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COMMENTARIES

ON THE LAW OF

PROMISSORY NOTES,

AND

GUARANTIES OF NOTES,

AND

CHECKS ON BANKS AND BANKERS.

WITH

OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE.

By JOSEPH STORY, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

"Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et æquo præstare oportet." — Dig., Lib. 44, tit. 7, l. 2, § 3.

"Tam rigida istius obligationis persequutio est inventa, ut Mercatores tanto tutius fidem aliorum sequi possent." — Heinecc., De Camb., cap. 5, § 1.

THIRD EDITION.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

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ADVERTISEMENT TO THE THIRD EDITION.

THE present Edition of the Commentaries on Promissory Notes contains the illustrations and authorities furnished by the cases decided in England and America since the publication of the second Edition. With the view of preserving the original text, as left by the Author, the new matter now introduced, except merely the names of additional cases, is marked by brackets; thus [ ]

CHARLES SUMNER.

BOSTON, OCTOBER, 1851.

ADVERTISEMENT TO THE SECOND EDITION.

The present Edition of this work is a reprint of the former edition, except that the manuscript notes left by the Author, and the late cases arising in the law applicable to Promissory Notes, have been added by the Editor.

W. W. STORY.

Boston, September 24, 1847.

TO THE HONORABLE

THOMAS H. PERKINS.

SIR,

IT has long been my intention to ask your permission to dedicate some one of my works on Commercial Law to you; and I know of no one, which could be more appropriate for such a purpose, than these Commentaries on the Law of Promissory Notes. Highly as I prize your personal friendship and private character, I should be sorry to have this dedication deemed a mere acknowledgment, on my part, of their intrinsic worth. I rather desire, that it should be deemed a tribute of respect to your public character, to your noble charities, and to your steadfast and elevated principles of action. You justly stand at the head of our commercial community; and you have achieved this enviable distinction by a life of successful enterprise, in which one knows not which most to praise, the skill, and intelligence, and integrity, which have deserved that success, or the liberal spirit, and unostentatious hospitality, which have constantly been its accompaniments. I trust, that you have many years yet left to enjoy the satisfactions and pleasures of such a life, admitting of such a retrospect. No one beyond the circle of your immediate family cherishes that hope with more earnestness than myself, being

With the highest respect, most truly

Your obliged servant,

JOSEPH STORY.

CAMBRIDGE, June, 1845.

PREFACE.

In pursuance of the plan, which was announced in the Preface to my work on Bills of Exchange, the present treatise on Promissory Notes is now presented to the public. In the preparation of it, I have been fully convinced of the great utility and importance, in a professional, as well as practical view, of separating the doctrines respecting Bills of Exchange from those, which belong to Promissory Notes. Many of the topics, which are necessary to be examined and discussed, are indeed, common to both subjects, and might, therefore, seem fit to be brought together in a single treatise. But, upon a closer survey, it will be found, that there are many peculiar doctrines and principles belonging to each, and many diversities in the application of those doctrines and principles to the business and exigencies of commercial life. The formulary, in which many of the propositions, common to each, are to be laid down, rarely admits of being enunciated precisely in the same words, or with the same legal effect; and not unfrequently the propositions themselves are required to be stated and illustrated with qualifications and limitations in respect to the one, which are either incorrect, or defective in respect to the other. The obligations of the drawer of a Bill, and those of the maker of a Note, are exceedingly different in their nature and extent. And although it is often said, that the maker of a Note stands in the same predicament as the acceptor of a Bill; and that the indorser of a Note stands in the same character as the drawer of a Bill; yet these propositions are to be received *sub modo*, and with various qualifications. They rather establish a general analogy between them, than an absolute identity of legal position and obligation. The acceptor of a Bill is always presumed to warrant the genuineness of the signature of the drawer; but the maker of a Note does not warrant the genuineness of the signature of any of the indorsers thereon. The drawer of a Bill is never supposed to warrant the genuineness of the signature of any of the indorsers, nay, not of the payee. On the other hand, the indorser of a Note warrants the genuineness of the signatures of all the antecedent parties on the Note. But it is in the more minute details and ramification of the doctrines, applicable to each, that we chiefly perceive the importance, nay, the necessity, of distinguishing carefully between them. The subject of protest and damages, in cases of Bills of Exchange, finds no place in the consideration of Promissory Notes; and even the subject of notice, which is common to both, may be despatched in a few pages in cases of Bills of Exchange, but is susceptible of almost endless varieties of detail in cases of Promissory Notes. In the French and foreign law, the subject of Bills of Exchange is commonly discussed at great length, and generally is extended through a bulky volume; while the subject of Promissory Notes is condensed into a few pages, at once meagre and unsatisfactory. The Commercial Code of France embraces seventy-six articles on the subject of Bills of Exchange; but it treats of Promissory Notes in two brief and vague articles only. How different is this in the law of England. The works of the most distinguished authors of England treat of Bills of Exchange in a comparatively concise and general way, while Promissory Notes occupy a large space, and are followed out into the most minute practical results. It may be affirmed, with some confidence, that, in the Courts of Justice in England, for every single suit litigated upon a Bill of Exchange, twenty will probably be found upon Promissory Notes, — so vast is the circulation, and so extensive and complicated are the transactions growing out of the latter, which require almost a daily modification of the law to adapt it to the new exigencies of business. Hence it is, that Westminster Hall has, during the last century, become the great repository of the law on this subject; and the decisions there made, have acquired a commanding influence and interest throughout the commercial world.

In no one branch of the law is more fulness in the statement and exposition of principles required, than in that of Promissory Notes. I have endeavored, therefore, to bring within the text all the leading principles, with such illustrations as might serve to explain and confirm them. In the notes, many of the authorities will be found collected, with such auxiliary comments, and citations from the opinions of learned Judges and Jurists, as might give more free and ample information, than the text could properly supply. I have borrowed largely from the able writers, who have preceded me, and have also borrowed some materials from my own former works upon kindred subjects. The latter course was indispensable in order to make the present work, as is its design, entirely independent in its structure and completeness from them. Upon a close examination, however, the learned reader will find, that few passages have been introduced into the text, which did not require some alterations to adapt them to the purposes of the present Commentaries; and they have never been introduced for the mere purpose of display, or of swelling the volume.

