*) in           , on the            day of           ; (*or, by indorsers*)           , on the            day of           ; (*or, by depositing such notice, directed to the said* { P. Q., } at           , in Her Majesty's post office in            on the            day of           , and prepaying the postage thereon).

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,  
*Notary Public.*

## FORM J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(*Copy of Bill or Note and Indorsements.*)

On this            day of           , in the year 18           , I, N. O., one of Her Majesty's justices of the peace for the district (*or county, &c.*), of           , in the Province of           , dwelling at (*or near*) the village of           , in the said district, there being no practising notary public at or near the said village (*or any other legal cause*), did, at the request of           , and in the presence of           , well known unto me, exhibit the original { bill } whereof a true copy is above written unto P. Q., the { drawer } { note } { acceptor } { promisor } thereof, personally (*or at his residence, office, or usual place of business*) in           , and speaking to himself (*his wife, his clerk, or his servant, &c.*), did demand { acceptance } thereof, unto which demand { he } { payment } { she } answered:—"           ."

Wherefore, I, the said justice of the peace, at the request aforesaid, have protested, and by these presents do protest against the { drawer and indorsers } of the said { bill } and all other { promisor and indorsers } { note }

parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of {acceptance } of the said { bill }  
 { payment } { note }

All which is by these presents attested by the signature of the said (*the witness*) and by my hand and seal.

(Protested in duplicate.)

(*Signature of the witness.*)

(*Signature and seal of the J. P.*)

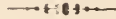
## SECOND SCHEDULE.

### ENACTMENTS REPEALED.

Province and Chapter.	Title of Act and extent of repeal.
Dominion of Canada : Chap. 123, Revised Statutes ..	An Act respecting Bills of Exchange and Promissory Notes—The whole Act.
Province of Quehec : Civil Code of Lower Canada ..	Articles 2279 to 2354, both inclusive [*].
Nova Scotia : Revised Statutes, third series, chap. 82 .....	“Of Bills of Exchange and Promissory Notes.” Section 2. The other sections of this chapter have been heretofore repealed.
New Brunswick : Revised Statutes, chap. 116 ..	“Of Bills, Notes and Choses in Action.” Section 2. The other sections of this chap. have been heretofore repealed.
30 Vic., 1867, chap. 34 .....	An Act to amend chap. 116 of the Revised Statutes, “Of Bills, Notes and Choses in Action ;” also Act 12 Vic., chap. 39, relating thereto. Section 1.

[\*Except in so far as such articles, or any of them, relate to evidence in regard to Bills of Exchange, Cheques and Promissory Notes.]

# INDEX.



## ACCEPTANCE,

- meaning of, 26, 66.
- requisites of, 65-72, 155.
- must be in writing on the bill, 66.
- mere signature sufficient, 66.
- of bill in blank, 70, 71.
- of overdue or dishonored bill, 71, 72.
- of dishonored bill payable after sight, 71, 72.
- general acceptance, 73, 160, 190.
- qualified acceptance, 73, 154, 155, 190.
  - conditional, 73, 75.
  - partial, 73, 75.
  - local, 73.
  - as to time, 73.
  - by some of the drawees, 73.
- to pay at a specified place, 73, 75, 156, 160, 190.
- incomplete and revocable till delivery, 80, 81.
- waiver of, 214.
- acceptor must not alter words, 155.
- notice of acceptance, 80, 82.
- holder may refuse to take qualified acceptance, 154, 155.
- duty of holder taking qualified acceptance, 154, 155.
- presentment for, 146-152.
- contract of acceptor, 33, 193-195.
- provisions as to acceptance do not apply to notes, 193, 223.
- is admission of effects, 33, 69, 192.
- Court may compel, 133, 192, 225.

## ACCEPTANCE *Supra Protest*,

- when a bill may be accepted *supra protest*, 219, 220.
- for whose honor a bill may be so accepted, 219, 220.
- maturity of bill payable after sight so accepted, 220, 221.
- contract of acceptor *supra protest*, 220, 221.
- presentment for payment to acceptor *supra protest*, 221, 222.
- protest necessary on dishonor by such acceptor, 221.
- suspends holder's right of action, 154.

## ACCOMMODATION BILL,

- what it is, 118.
- what is not, 118.

ACCOMMODATION BILL—*Continued.*

- to whom an accommodation party is liable, 110, 115, 118-121.
- rights of sureties on, to contribution, 119.
- parties to, 79, 119, 127.

## ACCORD AND SATISFACTION,

- payment of debt by smaller amount, 204, 213.

## ACTION,

- includes counter-claim and set-off, 27.
- who may sue on bill or note, 126.
- defences and costs in, 86, 126, 190, 260.
- damages recoverable, 200-202.
- against bank for dishonoring customer's cheque, 240, 241.
  - improperly protesting accepted bill, 186.
- on lost bill or note, 225.

## ADDRESS,

- for sending notice of dishonor, 172.

## AGENT,

- who may be, 105.
- duties of, 105.
- signature "per proc." on bill, 102-104, 266.
- implied authority to draw, accept, or indorse bills, 104-108.
- liability of agent acting without authority, 67, 102, 110.
- mode of avoiding personal liability, 104.
- signing in a representative capacity, 104-109.
- unauthorized signature of, conveys no title, 99, 102.
- ratification of unauthorized signature, 105.
- whether signature is that of principal or agent, 104, 109.

## AGREEMENT,

- instruments being agreements and not notes, 33-41, 257.
- parol agreement cannot vary bill or note, 74.
- to waive or renounce holder's rights, 213, 214.

## ALIEN ENEMY,

- bill or note by, 88.

## ALLONGE,

- meaning of, 134, 135.

## ALTERATION OF BILL OR NOTE,

- when it vitiates instrument, 97-102, 213-218, 227, 248, 257.
- acceptor not to alter, 155.
- material alterations, 216-218, 227.
- alteration of figures in margin of instrument, 56, 71.
- cheque altered as to amount payable, 102, 217.
- nature of the negligence on, 217, 227, 264.

ALTERATION OF BILL OR NOTE—*Continued.*

- meaning of "apparent," 216.
- where alteration not apparent, 216, 249.
- immaterial alterations, 218.
- to correct a mistake or carry out intention, 56, 216, 218, 253.
- liability of transferor of altered instrument, 217.
- of crossed cheque, 245, 248.

## ALTERNATIVE,

- maker of note in the, 256-258.
- payee in the, 46-48.
- bill cannot be addressed to drawees in the, 46.

## AUTHORITY,

- meaning of term, 88, 194.
- to fill up blanks in a bill, 76-80.
- of agent, 103, 105.

## AVAL. 127, 198-200.

## BANK,

- meaning of, 27.
- relation between bank and customer, 8, 10, 27, 28, 237-251.
- should know its customer's signature, 238.
- action against, for dishonoring customer's cheques, 240, 241.
  - for improperly protesting accepted bill, 186.
- paying demand bill or cheque on forged indorsement, 97, 101, 239.
- lien of, 255.
- customers should domicile their bills, 157.
- paying customer's deposit to sheriff, 239.
- liability of, on "marking" cheques, 238.
- duties of, as to crossed cheques, 244-251.
- not liable to true owner of crossed cheque, 250.