The subjects of the Guaranties of Notes and of Checks have been added, as becoming daily of more use and significance in commercial dealings. The latter is treated briefly, as indeed few doctrines of a peculiar nature belong to it. The former has been discussed more at large; and the materials thereof are mainly drawn from American jurisprudence, since in England the contract of guaranty, as applied to Notes, has not, as yet, furnished many occasions for litigation or decision.

I cannot better conclude this Preface than by a quotation from the Commentaries of my venerable friend, Mr. Chancellor Kent, himself at once a fine model of the judicial character, and an illustrious example of what genius, and learning, and devotion to all the branches of jurisprudence can accomplish. "The law concerning negotiable paper," says he, "has at length become a science, which can be studied with infinite advantage in the various codes, treatises, and judicial decisions; for, in them, every possible view of the doctrine, in all its branches, has been considered, its rules established, and its limitations accurately defined."

CAMBRIDGE, near Boston,
June, 1845.

CONTENTS.

PAGE
INDEX TO CASES CITED xv

CHAPTER I.

SECTION
Nature and Requisites of Promissory Notes . . . 1 – 59

CHAPTER II.

Competency and Capacity of Parties to Promissory Notes . . . . 60 – 102

CHAPTER III.

Rights, Duties, and Obligations of Parties to Promissory Notes . . . . 103 – 115

CHAPTER IV.

Rights, Duties, and Obligations of Parties, on Transfers 116 – 180

CHAPTER V.

Promissory Notes. — Consideration, what is sufficient, and between whom necessary . . . . 181 – 197

CHAPTER VI.

Presentment of Promissory Notes for Payment . . 198 – 256

CHAPTER VII.

Excuses for Non-presentment of Promissory Notes . 257 – 296

CHAPTER VIII.

Notices and other Proceedings on the Dishonor of Promissory Notes . . . . 297 – 369

CHAPTER IX.

Matters of Defence and Discharge of Parties to Promissory Notes . . . . 370 – 453

CHAPTER X.

Of the Guaranty of Promissory Notes . . . . 454 – 486

CHAPTER XI.

Checks on Banks and Bankers . . . . . 487 – 503

PAGE

INDEX 689

INDEX TO CASES CITED.

The References are to the Sections.

A.

	Section
Abat *v.* Holmes	423
—— *v.* Rion	334
Abbot *v.* Bailey	86
Abrahams *v.* Skinner	122
Acheson *v.* Fountain	139, 142
Ackland *v.* Pearce	192, 193
Adams *v.* Cordis	399
—— *v.* Gregg	419
—— *v.* Jones	482
—— *v.* Lindsell	430
—— *v.* Oakes	246
Aertson *v.* Cage	378
Agan *v.* McManus	268, 278, 309
Aldridge *v.* Turner	133
Alexander *v.* Burchfield	493
Allaire *v.* Hartshorne	187, 190, 191, 195
Allen *v.* Edwardson	315
—— *v.* Keeves	490
—— *v.* Mawson	16
—— *v.* Rightmere	59, 147, 468, 471, 472, 476, 480
Allnutt *v.* Ashenden	458
Alves *v.* Hudgson	22, 156, 158
American Bank *v.* Doolittle	425
Amory *v.* Meryweather	190
Ansbaugh *v.* Gearhart	59, 468
Ancher *v.* Bank of England	142
Anderson *v.* Cleveland	201, 419
—— *v.* Drake	236, 265
—— *v.* Robson	110
Anderton *v.* Beck	203
Andrews *v.* Boyd	148, 281, 357
—— *v.* Franklin	27, 28
—— *v.* His Creditors	155
—— *v.* Pond	155 – 157, 165 – 167, 178
Anson *v.* Bailey	276, 346
Anthon *v.* Fisher	96
Antoine *v.* Morshead	94, 96
Appleby *v.* Biddolph	22, 27
Arbouin *v.* Anderson	109, 113, 196, 197
Armistead *v.* Armistead	230
Armitt *v.* Breame	45
Armstrong *v.* Percy	262
Arnold *v.* Redfern	167
—— *v.* Revolt	87, 124, 306
—— *v.* The Mayor, &c. of Poole	74
Arundel Bank *v.* Goble	415
Ashly *v.* Ashly	12
Aspinwall *v.* Meyer	74, 381
Astor *v.* Benn	339
Atkins *v.* Owens	402
Atkinson *v.* Manks	17
—— *v.* Ritchie	259
Attorney-General *v.* Life and Fire Ins. Co.	74
Atwood *v.* Griffin	37, 138
Aubert *v.* Walsh	106
Austin *v.* Boyd	58, 476

Section
Averill v. Hedge 430
——— v. Lyman 425
Avery v. Pixley 213
——— v. Stewart 220
Ayer v. Hutchins 190
Aylett v. Ashton 85
Aymar v. Sheldon 339
Ayrey v. Davenport 422
——— v. Fearnsides 18, 20

B.

Babcock v. Bryant 460
Bachellor v. Priest 195, 246
Backhouse v. Harrison 382
Backus v. McCoy 264
——— v. Shipherd 271, 272
Badnall v. Samuel 415, 416
Bailey v. Freeman 133, 459, 469
——— v. Hazard 480
Baker v. Birch 287
——— v. Briggs 58, 438, 467, 468, 473, 476
——— v. Flower 416
Baker v. Lovett 77
——— v. Wheaton 111, 168, 243
Baldwin v. Richardson 335
Ballingalls v. Gloster 121, 128, 480
Ballou v. Talbot 69, 71
Bancroft v. Hall 226, 312, 314, 319, 324, 338
Bangor Bank v. Treat 34
Bank (Oxford) v. Haynes 59
—— (Springfield) v. Merrick 17
—— (Mechanics' & Farmers') v. Schuyler 10
—— (Merchants') v. Spicer 34
—— (Bangor) v. Treat 57
—— of Alexandria v. Swann 325, 331
—— of America v. Woodworth 232
—— of Chenango v. Root 239, 255, 308, 327
—— of Columbia v. Lawrence 235, 312, 313, 320, 322 - 325, 328, 338, 340, 341
——————— v. Patterson Administrator 74
—— of Geneva v. Howlett 343
—— of Ireland v. Beresford 184, 423
—— of Manchester v. Slason 129, 343
—— of North America v. McKnight 297
—— of Orleans v. Smith 326