## BANK NOTES,

- are promissory notes, 254.
- what transferor warrants, 202, 203, 216, 252.
- presentment of, 252.
- notice of dishonor, 254.
- lost or stolen notes, 83, 252.
- material alteration avoids, 216, 217.
- rule as to laches in giving notice of non-payment, 180.
- are not overdue notes, 252.

## BANKRUPTCY,

- presentment of bill for acceptance on, 150, 152.
- notice of dishonor on, 166.
- holder may protest bill for better security before it is due, 184, 188.



## BEARER,

- meaning of, 28, 53.
- bill payable to, is negotiable, 51, 131, 251, 255.
- what bills or notes are payable to, 48, 251.
- bill payable to, how negotiable, 131, 132, 202.
- where payee a fictitious or non-existing person, bill is payable to, 48.
- indorsement "without recourse" makes bill payable to, 65.

## BETTER SECURITY,

- protest for, when, 184, 188.

## BILL OF EXCHANGE,

- history of, 3, 25, 32.
- meaning of "bill," 28, 31-41.
- what is not, 33-40, 46, 57.
- privileges of, 1, 9, 102.
- requisites of, 31-41.
- must be an unconditional order, 31, 33, 83.
- must be signed by drawer, 31, 34.
- must contain the essentials of a contract, 34, 255.
- to whom payable, 31, 38, 48.
- must be addressed to drawee, 31, 34.
- addressed to one, and accepted by another, 68, 70, 103.
- drawer and drawee the same person, 43, 44, 251.
- drawee a fictitious person, 44, 48, 50, 98, 150, 164, 167, 178, 179, 182.
  - not having capacity to contract, 44, 45, 150, 178, 179, 183.
- payee a fictitious person, 48, 50, 98, 195.
- payable in money only, 31, 35, 38, 66, 69, 131.
- time of payment, 31, 37.
- sum payable must be certain, 31, 35, 53.
  - must not be out of a particular fund, 32, 39.
- date not essential, 32, 40, 59.
- ante-dating and post-dating, 59.
- consideration or value presumed, 2, 32, 40.
- not an assignment of funds, 192.
- place of drawing or payment, 32, 41, 227-237.
- capacity and authority of contracting parties to, 87-92.
- every contract on, revocable until delivery, 80.
- acceptance revocable until notified, 80, 82.
- contract of drawer or indorser, 131, 134, 195-198.
  - of acceptor, 193-195.
    - cannot be varied by parol evidence, 33.
- no person liable on, unless his name signed to it, 92.
- liability of stranger signing, 64, 68, 93, 106.
- presentment for acceptance, 146-163.
- qualified acceptance, 73, 75, 154.
- dishonor by non-acceptance, 153.

BILL OF EXCHANGE—*Continued.*

- indorsement of, 131-140.
- valid delivery presumed, in hands of holder in due course, 81, 84.
- negotiation of, 131-134, 140.
- when not negotiable, 33-40, 46, 51, 57.
- presentment for payment, 155-163.
- presentment before maturity, 158.
- title indefeasible, 1.
- accidental detention of, 185, 189.
- overdue or dishonored bill or note, 140, 141-143.
- measure of damages on, 200-202.
- release of, when it can be by parol, 213.
- discharge of, by payment, 203-212.
- material alteration of, 97-102, 155, 215-218, 227.
- re-issuing bill, 143, 204, 207, 208.
- acceptance *supra protest*, 219-222.
- payment *supra protest*, 222-224.
- inchoate instrument, 76-80.
- forgery of, 97-102, 216.
- when treated as a note, 44.
- inland and foreign, 41,-43, 200.
- in sets, 226, 227.
- lost bill, 224.
- conflict of laws, 227-237.
- meaning of "to retire," 207.
- difference between bills and cheques, 237.

## BLANK INSTRUMENT,

- signature on blank paper, 70.
- filling in drawer's name after acceptor's death, 71.

BOA FIDE HOLDER FOR VALUE, 110, 118, 121. *See Holder in due Course.*

## BUSINESS DAYS,

- what are not, 61.
- in computing time, when non-business days are excluded, 62-64, 79, 267.
- bill or note falling due on non-business day, 61. *See Days of Grace.*

CANADA, LAW OF, 234.

## CANCELLATION,

- of acceptance, 81.
- when bill discharged by, 205, 214.
- must be apparent, 214, 215.
- unintentional, 214.

## CAPACITY TO CONTRACT,

- meaning of the term, 88, 194.
- capacity to incur liability on bill, 44, 48, 50, 88, 98, 164, 167, 178, 182, 194.

CAPACITY TO CONTRACT—*Continued.*

- married women, 88.
- infant or person *non compos mentis*, 87, 88.
- alien enemy, 88.
- drunken person, 87.
- corporations, 89, 266. *See Corporations and Companies.*

## CHEQUE,

- origin of, 9.
- definition of, 227-239.
- how transferable, 131.
- not entitled to days of grace, 238.
- differences between cheques and bills, 237-239.
- not an appropriation of money in hands of banker, 192, 239.
- presentment of cheque for payment, 159, 239-242.
- when presentment or notice of dishonor is excused, 164-168.
- must be presented within banking hours, 151, 158, 160, 240.
- when want of due presentment discharges drawer, 239-242.
- extent to which he is discharged, 240, 241.
- duty of bank presenting cheque for customer, 240.
- obligation of banker to drawer, 240, 242, 243.
- forged cheques, 97, 101, 238. *See Forgery.*
- altered cheques, 102, 217. *See Alteration of Bill or Note.*
- cheque for illegal consideration, 239.
- post-dated cheques, 238, 239.
- payment by cheque, 205.
- marking cheques, 238.
- revocation of authority of bank to pay, 242-244.
  - by stopping payment of cheque, 242, 243.
  - by notice of death of drawer, 242, 243.
- crossed cheques, 244-251.
- course of legislation as to, 244.
- general and special crossings, 244-247.
- who may cross a cheque, 247.
- crossing a material part of cheque, 248.
- where the crossing is not apparent, 248, 249.
- when banker and drawer protected, 248, 249, 251.
- drawer or true owner may recover money wrongly received, 250.
- effect of crossing "not negotiable," 244, 247, 250.
- collecting banker, receiving payment, protected, 250.
- how cheque may be uncrossed, 247.
- capacity of corporations to draw cheques, 92.
- difference between bill or note and cheque, 237, 259.

## CHURCH,

- note given by trustees of a, 109.

## COLLATERAL SECURITY,

- agreement for in bill or note, 37.
- surety who pays bill or note entitled to securities, 208, 209.
- bill taken as, must be presented, 158.
- effect of taking, 211.