Section
Bank of Rochester v. Bowen 73
——————— v. Gould 349
—— of Salina v. Babcock 195
—— of Sandusky v. Scoville 195
—— of the Metropolis v. New England Bank 186
—— of Troy v. Topping 186
—— of U. States v. Carneal 234, 243, 319, 343, 348, 354
——————— v. Corcoran 322
——————— v. Dandridge 74
——————— v. Donally 155
——————— v. Dunn 148
——————— v. Hatch 312, 413, 415, 422, 423
——————— v. Merle 324
——————— v. U. S. 246, 452
——————— v. Smith 228
—— of Utica v. Bender 335, 344, 347
——————— v. Davidson 316, 336, 344
——————— v. De Mott 316, 335, 343 - 345
——————— v. Phillip 316, 335, 344
——————— v. Smith 126, 247, 297, 343
—— of Washington v. Triplett 169, 224
Banks v. Eastin 126, 246
Barber v. Backhouse 187, 190
Barclay v. Bailey 226
Barber v. Hodgson 259, 260
——— v. Mechanics' Fire Ins. Company 69
——— v. Parker 271
Barlow v. Bishop 87, 124, 306
——— v. Broadhurst 20
Barnard v. Planters' Bank 297
Barnes v. Bartlett 265
Barnett v. Brandao 186, 195
Barnsley v. Baldwin 27
Barnwell v. Mitchell 316, 335
Barough v. White 190, 491
Barrows v. Lane 467
Barton v. Baker 241
Bartrum v. Coddy 281
Bartsch v. Atwater 168, 391
Bateman v. Joseph 316, 335
Bates v. Coit 362
Bathe v. Taylor 37 *a*
Baxter v. Duren 118
——— v. Lord Portsmouth 101
——— v. Little 190
Bay v. Coddington 195
Bayard v. Shunk 119, 389

Section
Bayon v. Vavassour 159
Beard v. Webb 85
Beardesley v. Baldwin 22
Beardsley v. Wardner 419
Beardmare v. Cruttenden 427
Beauchamp v. Cash 349, 351
Bebee v. West Branch Bank 115, 419
Beck v. Robley 180
Beckwith v. Angell 459, 460, 474, 476, 477, 480
——— v. Carroll 197
——— v. Sibley 411
——— v. Smith 347
Bedford v. Deakin 416, 425
Beeching v. Gower 231, 500
Belden v. Lamb 316
Bell v. Frankis 358
—— v. Gardiner 361
—— v. Ingestre 120 a
—— v. Quinn 189
Bellasis v. Hestor 211
Bellievre v. Bird 235
Belmont Bank v. Patterson 237, 238
Bender v. Fromberger 264
Bennett v. Farnell 39, 132
——— v. Jenkins 264
——— v. Maule 423
Bennington v. Dinsmore, 33
Berkshire Bank v. Jones 148, 234, 243, 271, 272
Bernard v. Barry 171
——— v. Graves 389
Berry v. Usher 444
Besancon v. Shirley 18
Betts v. Kimpton 88
Beveridge v. Burgis 335
Beverly v. The Lincoln Gas Light and Coke Company 74
Bewley v. Whiteford 467
Bigelow v. Willson 211
Bignold v. Waterhouse 308
Bilbie v. Lumley 362
Bill v. Porter 104
Birchard v. Bartlet 58
Bishop v. Hayward 151, 478, 480
Bishop of Derry v. Chambers 41, 51
Bizzell v. Williams 18
Blackie v. Pidding 451
Blackwell v. Justice of Lawrence County 264
Blakely v. Grant 138, 147, 148, 316, 335, 359
Blanchard v. Hilliard 211
——— v. Russell 157, 172
Blackenhagen v. Blundell 33

Section
Bland v. Ryan 142
Blesard v. Hirst 359, 361, 362
Block v. Bell 16
——— v. Walker 6
Blogg v. Pinkers 184, 187
Boddington v. Schlencker 493
Boehm v. Sterling 178, 180, 488–491, 493, 494
Boggs v. Lancaster Bank 195
Bolton v. Dugdale 20
——— v. Puller 402
Bonafous v. Walker 265
Bond v. Farnham 281, 286, 357
——— v. Warden 493
Booth v. Franklin 231
Borradaile v. Lowe 274, 275, 362
Bosanquet v. Dudman 178, 186, 195
Boultbee v. Stubbs 252, 286, 427
Boulton v. Welsh 350, 351, 353
Bowen v. Morris 69
Bowers v. Hurd 184
Bowes v. Howe 203, 500
Bowie v. Duvall 228
Bowyer v. Bampton 192, 193
Boyce v. Edwards 482
Boyd v. Brotherton 37 a
—— v. Cleveland 275, 379, 362, 364
—— v. Plumb 73
Bracey v. Carter 157
Brackett v. Norton 155
Bradford v. Corey 146
——— v. Farrand 169
——— v. Hubbard 413, 422
Bradlee v. The Boston Glass Manufactory 70
Bradley v. Davis 348
Bragg v. Greenleaf 126
Braham v. Bubb 22
Braithwaite v. Gardiner 80
Bramah v. Roberts 186, 191, 195
Braman v. Hess 193
Brandon v. Nesbitt 96
Bray v. Hadwen 320, 324, 331
—— v. Manson 417
Brealey v. Andrews 362
Breed v. Hillhouse 275, 480
Brent v. Bank of Metropolis 314
—— v. Ervin 111
Brent's Ex'rs v. Bank of Metropolis 234, 235
Brentzer v. Wightman 207
Brett v. Levett 287
Brewster v. McCardel 48
Bridge v. Sherborne 224
Bridges v. Berry 104, 201, 203
Brigham v. Marean 126