COMPANIES. *See Corporations.*

## COMPUTATION OF TIME OF PAYMENT, 62-64, 79.

## CONDITION,

- instrument payable on a condition not a bill or note, 32, 33, 39, 40.
- drawer or indorser, negating or limiting his liability, 65.
  - waiving holder's duties as regards himself, 65.
- conditional indorsement, 65, 138. *See Indorsement.*
- may be disregarded, 138.
- conditional acceptance, 73, 75.

## CONFLICT OF LAWS,

- rules as to, 227-237.
- law of Canada, 234.

## CONSIDERATION,

- definition of, 110, 112.
- what constitutes, 110-117.
- pre-existing debt or liability, a good consideration, 110, 113.
- lien on a bill is a good consideration, 110, 116.
- presumed, 2, 40, 112, 127.
- parol evidence admissible to show want of, 69, 111, 113.
  - as to partial failure of, 86, 111.
  - as to illegality of, 86, 111, 121, 123.
- want of, not an equity attaching to bill, 113.
- accommodation party liable to a holder for value on, 110, 115, 118.
- legal or equitable duty, sufficient, 114.
- contrary to public policy, 121, 123-125.
  - compounding a felony or misdemeanor, 123-125.
  - note given on threat of prosecution, 123.
- in case of bill or note notice of illegality necessary, 121, 122, 125.
- illegal consideration avoids bill, 121, 123, 128.
- usurious consideration, 126, 129.
- where transfer is by delivery, 202.

## CONTINGENCY,

- instrument payable on, 39, 40, 57.

## CONTRACT ON BILL OR NOTE,

- incomplete until delivery, 80, 252, 255.
- joint or several, 256.
- of parties to, 193-195, 195-198, 262.

- CONTRIBUTION,  
 between co-sureties, 208-212.
- COPY,  
 indorsement on, 134, 135.  
 protest on, 185.
- CORPORATIONS AND COMPANIES,  
 description of in bill or note, 89.  
 corporation cannot as a rule contract by bill or note, 67, 87-91, 266,  
 267.  
 special or implied authority to draw, accept, or indorse bills, 87-91,  
 266.  
 how a bill or note may be made by a corporation, 67, 89, 267.  
 bill or note payable to officer, 51.  
 officers signing bills, 67, 104. *See Directors.*  
 usury law applicable to certain companies, 129.
- COSTS,  
 of plaintiff bringing action without demand, 190, 191, 260, 261.  
 on lost bill without offering indemnity, 225.
- CROSSED CHEQUE, 244-251. *See Cheque.*
- DAMAGES,  
 measure of, 200-202.  
 interest may be allowed as, 200, 201.  
 on delay in presenting cheque to bank, 240, 241.
- DATE,  
 not essential to validity of bill or note, 32, 40, 59.  
 if no date, holder may insert true date, 59, 78.  
     insertion of wrong date, 59.  
 ante-dating or post-dating bill or cheque, 60, 238, 239.  
 bill dated on Sunday not invalid, 66.  
 alteration of, in bill or note, 75, 217.
- DAYS OF GRACE,  
 meaning of, 60, 62.  
 on what instruments allowed, 60.  
 on note payable by instalments, 54.  
 bill or note due on last day of grace, 61, 63.  
 not allowed on ~~sight~~ demand bills, or cheques, 57, 238.
- DEATH,  
 filling in drawer's name after acceptor's death, 71.  
 presentment for acceptance where drawee is dead, 150, 151.  
     for payment where drawee or acceptor is dead, 157, 162.  
 notice of dishonor where drawer or indorser is dead, 171, 174.  
 of drawer of cheque, 242, 243.  
 delivery of bill after indorser's death, 83.

## DEBT,

antecedent debt is a consideration, 110, 113.

DEFECTS OF TITLE, 121-126, 140, 145, 193. *See Overdue Bill or Note.*

## DEFENCE,

meaning of, 31.  
 what is not, 69, 93, 128, 145.  
 chief grounds of, 86.

## DELIVERY,

meaning of, 29.  
 contract on a bill or note revocable till, 71, 80-86, 255.  
 in case of acceptance, notice without delivery sufficient, 80, 82.  
 if bill in hands of holder in due course, valid delivery presumed, 81, 84.  
 necessary to perfect negotiation by indorsement, 131, 133.  
 conditional, or for a special purpose, 81, 83, 86.  
 bill payable to bearer negotiated by, 131, 132.  
 rights of transferee by delivery of such bill, 131, 133.  
 transferor by delivery not liable on instrument, 202, 203.  
 contract of such transferor, 53, 203.  
 transfer by delivery gives an equitable title, 133.

## DEMAND, BILL OR NOTE PAYABLE ON,

what is, 56, 237, 259.  
 not entitled to days of grace, 57, 238.  
 bill accepted or indorsed when overdue, 56.  
 presentment for payment, 156, 159, 238, 239-242, 259-262.  
 when bill considered overdue, 141, 143.  
 when note considered overdue, 258, 259.  
 cheque is a bill payable on demand, 237, 259.

DILIGENCE, REASONABLE, 147, 148, 150, 159, 163, 164, 178, 203.

## DIRECTORS,

when personally liable on bills, 67, 89-91, 104-108.

## DISCHARGE OF BILL,

by payment, 203-215.  
 payment before maturity, 141, 206.  
 by marriage of maker and payee, 205.  
 by acceptor being the holder at maturity, 212, 213.  
 by renunciation at or after maturity, 213.  
     must be express in writing, 213.  
 by cancellation, 214. *See Cancellation.*  
 by alteration, 215-218. *See Alteration.*  
 discharge of bill drawn in a set, 226, 227.

DISCOUNT OF BILL, 110, 116, 208, 215.

- DISCREPANCY,**  
 between amount in words and figures, 53, 55, 56, 71.
- DISHONOR,**  
 meaning of, 153.  
 by non-acceptance, 153, 154.  
 by non-payment, 168.  
 notice of, 168-170.  
 knowledge of, not sufficient without notice, 166, 173.
- DISHONORED BILL,**  
 holder in due course taking, 121.  
 holder with notice, taking, 140-143.
- DIVIDEND WARRANT, 271.**
- DRAWEE,**  
 meaning of, 32, 35.  
 bill must be addressed to, 34, 35.  
 bill may be drawn payable to, 43, 44.  
 where drawer and drawee are the same person, 44, 254.  
   a fictitious person, 44-46, 98, 150, 164, 167, 178, 179, 182, 183.  
   a person not having capacity to contract, 44-46, 87, 150, 178, 179, 183.  
 must be named with reasonable certainty, 46-47.  
 when wrongly designated, 67.
- DRAWER,**  
 meaning of, 32, 34, 44.  
 bill may be drawn payable to, 43, 44, 193.  
 where drawer and drawee are the same person, 44, 254.  
   a fictitious person, 44, 98.  
 signature of, necessary, 34, 92.  
 indorser is in the nature of a new, 132, 137, 264.  
 as to filling in drawer's name in a blank acceptance, 76-80.  
 contract of, 195, 196.  
 may insert stipulation negating or limiting his liability, 65.  
 waiving holder's duties as regards himself, 65, 66.  
 may be compelled to give duplicate bill, 225.  
 of cheque when discharged by delay in presentment, 239-242.
- DRUNKARD,**  
 bill or note by, 87.
- DURESS,**  
 is a defect of title, 121.  
 on proof of, holder must shew consideration, 126.
- EFFECTS, WANT OF,**  
 in drawee's hands, excuses presentment for payment as against the  
 drawer, 164, 167.  
 excuses notice of dishonor, 178, 183.