Section

Brinkley *v.* Going 452
Bristol *v.* Sprague 195
——— *v.* Warner 27, 181
Britten *v.* Webb 151, 362
Brockway *v.* Allen 69
Bromage *v.* Lloyd 120 *a*
Brooks *v.* Elkins 12, 14
——— *v.* Mitchell 491
——— *v.* Stuart 425
Broughton *v.* Manchester Water Works Co. 74
Brown *v.* Butchers' & Drovers' Bank 121
——— *v.* Davis 178, 190, 488, 489
——— *v.* De Winton 12, 16
———, Ex parte 491
——— *v.* Gilman 1, 14
——— *v.* Harraden 6
——— *v.* Judrell 101
——— *v.* Knowley 117
——— *v.* Langley 291
——— *v.* Lusk 224
——— *v.* Maffey 288, 292
——— *v.* Noyes 229
——— *v.* Thornton 158
——— *v.* Turner 190
——— *v.* Williams 423
Browne *v.* Carr 413
Brownell *v.* Bonney 359, 364
Browning *v.* Kinnear 335
Brownson *v.* Appleby 186
Bruce *v.* Bruce 118, 135
——— *v.* Westcott 12, 37 *a*
Bruen *v.* Marquand 419
Brush *v.* Reeves 132
——— *v.* Scribner 195
Boucher *v.* Lawson 155
Buckley, Ex parte 57, 69
Buckmaster *v.* Grundy 264
Bullard *v.* Bell 501
Buller *v.* Crips 4, 6, 26
Bullet *v.* Bank of Pennsyl. 111, 448
Bullitt *v.* Scribner 6
Burbridge *v.* Manners 180, 320, 384
Burchell *v.* Slocock 3, 9
Burdick *v.* Green 104, 438
Burghart *v.* Hall 77
Burke *v.* McKay 297
Burnham *v.* Webster 366
Burrill *v.* Smith 118, 135, 378, 380, 413, 427
Burrough *v.* Moss 87, 124, 126, 178, 190, 306
Burrows *v.* Hannegan 312, 339, 357
——— *v.* Jemino 156, 168
Bush *v.* Livingston 193

Section

Bussard *v.* Levering 220, 320, 324
Butts *v.* Dean 438

C.

Caldwell *v.* Cassidy 228
Calliham *v.* Tanner 413, 420
Callow *v.* Lawrence 180
Campbell *v.* Hudgson 24
——— *v.* Humphreys 452
Camidge *v.* Allenby 117, 119, 201, 203, 389, 493, 500
Campbell *v.* Butler 473, 476, 477
Canal Bank *v.* Bank of Albany 361, 379, 380
Canfield *v.* Vaughan 147, 148, 471
Cannon *v.* Gibbs 460
Carleton *v.* Brooks 17
Carley *v.* Vance 228
Carlos *v.* Fancourt 22, 25
Carlow *v.* Kinealy 28
Carmena *v.* Bank of Louisiana 343
Carnegie *v.* Morrison 425, 482
Carr *v.* Shaw 173
Carrol *v.* Blencow 86
Carroll *v.* Upton 171, 236, 316
Carson *v.* Bank of Alabama 320
Carstairs *v.* Rolleston 423
Carter *v.* Saunders 64
Carver *v.* Warren 467, 468
Carvick *v.* Vickery 125, 239, 379
Cary *v.* Bancroft 437
——— *v.* Gooding 444
Cash *v.* Kennion 166, 397
Castle *v.* Burditt 211, 212
Caswell *v.* Coare 262
——— *v.* Wendell 264
Catskill Bank *v.* State 343, 344
——— *v.* Messenger 409
Caudell *v.* Shaw 85
Caunt *v.* Thompson 287, 295, 348, 367
Cayuga County Bank *v.* Bennett 320, 322
——— *v.* Dill 275
——— *v.* Hunt 241
——— *v.* Warden 349, 354
Cecil *v.* Plaistow 427
Central Bank *v.* Davis 138, 148, 270, 272, 360, 380
Chadwick *v.* Allen 9, 12
Chaffee *v.* Jones 58
Chalmers *v.* Lanion 178, 191
Chamberlain *v.* Hopps 45
Champion *v.* Plumer 33
——— *v.* Terry 445, 449

	Section
Chandler *v.* Herrick	409, 410
——— *v.* Mason	268
Chanoine *v.* Fowler	301, 303
Chapcott *v.* Curlewis	316, 334
Chapman *v.* Annett	359
——— *v.* Black	193
——— *v.* British Guiana Bank	348
——— *v.* Durant	104
——— *v.* Keane	302, 303
——— *v.* Lipscombe	316, 335, 345
——— *v.* Robertson	161
Charles *v.* Marsden	194
Chartres *v.* Cairnes	155, 168
Chateau *v.* Webster	309
Chaters *v.* Bell	139
Chaworth *v.* Beech	121
Cheetham *v.* Ward	425
Chenot *v.* Lefere	39
Chewing *v.* Satewood	348
Chick *v.* Pilsbury	321, 324
Childs *v.* Monins	63
Church *v.* Barlow	246, 326
——— *v.* Clark	226, 228
——— *v.* Imperial Gas Light and Coke Co.	74
City Bank *v.* Cutter	297
Claridge *v.* Dalton	420, 423
Clark *v.* Blackstock	57
——— *v.* Cochran	158
——— *v.* Eldridge	348
——— *v.* Farmer	55
——— *v.* King	17
——— *v.* Martin	6
——— *v.* Percival	20
——— *v.* Pigot	137, 246
——— *v.* Reed	111
——— *v.* Ricker	190
——— *v.* Sigourney	120, 120 *a*
Clarke *v.* Devlin	411, 413, 419
———, *In the matter of,*	57, 69
——— *v.* Sharpe	316, 335, 346
Clay *v.* Oakley	71, 312, 320, 322
Clayton *v.* Gosling	29, 51
Clegg *v.* Cotton	289
——— *v.* Levy	158
Clerk *v.* Pigot	126, 142
Cleveland *v.* Stewart	70
Clode *v.* Bayley	326
Closson *v.* Stearns	11
Clowes *v.* Chaldecott	320
Clute *v.* Small	37 *a*
Cockell *v.* Gray	161
Cockerell *v.* Barber	391, 396
Cockrill *v.* Kirkpatrick	18
Cocks *v.* Borradaile	139

	Section
Cockshott *v.* Bennett	427
Coddington *v.* Davis	271, 272, 297, 357, 364
Coggill *v.* American Exchange Bank	39, 379
Cole *v.* Blake	452
——— *v.* Sherwood	69
Colehan *v.* Cooke	22, 27, 32
Collott *v.* Haigh	418, 419, 422, 423
Collins *v.* Butler	236, 238, 241
——— *v.* Martin	181, 191
Collis *v.* Emett	39
Colman *v.* Sayer	211, 224
Colt *v.* Noble	326
Combe *v.* Woolf	485
Commercial Bank *v.* Cunningham	419, 422, 423
——— *v.* Pickering	422
——— of Natchez *v.* King	324
——— *v.* Wood	128
Commonwealth *v.* Manley	87
Cone *v.* Baldwin	197
Connor *v.* Bellamont	166
——— *v.* Martin	124, 306, 375
Conroy *v.* Warren	190, 489, 490, 492, 493, 497, 498
Consequa *v.* Fanning	399
——— *v.* Willings	166
Cooch *v.* Goodman	187
Cook *v.* Bradley	362
Cooke *v.* French	352
Coolbrorth *v.* Purinton	12
Cooley *v.* Lawrence	473
Coolidge *v.* Payson	195
——— *v.* Ruggles	22
Cooper *v.* Davies	452
——— *v.* Earl	339
——— *v.* Meyer	39, 132
——— *v.* Smith	33, 485
Coore *v.* Callaway	246
Corney *v.* Da Costa	281
Cornu *v.* Blackburn	96
Cornwall *v.* Gould	411
Cory *v.* Scott	268, 292, 356, 359, 362
Cotes *v.* Davis	87, 306
Cowper *v.* Smith	485
Cox *v.* Strode	264
Crawford *v.* Millspaugh	410, 425
Crawshaw *v.* Collins	125
Creamer *v.* Perry	272, 275, 280, 282, 362
Critchlow *v.* Parry	135, 380
Crocker *v.* Getchell	306 *a*
Croghan *v.* Conrad	411
Cromwell *v.* Hynson	317

	Section
Crook *v.* Jadis	382
Crosse *v.* Smith	309, 312, 315, 322, 324
Crossen *v.* Hutchinson	241, 286
Crozer *v.* Chambers	134, 476
Cruchley *v.* Clarence	37, 37 *a*, 122, 138
Cruchly *v.* Mann	37, 37 *a*
Cruger *v.* Armstrong	190, 488, 492 497, 498
Crumpston *v.* McNair	59, 72, 472
Crutchers *v.* Wolfe	361
Cuming *v.* French	278
Cummings *v.* Gassett	12
Cunningham *v.* Soules	71
Curtis *v.* Ingham	104
——— *v.* Richards	14
Cushman *v.* Haynes	20
Cutter *v.* Powel	259
Cuyler *v.* Cuyler	408
——— *v.* Nellis	335
——— *v.* Stevens	219, 341

D.

Dana *v.* Sawyer	226
Dangerfield *v.* Wilby	104
Daniel *v.* Andrews	6
Daniels *v.* Cartony	193
Darbishire *v.* Parker	258, 319, 320, 324, 325, 337, 338
Darling *v.* March	364
Darnell *v.* Williams	187, 190
Daubuz *v.* Morshead	96
David *v.* Ellice	425
Davies *v.* Wilkinson	20
Davis *v.* Dodd	108, 445, 446
——— *v.* Williams	343
Dawkes *v.* Lord Deloraine	25, 41
Day *v.* Nix	187
Dean *v.* Hall	59, 459, 472–474, 476, 477, 480, 484
——— *v.* Newhall	409, 425
——— *v.* Richmond	85, 88
De Bergareche *v.* Pillin	234
Debarry *v.* Darnell	18
Deblieux *v.* Bullard	321
De Forrest *v.* Frary	22
De Gaillon *v.* L'Aigle	86
Dehers *v.* Harriot	16, 224
De la Chaumette *v.* Bank of England	172, 175
De la Courtier *v.* Bellamy	45
De Launey *v.* Mitchill	190
Delegal *v.* Naylor	396
Deminds *v.* Kirkman	325
Dennie *v.* Hart	389
Dennis *v.* Morrice	280, 364
Denniston *v.* Bacon	190
Descadillas *v.* Harris	104
De Sobry *v.* De Laistre	155, 157
Derry *v.* Duchess of Mazarine	86
De Silva *v.* Fuller	384
Devaynes *v.* Noble	310
De Wolf *v.* Johnson	166
——— *v.* Reland	133, 457, 459
Dezeng *v.* Bailey	410
Dickenson *v.* Bowes	227
Dingwall *v.* Dunster	201, 419
Dixon *v.* Elliott	350
——— *v.* Nuttall	26, 29
Dobree *v.* Eastwood	303, 323, 328, 330, 332
Doe *v.* Beavan	245
Dole *v.* Gold	350, 354
——— *v.* Weeks	132
——— *v.* Young	457, 460
Dollfris *v.* Frosch	246, 452
Don *v.* Lippman	164, 165
Donnelly *v.* Howie	275, 358, 362
Douglass *v.* Howland	59, 458, 460, 467
——— *v.* Reynolds	460, 472
Dowe *v.* Schutt	190
Down *v.* Halling	178, 197, 382, 489, 490, 493
Downer *v.* Remer	343
Downing *v.* Backenstoes	3
Drake *v.* Elwyn	72
Draper *v.* Jackson	87
Drayton *v.* Dale	80, 101
Drury *v.* Macaulay	21
——— *v.* Strong	264
Dubois *v.* Del	69
Du Costa *v.* Cole	391
Dugan *v.* U. States	127, 246, 452
Duhammel *v.* Pickering	96
Duke *v.* Dow	24
Duncan *v.* McCullough	237
——— *v.* Scott	188
——— *v.* Sparrow	342
——— *v.* Young	337
Dungannon *v.* Hackett	399
Dunlap *v.* Harris	6
Dunn *v.* O'Keeffe	178
Durnford *v.* Patterson	224
Dusenbury *v.* Ellis	71
Dutchess Cotton Manufacturing Company *v.* Davis	3
Duvall *v.* Farmers' Bank	281
Dwight *v.* Scovil	294
Dyer *v.* Hunt	155, 156
Dyke *v.* Mercer	409

Section

E.