EFFECTS, WANT OF—*Continued.*

- excuses protest, 185.
- no excuse where drawer has reasonable belief that the bill would not be paid, 164, 166.
- where effects are on their way to drawee at maturity of bill, 179.

EQUITIES ON THE INSTRUMENT. *See Overdue and Dishonored Bills and Notes.*

## ESTOPPEL,

- as to inchoate instruments, 70-72, 76-79.
- by drawing, 195, 196.
- by acceptance, 193.
- by delivery, 81.
- by indorsing, 196, 198.
- by making a note, 262.
- in cases of forgery, 99-101, 194.

## EVIDENCE,

- presumptive, 77, 84, 86, 128.
- conclusive, 81, 85, 193, 195, 196, 198.
- not admissible to vary bill or note, 33.

## EXCHANGE,

- foreign bill payable in Canada, 200, 201.
- bill payable according to an indicated rate of exchange, 53, 55.

## EXECUTORS,

- parties to bills, 67, 83, 101, 108, 136.

## FEES,

- tariff of notarial, 270.

## FICTITIOUS PERSON,

- payee, 48, 50, 98, 195.
- drawee, 44, 45, 98, 150, 164, 167, 178, 179, 182, 183, 195.
- drawer, 44, 194.

## FIGURES AND WORDS,

- discrepancies between, 53, 55, 56, 71.

## FORCE AND FEAR,

- is a defect of title, 86.

## FOREIGN BILLS AND NOTES,

- definition of, 41-43, 252.
- what law governs contract, 200, 227-237.
- protest of, 184, 187.
  - is the only legal notice of dishonor of, 187.
- damages on, 200.



## FOREIGN LAWS.

- what countries are foreign to the *forum*, 41, 229.
- conflict of laws, 227-237.
- revenue laws not recognized, 228, 230.
- codes on bills and notes, 15-20.

FORGERY. *See Alteration.*

- definition of, 97-102, 216.
- bill drawn in fictitious names is, 46.
- no title can be derived through, 97-99.
- estoppel, when bill accepted in blank, 80, 99, 100.
- party with notice of forgery, lying by, 99.
- caused by negligence, 77-79, 101, 216.
- may be ratified, 99-101, 215.
- bank's duty to know customer's signature on cheque, 238.
- what a party transferring bill, note or cheque, warrants, 202.
- remedy on forged instrument, 97, 101, 239.

FRAUD. *See Alteration of Bill or Note.*

- fraudulent bill or note, 79, 126, 129.
- notice of, 121, 122, 125.
- in filling in amount, 79.
- in filling in drawer's name in a firm's bill fraudulently accepted, 77.
- in altering marginal figures in blank acceptance, 56, 72.
- in altering a bank note, 99, 217.
- fraudulent indorsement, 99.

## FUND,

- bill or note payable out of particular fund, is conditional, 32, 39.
- indication of a particular fund, is not conditional, 32, 39.

## GOOD FAITH,

- negligence does not destroy, 121, 122, 216, 240, 264-266.
- nor means of knowledge, 123.

GUARANTOR, *See Aval.*

- liable on bill or note without presentment to maker, 190.
- not entitled to notice of dishonor, 182.

## HISTORY OF THE LAW OF BILLS OF EXCHANGE, 3, 25.

## HOLDER,

- meaning of, 29, 59, 121.
- may sue on bill, 144.
- when title defective, 121, 123-125.
- is a holder for value if value has once been given, 125.
- with defective title may negotiate the bill, 144.

## HOLDER IN DUE COURSE,

- who is, 121-126.
- holder deriving his title through a, 121, 125, 145.

HOLDER IN DUE COURSE—*Continued.*

- every holder *prima facie* deemed a, 29, 59, 121, 126-128.
- holds the bill free from defects of title, 83, 121, 125, 145.
  - free from certain personal defences, 145, 193, 195.
  - altered bill according to original tenor, 215, 216.
- how cancellation affects a, 214.

HOLIDAYS, 61, 267. *See Business Days.*

HONOR *Supra Protest,*

- acceptance for, 219-222.
- payment for, 222-224.

HOURS, REASONABLE, 158, 160.

ILLEGAL CONSIDERATION,

- illegal consideration makes title defective, 121, 123-125.
- bill given for, in hands of holder deriving title through a holder in due course, 125.

IMMEDIATE AND REMOTE PARTIES, 80, 83.

INCHOATE INSTRUMENTS,

- authority to fill in blank paper, 59, 70, 71, 76-80.
- time within which it must be filled in, 76, 79.

INDEMNITY,

- on giving duplicate bill, 224-225.
- in action on lost bill, 225.

INDORSEMENT,

- meaning of, 30, 134, 135.
- forms of, 135.
- indorser is in the nature of a surety, 137.
- indorser is in the nature of a new drawer, 137, 264.
- transferor may be compelled to indorse, 133, 225.
- signature essential to, 134, 135.
- signature on blank paper, 76-80.
- may be on any part of bill, 134, 137.
- on copy, 134, 135.
- on allonge, 134, 135.
- must be of the entire bill, 134, 135.
- indorser's contract revocable till delivery, 80, 81, 131, 135.
- misspelt indorsement, 134, 137.
- is a guarantee of prior signatures, 137, 195, 198.
- may negative or limit liability, 65.
- transfer without, 131, 133.
- after death of payee, 83, 133.
- by partner. *See Partner.*

**INDORSEMENT—Continued.**

- indorsement to two or more severally, 134, 136.
- presumed order of, where two or more indorsements, 134, 137, 144, 198, 209.
- special indorsement, 135, 138.
- restrictive indorsements, 139, 140.
- conditional indorsement, may be disregarded by payer, 138.
- blank indorsement converted into special, 138, 139.
- after indorsement in blank, bill payable to bearer, 51.
- waiving holder's duties as against indorser, 65.
- fraudulent, 99.
- effect of indorsing an overdue bill, 56, 57, 141.
- effect of indorsing an incomplete bill, 76-80.
- indorsement of bill back to prior party, 143.
- contract and liability of indorser, 195, 196, 197.
- liability of stranger signing bill, 68, 93, 198-200, 209.
- bank paying on forged indorsement, 97, 101, 238.
- striking out indorsements, 204, 208, 209.
- effect of indorsing note payable to maker's order, 251, 254.
- contribution between indorsers. *See Surety.*

**INFANT,**

- capacity to contract, 87, 88, 91.
- liability on bill drawn during infancy, but accepted after, 91.
- transfer of title by, 87, 91, 92.