Eagle Bank v. Chapin 321, 324
——— of New Haven v. Smith 118
Easley v. Crockford 197
East India Co. v. Tritton 135, 380
Eastwood v. Kenyon 185
Eaton v. Bell 63, 65
Eccles v. Ballard 132
Edie v. East India Co. 37 a, 138, 142, 143, 139
Edis v. Bury 16
Edmonds v. Cates 323, 352
Edwards v. Davis 85
——— v. Dick 193
——— v. Jones 191
Egg v. Barnett 106
Eichelberger v. Finley 498
Ekins v. East India Co. 166, 396, 399
Elford v. Teed 226, 235
Elliot v. Cooper 34
——— v. Sleeper 104
Ellis v. Brown 134, 476
——— v. Ellis 14, 17
——— v. Galindo 420
——— v. Wild 118
Ellison v. Dezell 423, 426
Emerson v. Providence Hat Manufacturing Company 69, 438
Emly v. Lye 117, 119, 389
Emmott v. Kearns 458, 459, 465
England, Bank of, v. Newman 118
English v. Darley 401, 414, 415, 416, 420, 423, 427
Esdaile v. Sowerby 241, 252, 286, 302
Etheridge v. Binney 72, 73
Etting v. Brinkerhoff 488, 497
——— v. Schuylkill Bank 330
Evans v. Cramlington 125, 146, 375, 377
——— v. Drummond 425
——— v. Evans 304
——— v. Gee 138
——— v. Gray 168
——— v. Kymer 190
——— v. Smith 195
——— v. Underwood 27
——— v. Wells 69
Everson v. Carpenter 78
Exchange and Banking Co. of N. Orleans v. Boyce 343
Exon v. Russell 49

Section

Eyre v. Barthrop 424

F.

Fairfield v. Adams 127
Faith v. Richmond 72
Faithorne v. Blaquire 85
Fales v. Russell 111, 243
Fanning v. Consequa 166
Farmers' and Mechanics' Bank v. Day 359
Farnum v. Fowle 241, 286
Fayle v. Bird 227, 235
Fear v. Dunlap 134, 474, 476
Feeter v. Heath 71
Feise v. Randall 427
Fenn v. Harrison 117, 118
Fenton v. Goudry 235
Fentum v. Pocock 418, 419, 422, 423
Fenby v. Pritchard 195
Fenn v. Harrison 118
Ferguson v. Flower 159
Ferris v. Bond 22, 34
Fergusson v. Children 371
Field v. Nickerson 129
Fink v. Cox 184
Firth v. Thrush 316, 335, 359, 362
Fisher v. Evans 316, 335
——— v. Leslie 14
——— v. Pomfrett 36, 142
Fishmongers' Company v. Robertson 74
Fitch v. Sutton 410
Fitler v. Morris 316
Fitzgerald v. Williams 269
Fleckner v. Bank of U. States 246
Fleming v. Simpson 188
Flemington v. Smothers 167
Fletcher v. Bank of U. States 127
——— v. Froggatt 362
Flight v. McLean 16
Flindt v. Waters 94
Flint v. Day 476
Foden v. Sharp 228
——— and Slater v. Sharp 228
Fogg v. Sawyer 119, 389
Foler v. Givens 458
Folger v. Chase 121, 127, 151, 243
Fonda v. Van Horne 77
Foote v. Brown 460
Forrey v. Baxter 104
Foster v. Barney 207, 480
——— v. Fuller 63
Fotheringham v. Price 275
Fowell v. Forrest 509
Fox v. Frith 65

Section

Francis *v.* Wigswell 85
——— *v.* Wilson 263
Franklin *v.* Vanderpoel 498
——— *v.* Verbois 238, 312
Frazer *v.* Harvie 359
Freakley *v.* Fox 444
Free *v.* Hawkins 24, 25, 135, 148, 291, 367
Frederick *v.* Cotton 36
Freeman *v.* Boynton 111, 243, 246, 247, 255, 265, 280, 362
French *v.* Price 425
French's Executors *v.* Bank of Columbia 295, 357
Fry *v.* Hill 208
—— *v.* Rousseau 18
Frye *v.* Barker 419
Fuller *v.* McDonald 148, 171
Fullerton *v.* Bank of U. S. 234, 243
Furniss *v.* Gilchrist 74, 115*b*, 178, 190, 195
Furze *v.* Sharwood 72, 73, 352, 353

G.