**INITIALS,**

- signature by, 35, 75.
- necessary to uncross a cheque, 247.

**INLAND BILL OR NOTE,**

- what bill is, 41-43.
- what note is, 231, 233, 252, 255.

**INSTALMENTS,**

- bill or note payable by, 53, 54.
- days of grace on such bill or note, 54.

**INTEREST,**

- bill or note payable with interest, 53, 54.
- from what time interest runs when expressed, 54.
  - when not expressed, 54.
- when recoverable, 200-202.
- usurious, 129.

**INTERPRETATION,**

- of terms used in Act, 23-31.
- of crossing cheques, 244-247.

## I O U,

meaning of, 253.

is evidence of an account stated, 253.

## ISSUE OF BILL OR NOTE, 30, 59, 80, 255.

## JOINT AND SEVERAL NOTE,

provisions as to, 49, 136, 256-258.

"I promise to pay," signed by two persons, 256-257.

"We promise to pay," 256.

if note is joint, judgment against one is a bar to an action, 256.

when some refuse to sign, 93, 136.

presentment of, 150, 151, 162.

## JUSTICES OF THE PEACE,

may protest bills or notes, 268, 269.

LACHES. *See Presentment, Notice of Dishonor, Cheque.*

## LAW-MERCHANT,

history of, 3-24.

## LIABILITY,

drawer or indorser may limit, 65.

of acceptor or maker, 193, 262, 263.

of acceptor, *supra protest*, 220.

of drawer or indorser, 65, 195-198.

of maker of note, 262, 263.

## LIMITATIONS, STATUTE OF,

when time begins to run on bills, 57.

on cheque, 241.

## LOST BILL,

when bill lost or detained, protest may be made on copy, 185, 189.

when loser may demand a duplicate, 225.

must give an indemnity, 225.

drawer of a lost bill entitled to notice of dishonor, 170.

when the Court may order it not to be set up, 225.

## LUNATIC AND IDIOT,

contract with, 87.

## MAKER OF A NOTE,

corresponds to acceptor of bill, 252.

presentment to, not in general necessary, 259, 261.

where note payable at a particular place, 260

contract of, 193, 262.

## MANITOBA,

law of, 235.

- MARK,**  
signature may be by, 35.
- MARKING CHEQUE,**  
effect of bank marking a cheque, 238.
- MARRIAGE,**  
is a sufficient consideration for a bill or note, 113.  
an instrument promising to pay on, is not a note, 34, 58.  
of maker and holder, discharges note, 205.
- MARRIED WOMAN,**  
contracts with, 88.  
may now contract as regards her separate property as a *feme sole*, 88.
- MEMORANDUM,**  
effect of place of payment being mentioned in a, 76, 161, 260, 261.
- MERGER,** 206, 207.
- MIS-SPELLING,**  
drawer's or acceptor's name, 67, 70.  
payee's or indorser's name, 134, 137.  
mode of indorsement, where name is mis-spelt, 67, 70, 137.
- MISTAKE,**  
alteration to correct, 56, 216, 218, 253.
- MONTH,**  
means calendar month, 62, 64.
- MUNICIPAL CORPORATIONS,**  
bills and notes of, 40, 88-92, 266, 267.
- NEGLIGENCE,**  
in taking a bill or note not the same as *mala fides*, 79, 123, 249, 264-266.  
gross negligence may be evidence of *mala fides*, 123, 166, 264-256.  
of bank in paying cheque, 248, 249, 250.
- NEGOTIATION OF BILL OR NOTE,**  
meaning of, 131-134, 140-143.  
what bills are negotiable, 51, 131, 134, 138.  
transfer of, without indorsement, 131, 133, 138, 202.  
by indorsement, 51, 131, 132, 134-138. *See Indorsement.*  
within a reasonable time, 76, 143, 148.  
negotiation back to party, 204, 207-209, 212.  
when such bill may be re-issued, 204, 208.  
negotiation of bill by holder whose title is defective, 140, 141, 144-146.  
of bill issued in blank and filled in afterwards, 76, 80.  
when bill ceases to be negotiable, 51, 140, 142, 204, 207.  
words prohibiting transfer, 51, 139, 247.

## NEW BRUNSWICK,

law of, 235.

tariff of notarial fees in, 271.

NON-BUSINESS DAYS. *See Business Days.*

## NOTARY,

presentation of bill by, 160, 161.

protests and notices by, 180, 181, 184-189, 221, 223, 269.

justice of peace may act when notary not accessible, 268.

tariff of fees, 270, 271.

NOTE. *See Promissory Note.*

## NOTICE,

what amounts to notice of defect of title, 121, 122, 141, 145, 265.

## NOTICE OF DISHONOR,

on dishonor by non-acceptance or non-payment, 152, 153, 168-170.

to whom it must be given, 168, 170-178.

must be a formal notification of dishonor, 166, 173.

by non-payment, after notice of dishonor by non-acceptance, 169.

holder of bill taken as collateral security must give notice, 158.

by an agent, 170, 172.

what parties may avail themselves of it, 170, 171, 173.

sufficiency of, 171, 173, 174.

may be verbal or written, 171, 173.

misdescription in, 171, 173.

in case of death of drawer or indorser, 171, 172, 174.

two or more drawees, 171, 175.

when to be given where the parties live in same place, 171, 175.

in different places, 171, 172, 176.

time within which party receiving notice has to give notice, 172, 176.

notice by post, 172-178.

consequences of not giving due notice, 168.

when excused, 178, 179.

waiver of, 178, 182.

as regards drawer,

where drawer and drawee the same, 178.

drawee fictitious, or not able to contract, 178, 182.

absence of effects in drawee's hands, 178, 183.

countermand of payment, 178.

as regards indorser,

drawee fictitious, or not able to contract, 179, 183.

when bill presented to indorser, 179.

bill or note for his accommodation, 179, 183.

miscarriage by post-office, 172, 177.

acceptor for honor entitled to, 220.

## NOTING FOR PROTEST,

- what it is, 184, 185, 187.
- not necessary on inland bill, except in Quebec, 184, 186.
- must be done on day of dishonor, 184, 187, 267.
- when delay in noting excused, 185, 267.

## NOT NEGOTIABLE,

- when bill or note becomes, 51, 139, 140, 142, 204, 207.
- cheque crossed "not negotiable," 244-247.

## NOVA SCOTIA,

- law of, 235.
- tariff of notarial fees in, 270.

## OFFICE,

- bill may be payable to holder of an office, 48.

## ONTARIO,

- law of 235.
- notarial fees in, 270.

ONUS PROBANDI. *See Evidence.*

## ORDER, BILL PAYABLE TO,

- what bills are, 51, 52.
- assignable by indorsement, 51. *See Indorsement.*
- omission of the words "or order" in special indorsement immaterial, 51.

## OVERDUE BILL OR NOTE,

- negotiation of, 140-143, 252.
- may be accepted, 71, 62.
- when bill payable on demand is overdue, 141-143.
- when note payable on demand is overdue, 258.
- not overdue if a reasonable time has elapsed since issue, 258.
- when cheque is overdue, 240.
- subject to equities and defects of title, 141.
- bill indorsed when overdue is payable on demand, 56, 57.