Gadcomb *v.* Johnson 128
Gaither *v.* Farmers' and Mechanics' Bank of Georgetown 193
Gale *v.* Kemper 228, 243
—— *v.* Kemper's Heirs 234
Galway *v.* Matthew 57, 73
Galpin *v.* Hard 264
Galt *v.* Galloway 378
Gamblin *v.* Walker 6
Garford *v.* Bradley 88
Garland *v.* The Salem Bank 241, 275, 280, 361
Garner *v.* Garner 85
Garnett *v.* Woodcock 226
Goscoigne *v.* Smith 187
Gaters *v.* Madeley 306
Geary *v.* Physic 11, 34, 121
Geill *v.* Jeremy 320, 324
George *v.* Surrey 121
Gibb *v.* Mather 227, 229
Gibbon *v.* Coggon 362, 364
——— *v.* Scott 148
Gibbs *v.* Merrill 78
Gibson *v.* Minet 33, 120
——— *v.* Powell 121
Gilbert *v.* Dennis 111, 243
——— *v.* Nantucket Bank 132
Giles *v.* Bourne 45
Gill *v.* Cubett 197
Gillard *v.* Wise 242
Gillett *v.* Averill 234
Gist *v.* Lybrand 343

Section

Gladstone *v.* Hadwen 188
Glassington *v.* Rawlings 211
Glenn *v.* Thistle 322, 362
Gloucester Bank *v.* Worcester 419
Glynn *v.* Baker 55
Goldsmith *v.* Bland 315
Goddin *v.* Shipley 165, 215
Goodall *v.* Dolley 275, 278, 361
Goodman *v.* Harvey 109, 113, 196, 197, 382
Goodnow *v.* Smith 425
——— *v.* Tyler 438
Goodsell *v.* Myers 78
Gore *v.* Brazier 264
Gorgerat *v.* M'Carty 246
Gorgier *v.* Mieville 55
Goss *v.* Nelson 26, 28
Gould *v.* Armstrong 192
——— *v.* Robson 413, 414, 422
Goupy *v.* Harden 65, 146, 208
Gowan *v.* Jackson 208, 308
Grafton Bank *v.* Flanders 71
Graham *v.* Moore 305
Granden *v.* Le Roy 194
Grand Bank *v.* Blanchard 320
Granite Bank *v.* Ayers 238, 286, 312, 313
Grant *v.* Healey 399
——— *v.* Vaughan 6, 36, 113, 137
——— *v.* Welchman 187
Gray *v.* Cooper 80
—— *v.* Donahoe 18
Green *v.* Boaz 36
—— *v.* Croft 452
—— *v.* Davis 12
—— *v.* Deakin 73
—— *v.* Dodge 59, 472
—— *v.* Drebilbis 29
Greenwood *v.* Curtis 157, 438
Gregory *v.* Fraser 188
——— *v.* Paul 86
Grew *v.* Bevan 188
—— *v.* Burditt 190
Griffin *v.* Goff 275, 287, 361
Griswold *v.* Waddington 94, 100, 262
Grosvenor *v.* Stone 334
Groton *v.* Dallheim 241
Grover *v.* Grover 128
Grugeon *v.* Smith 352, 353
Guernsey *v.* Burns 126
Guidrey *v.* Vives 468
Guild *v.* Eager 180
Gunson *v.* Metz 275
Guy *v.* Harris 14
Gwinnell *v.* Herbert 128, 129

Section

H.

Haddock v. Bury 362
——— v. Murray 243
Hagedon v. Reid 297
Hague v. French 45
Haigh v. Brooks 465
Hale v. Burr 237, 253
Hall v. Cole 415
—— v. Farmer 457, 459, 472
—— v. Franklin 76
—— v. Hadley 485
—— v. Hale 197
—— v. Newcomb 133, 138, 147, 469, 473, 476, 477, 480
—— v. Rogers 460
—— v. Smith 57
—— v. Wilcox 423
Hallett v. Holmes 415
Haly v. Lane 191
Halstead v. Mayor of New York 74
Hammett v. Wyman 425
Hammond v. Dufrene 498
——— v. Messenger 128
Hampton v. Speckenagle 71
Handly v. Rankin 296
Hank v. Crittenden 460
Hansard v. Robinson 106, 107, 201, 243, 389, 445, 446, 449, 450
Hanson v. Buckner 264
Harker v. Anderson 488–490, 498
Harley v. Thornton 119, 389, 502
Harris v. Clark 239, 255
——— v. Robinson 316
Harper v. Little 71
Harrisburg Bank v. Meyer 190
Harrison v. Close 409, 410, 425
——— v. Courtauld 418, 423
——— v. Ruscoe 306 a
Hart v. Green 229
—— v. Long 235, 362
Hartford Bank v. Barry 127, 246
———— v. Stedman 320, 324
Hartley v. Case 348–352
——— v. Wilkinson 23
Harvey v. Archbold 167
Haslett v. Ehrick 411
Hatch v. Trayes 51
Hatchett v. Baddeley 85, 86
Haugh v. Gray 459
Haussoullier v. Hartsinck 26
Hawes v. Armstrong 458
Hawken v. Bourne 72
Hawkes v. Salter 324, 331
——— v. Saunders 185
Havens v. Huntington 178, 180

Section

Haydock v. Lynch 25
Hayes v. Warren 185
Haynes v. Birks 320, 326
Hazelton Coal Co. v. Ryerson 340, 343
Healy v. Gorman 166, 167
Heaton v. Hubbard 480
Hedger v. Steavenson 352, 353
Hefford v. Morton 413
Hemenway v. Stone 57
Henderson v. Appleton 500
——— v. Benson 192, 193
Henry v. Jones 211
Hensdale v. Bank of Orange 111
Hepburn v. Toledano 236
Herford v. Wilson 362
Herrick v. Carman 133, 473, 476, 477, 480
Herring v. Dorell 362
Hestres v. Petronic 309
Hewet v. Goodrick 413
Heylyn v. Adamson 4, 121
Heywood v. Perrin 49
——— v. Watson 186, 195
——— v. Wingate 36 a
Hicks v. Brown 168
—— v. Duke of Beaufort 359, 364
Higham v. Ridgeway 297
Hill v. Halford 22
—— v. Heap 293
—— v. Lewis 128, 477, 480
—— v. Varrell 316, 344, 359
Hills v. Bannister 63, 69, 70
Hilton v. Fairclough 323
——— v. Shepherd 258, 324, 331
Hine v. Allely 238, 315
Hinsdale v. Bank of Orange 448
Hitchcock v. Humphrey 460
Hoare v. Clute 438
——— v. Graham 25, 148, 150, 291, 367
Hodges v. Adams 139
——— v. Gault 317
——— v. Steward 121
Hodgkins v. Bond 467
Hogaatt v. Bingaman 322
Holbrow v. Wilkins 284, 485
Holliday v. Atkinson 51, 79, 181, 184, 187, 362
Holeman v. Hobson 191
Holmes v. Blogg 77
——— v. De Camp 104, 438
Homes v. Smith 195, 220
Hone v. Allen 186
—— v. Folger 186
Hooper v. Williams 16
Hopes v. Alder 275, 364