## PART PAYMENT,

- when a discharge of bill or note, 205.

PARTIAL ACCEPTANCE, 73, 85. *See Qualified Acceptance.*PARTIAL INDORSEMENT, 135, 138. *See Indorsement.*

## PARTNER,

- each partner the agent of the others, 83, 93, 95, 175, 205.
- where one partner can bind the firm by bill or note, 68, 70, 76, 256.
- acceptance in blank by, 77, 97.
- indorsement by, 136.

PARTNER—*Continued.*

- notice of dishonor to, 175.
- partnerships not in trade, 76, 89, 96.
- signature as agent, or in representative capacity, 96, 106, 136.
- mistake in the name of firm, 96-97.

## PATENT RIGHT,

- bill or note given for, 126, 130.

## PAYEE,

- meaning of, 32.
- must be indicated with reasonable certainty, 31.
- parol evidence to identify payee, 49.
- fictitious or non-existing person, 48, 50, 98, 195.
- where payee dead, 49.
- the holder of an office, 48, 49.
- as to filling in payee's name where it is left blank, 48.
- signature of, necessary to incur liability as indorser, 92, 93.
- indorsement by, where name is wrongly stated, 50, 134, 136.
- indorsing bill not negotiable, 51.

## PAYMENT,

- meaning of, 204.
- presentment for, 155-163. *See Presentment for Payment.*
- when a discharge of bill, 203-215.
  - to whom payment should be made, 204, 206.
  - by whom, 203, 204.
  - on maturity of bill, 204.
  - part payment, a discharge, 205.
  - accommodation bill, 204, 209-212.
- when drawer or indorser may re-issue bill after payment, 204, 207-209.
- payment by a renewal note, 205.
- "stopping" payment of cheque, 242, 243.
- when drawer or true owner of cheque can recover the amount, 250.
- when crossed cheque is paid contrary to the crossing, bank liable, 248.
- payment of debt by smaller amount, 205, 213.

PAYMENT, *Supra Protest,*

- meaning of, 222, 223.
- where two or more offer to pay, 222.
- for whose honor, 222.
- what procedure required on, 223, 224.
- rights of payer for honor *supra protest*, 222, 223.
- holder of bill refusing to receive, 223.

## PERSON,

- what it includes, 44.
- fictitious. *See Fictitious Person.*



## PLACE,

- bill drawn payable elsewhere than at the place of business or residence of the drawer, 147, 156, 162, 163.
- acceptance to pay at a particular place, 73, 75, 156, 160, 190.
- of payment in note, 259-262.
- of payment in memorandum, 76, 161, 260, 261.
- where bill should be presented for payment, 156, 162.

## POSSESSION OF BILL OR NOTE, 29, 78.

## POST-OFFICE,

- presentment for payment through, 151, 157, 163.
- presentment for payment at, 157, 163.
- notice of dishonor through, 172, 177.
- miscarriage of, 172, 177.

## PRESENTMENT FOR ACCEPTANCE,

- necessary, where bill payable after sight, 146, 148.
- should be personal, 157.
- where bill drawn payable elsewhere than at residence or place of business of drawee, 147, 156, 162, 163.
- consequence of not presenting, 148.
- duty of agent as to, 150.
- to whom it must be made, 150, 151.
- at what time it must be made, 148, 150, 151.
- two or more drawees, 150, 151.
- where drawee is dead, or bankrupt, or cannot be found, 150, 151.
- presentment through the post-office, 151, 157, 163.
- when excused, 150, 152.
- dishonor by non-acceptance, 152, 153, 154.
- refusal to take qualified acceptance, 151, 154.
- duties of holder as to qualified acceptance, 154, 155.

## PRESENTMENT FOR PAYMENT,

- requisites and meaning of, 155-163.
- is generally local, 157.
- when to be made, where instrument is not payable on demand, 156, 158.
- where payable on demand, 156, 159.
- by whom, 156, 160.
- at a reasonable hour, 158.
- to whom, 156, 160.
- to person having no capacity to contract, 157.
- at what place, 76, 156, 160-163.
- of bill or note, when place of payment is indicated by way of memorandum, 76, 161, 259-262.
- of cheque, 239, 240. *See Cheque.*
- of bill, where two or more persons are drawees or acceptors, 157, 162.
- of accommodation bill for benefit of indorser, 118.

PRESENTMENT FOR PAYMENT—*Continued.*

- where drawee or acceptor is dead, 157.
- bankruptcy of drawee or acceptor, 157.
- through the post-office, 151, 157, 163.
- at the post-office, 157, 163.
- excuses for delay in, or non-presentment, 163.
- dishonor by non-payment, 168.
- of bill accepted generally, not necessary to charge acceptor, 189, 190.
  - necessary in case of qualified local acceptance, 190.
  - omission to present on the day such bill matures, 190.
- of note, when necessary to charge maker, 258-262.
- bill or note must be exhibited on, 190, 191.
- when paid, must be delivered up, 190, 191.
- presentment to acceptor for honor, 221. *See Acceptance for Honor.*
- after bill accepted for honor, presentment to drawee necessary, 221.

PRESUMPTION. *See Evidence.*

PRINCIPAL AND AGENT. *See Agent.*

PRINCIPAL AND SURETY. *See Surety.*

## PROCURATION,

- who may sign under, 102, 267.
- signature by, operates as notice of limited authority, 102-104, 251.
- usual signature for corporation, 267.

## PROMISSORY NOTE,

- definition of, 28, 251-255.
- what is not, 33-40, 253.
- must be an unconditional promise, 34, 251.
- any words amounting to a promise to pay sufficient, 00.
- note payable by instalments, 54.
- time of payment may be uncertain, if the event must inevitably happen, 253.
- note payable to maker's order, 251, 254.
- containing pledge of collateral security, 251, 255.
- alteration of, 215-218. *See Alteration of Bill or Note.*
- cancellation of, 214.
- foreign note, 252, 255.
- inchoate until delivery, 255.
- joint and several note, 256-258.
- presentment for payment, 259-262. *See Presentment for Payment.*
- when note payable on demand and indorsed, must be presented, to charge indorser, 258, 259.
- overdue note, 258, 259. *See Overdue Bill or Note.*
- contract of maker, 262.
- certain provisions applicable to bills apply to notes, 263.

PROMISSORY NOTE—*Continued.*

- maker and indorser of note correspond to acceptor and drawer of bill, 263.
- protest on foreign note necessary to charge indorsers, 263.
- difference between cheque and note, 259.

## PROTEST,

- necessary on dishonor of foreign bills, 184, 187.
  - but not on foreign notes except to charge indorsers, 263.
- unnecessary on inland bills or notes, except in Quebec, 184, 186.
- is the only legal notice of dishonor of a foreign bill, 187.
- time when it should be made, 184, 185, 187, 267.
- extending protest, 184, 187, 267, 268.
  - for better security, 184, 188.
- when bill sent through post office, 185, 188.
- at what place, 185.
- at what hour it may be made, 185, 189.
- what the protest must contain, 185, 189.
- where bill lost, or destroyed, or detained, 185, 189, 224.
- when excused, 185, 189.
- necessary before presenting bill to referee in case of need, 219, 221.
- necessary on dishonor of bill accepted *supra protest*, 221.
- notarial acts, 185, 221, 223, 268-271.
- where notary is not available, 268, 269.
- tariff of notarial fees, 268, 270, 271.
- forms to be used, 1st Schedule, 268, 271, 274-279.

## PUBLIC POLICY,

- contracts against, 121, 123-125.

## QUALIFIED ACCEPTANCE, 73-76, 154-155.

## QUEBEC,

- holidays in, 61.
- law of, as to bills and notes, 186, 187, 235.
- notarial fees in, 268, 271.
- inland and foreign bills and notes must be protested in, 184, 186.
- pour Aval*, contract of, in, 199, 200.

## RATIFICATION,

- of infant's contract, 91.
- of agent's signature, 103, 105, 106.
- of partners' acts, 93, 95.
- of corporation's contract, 90, 107.
- of unauthorized signature, 99.
- forgery may be ratified, 101, 215, 216.

## REASONABLE TIME, 76, 79.

## RE-EXCHANGE,

- what it is, 55, 200, 201.
- when recoverable, 55, 200, 201.

## REFEREE IN CASE OF NEED, 64, 221.

## RE-ISSUE OF BILL,

- when party liable thereon may re-issue bill, 143, 144, 204, 207, 208.

## RELEASE,

- of acceptor at maturity, 213.
- of other parties at or before maturity, 213.
- must be in writing, 213.

## RELIGION.

- law-merchant respects different religions, 179.

## REPEAL OF STATUTES, 272, 273.

RESTRICTIVE INDORSEMENT, 135, 136, 139, 140. *See Indorsement.*

## SALE OF BILL OR NOTE, 131, 132, 202, 203.

## SET, BILL IN A,

- when they constitute one bill, 226, 227.
- liability of indorser where more than one part is indorsed, 226, 227.
- liability of drawee accepting more than one part, 226, 227.
- paying part not bearing his acceptance, 226, 227.

## SIGHT,

- bill payable at sight, 57.

## SIGNATURE,

- what is sufficient, 35.
- may be by a mark or initials, 35.
- place of, immaterial, 93.
- of drawer necessary, 31, 34.
- of acceptor necessary, 66.
- necessary for a valid indorsement, 94, 134, 135.
- signature on a blank paper, 76-80.
- signing in a trade or assumed name, 93-95.
- signing in the name of a firm, 68, 93, 95.
- by an agent, 102-110, 266.
- unauthorised signature may be ratified, 97, 99.
- signature by procuration, 102-104, 266.
- liability of person signing as agent, 102-110.
- forgery of, 97-102.
- forged or unauthorised, confers no right to bill, 97-102.
- liability of stranger signing bill, 64, 68, 93, 94, 127, 198, 200.

## SPECIAL INDORSEMENT, 87.

STATUTES, CONSTRUCTION OF, 85, 123, 262.

STOLEN OR LOST, BILL, NOTE, OR CHEQUE, 77, 83, 245, 252.

STRANGER,

- signature on bill by, 64, 68, 93, 94, 127, 198, 200.
- acceptance by a stranger, 219.
- payment by a stranger, 222.

STRIKING OUT INDORSEMENTS, 204.

SUM PAYABLE,

- must be a sum certain in money, 31, 38, 53, 54.
- where sum expressed in words differs from sum in figures, 53, 55.
- when description of money omitted, 56, 218, 253.
- where sum is filled in, and marginal figures altered, 56, 71.
- is the true consideration, 2, 33, 40, 112.

SUNDAY. *See Business Days.*

- bill dated on, 60.
- notice of dishonor dated on, 174.

SUPRA PROTEST,

- referee in case of need, 64, 221.
- acceptance for honor, 219.
- payment for honor, 222.

SURETY,

- party to an accommodation bill, 118-121.
- where evidence admissible to show suretyship, 93.
- as between holder and surety, 119, 196, 197.
- as between indorsers, 93, 137.
- entitled to securities held by the creditor, 207-209.
- contribution between co-sureties, 137, 209, 210.
- signature as, 64, 68, 93, 199, 200.

TIME.

- bill or note payable at fixed, 31, 37, 57, 62.
- computation of, 62-64, 79, 267.
- "month" means calendar month, 62, 64.
- reasonable, 76, 79, 141, 143, 148, 149, 153, 156, 158, 159, 163, 240, 242, 258.

TIME OF PAYMENT,

- bill or note payable on demand or at sight, 56, 251.
- when no time for payment is expressed, 56, 75.
- bill payable at determinable future time, 57, 251.
- on an event certain to happen, 57, 253.
- when bill drawn in one country and payable in another, 229, 237.

TRADE NAME, 93-95.

TRANSFER, 131. *See Negotiation.*

TRANSFEROR BY DELIVERY,  
    who is, 131, 132, 202, 203.  
    what he warrants, 202, 203.

UNAUTHORIZED SIGNATURE, 97, 99.

UNDUE INFLUENCE,  
    title to bill or note given under, 121, 126.

USAGE OF TRADE,  
    in determining what is reasonable time, 156, 163, 240, 242, 258, 259.

USURIOUS CONSIDERATION, 126, 129.

VALUE,  
    meaning of, 30, 110-117.  
    presumed, 2, 11, 40, 112, 127.  
    during currency of bill or note, is sufficient, 110, 115.  
    " value received," not necessary to state in a bill or note, 16, 32, 40.

WAIVER,  
    of presentment, 164, 167.  
    of notice of dishonor, 166, 173, 178, 182.  
    of protest, 185, 189.  
    discharge of bill by, 213.

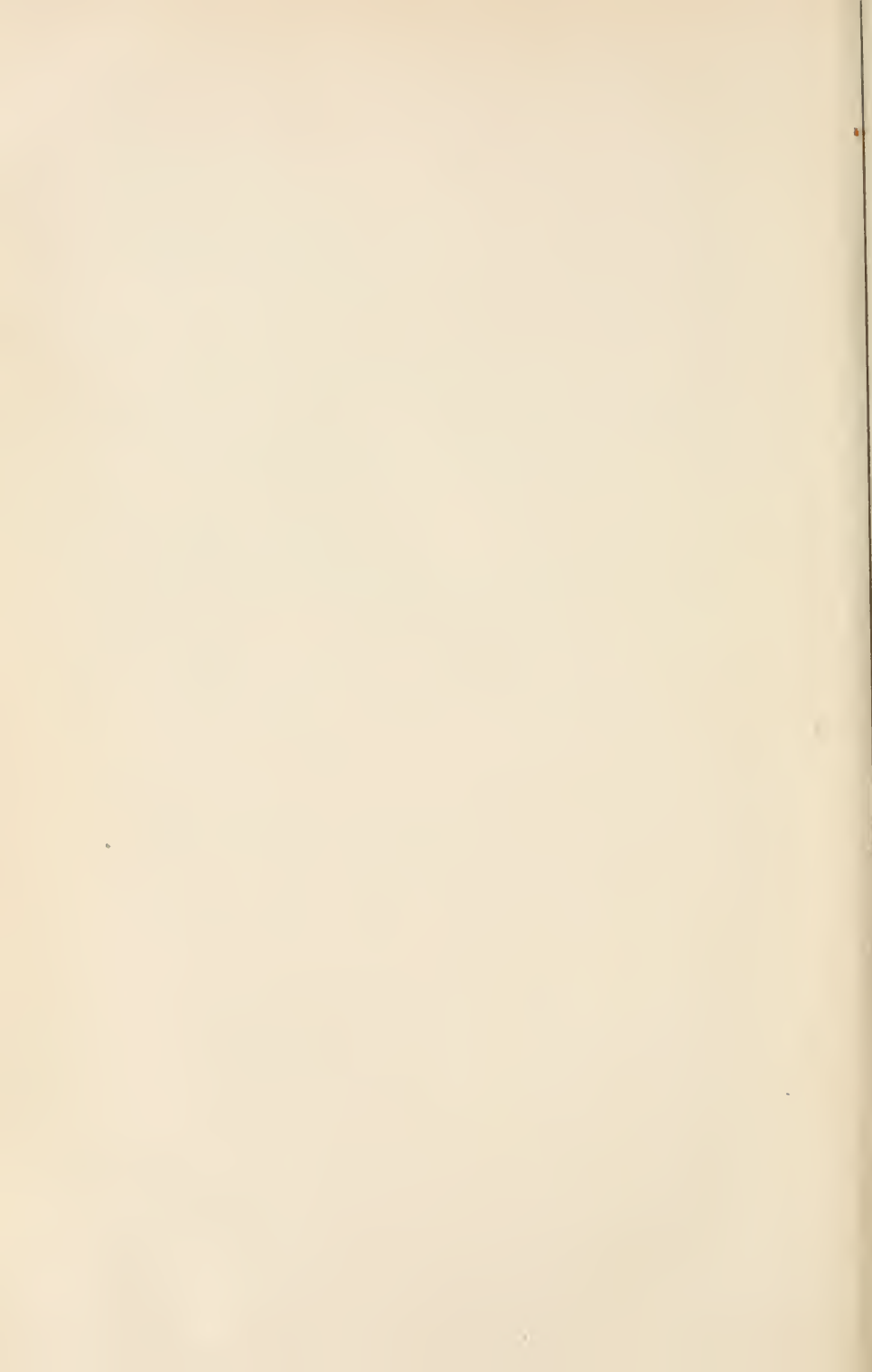
WARRANTY, 202. *See Estoppel.*

" WITHOUT RECOURSE,"  
    negatives liability, 65, 131, 134, 209.  
    proper form for agent, 102, 104, 109.

WRITING,  
    includes printing, 35.

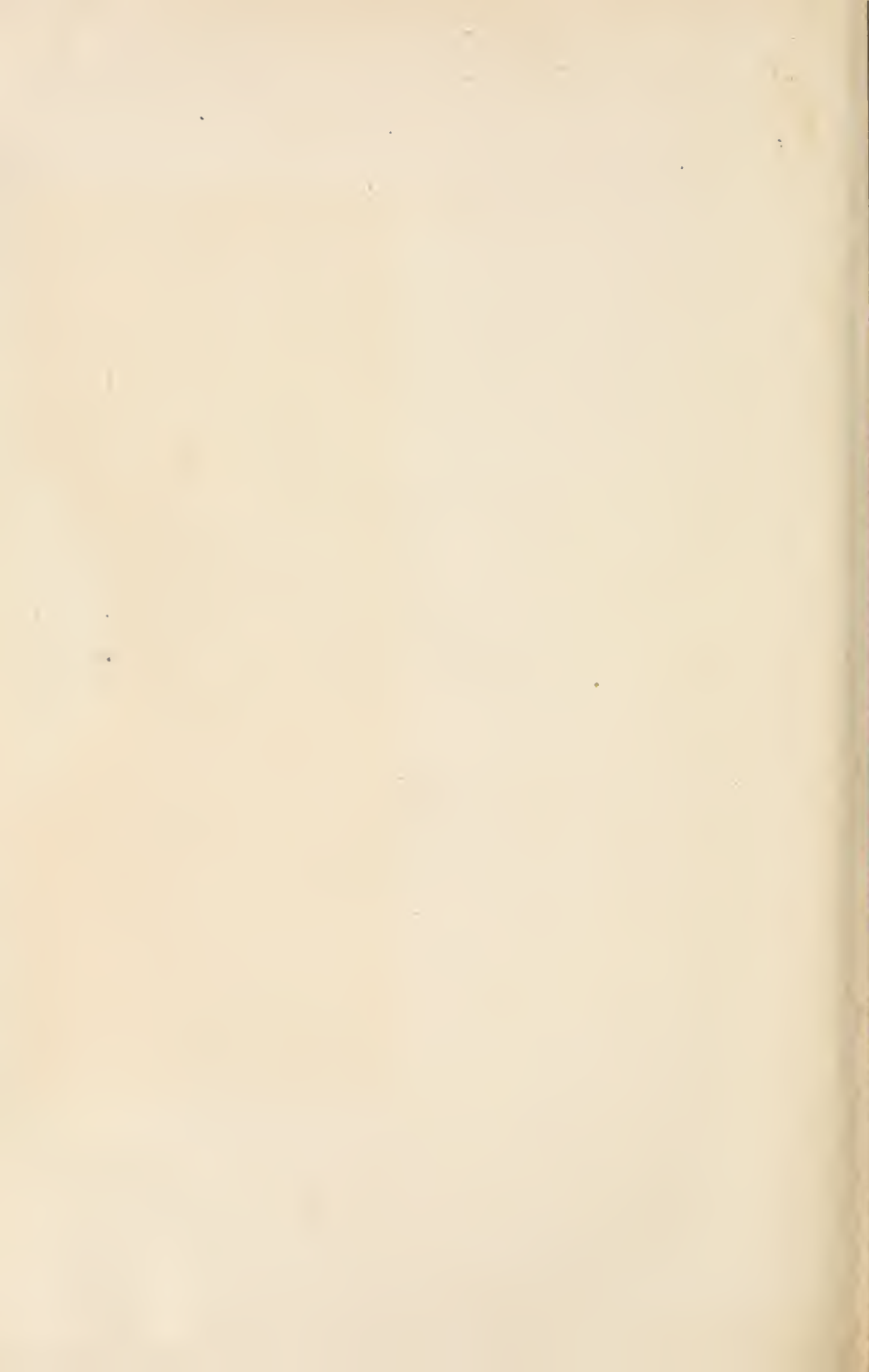
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