Section
Hopkins v. Liswell 274, 275, 362
——— v. Mehaffy 69, 71
Hopkirk v. Page 262, 337
Hordern v. Dalton 338
Horford v. Wilson 364
Hornblower v. Proud 186
Horne v. Redfearn 12
Hosford v. Nichols 166, 167
Hough v. Gray 58, 59, 457, 468, 470, 472, 473, 476, 477, 480
——— v. Barton 106
Houghton v. Page 155, 156, 166, 167
Houlditch v. Cauty 352, 353
Houriet v. Morris 98
How v. Bigelow 88
Howard v. Chapman 389
——— v. Ives 316, 321, 326, 327, 331, 335
——— v. Oakes 88
Howden v. Haigh 421
Howe v. Bowes 237, 238, 241, 315, 500
——— v. Nickels 460
Howell v. Jones 485
——— v. Wilson 380
Hubbard v. Jeckson 180
——— v. Troy 297, 324
Hubbly v. Brown 413
Hudson v. Granger 249
Hull v. Blake 168
——— v. Pilfield 422
Hunt v. Adams 57-59, 133, 466, 467, 473, 480
——— v. Boyd 104
——— v. Brigham 419, 422
——— v. Brown 459, 470, 372, 478
——— v. Fish 195, 343
——— v. Holden 213
——— v. Massey 79
——— v. Wadleigh 241
Hunter v. Jeffery 39, 132
Hurd v. Little 411
Hussey v. Freeman 278, 365
Hutchins v. Olcutt 104
Hutz v. Karthause 307
Hyde v. Price 85

I.

Ilsley v. Jewett 438
Innes v. Dunlap 174
Ireland v. Kipp 312-314, 320, 322, 323, 343

Section

J.

Jacaud v. French 402, 425
Jackman v. Mitchell 427
Jackson v. Davidson 427
——— v. Lomas 427
——— v. Newton 201
——— v. Richards 241
——— v. Stackhouse 410
——— v. Warwick 187, 190
Jacoby v. Lausatt 265
James v. Atkins 138
——— v. Badger 422
——— v. Catherwood 158
Jameson v. Swinton 226, 302, 303
Jarvis v. St. Croix Manufact. Co. 295
——— v. Wilkins 458
——— v. Williams 13
Jay v. Warren 415
Jeffrey v. McTaggart 174
Jenkins v. Reynolds 458, 459
Jennings v. Thomas 476
Jennison v. Stafford 181
Jenny v. Herle 25, 27
Jerome v. Whitney 17
Johnson v. Johnson 438
——— v. Summer 265
——— v. Weed 438
——— v. Wilmarth 459
Johnston v. Searey 271
Jolly v. Young 213
Jones v. Darch 78, 80
——— v. Fales 17, 18, 111, 128, 241, 360
——— v. Fort 246, 247, 249, 305
——— v. Hibbert 190, 191
——— v. Jones 51
——— v. Kennedy 438
——— v. Kennison 422
——— v. Lewis 343
——— v. Radford 239
——— v. Ryde 118, 135
——— v. Savage 274, 275, 361
——— v. Thorn 125
——— v. Wardwell 328, 346
——— v. Witter 128
Josceline v. Laserre 16, 25, 27
Josselyn v. Ames 58, 128, 459, 473, 474, 477, 480
Judah v. Harris 18
Juniata Bank v. Hale 241

Section

K.

Kasson v. Smith 190
Kay v. Duchess 86
Keane v. Boycott 77
Kearslake v. Morgan 104, 438
Keith v. Jones 18
Kemble v. Mills 270, 284, 369, 460, 489
Kennard v. Knott 414
Kennedy v. Gouveia 69
——— v. Motte 432
Kent v. Lowen 186
Kenworthy v. Hopkins 428
Kerrison v. Cooke 418, 422
Ketchell v. Burns 147, 468, 470, 472, 480, 484
Kilgour v. Miles 220
Kimball v. Huntington 12, 14, 59, 128, 472
King v. Baldwin 414
—— v. Bickley 352, 353
—— v. Box 41
—— v. Hoare 409, 410
—— v. Holmes 235
—— v. Thorn 63
Kingston v. Long 22
Kirby v. Sisson 448
Kirk v. Blurton 72
Kirshaw v. Cox 37 *a*
Kitchen v. Bartsch 102
Knight v. Hunt 190
——— v. Pugh 109, 196
——— v. Putnam 193
Konig v. Baynard 388
Kramer v. M'Dowell 322
——— v. Sandford 281
Kufh v. Weston 328, 338, 340

L.

Labron v. Woram 473, 476, 480
Lacon v. Hooper 161, 212
Lacy v. Kinaston 409
Ladd v. Kenney 362
Lafitte v. Slatter 288
Lambert v. Chiselm 316
——— v. Oakes 380
——— v. Pack 380
——— v. Taylor 130
Lamourieux v. Hewitt 133, 147, 472, 480, 484
Lane v. Schutz 85
—— v. Steward 148, 272, 366
Lang v. Gale 161, 212
Langdale v. Trimmer 320, 326
Lanusse v. Barker 399

Section

Lanusse v. Massicot 238, 320
Lapice v. Smith 166
Laporte v. Landry 278, 312, 320, 322, 365
Laugher v. Brefitt 265
Lawrence v. Dougherty 17
——— v. Langley 241
——— v. M'Calmont 284
——— v. Ralston 275, 362
Lawrason v. Mason 482
Law v. East India Company 427
Laxton v. Peat 418, 419, 422, 423
Lazarus v. Shearer 69, 71
Leach v. Blow 70
Leavitt v. Putnam 178, 180
Lechmere v. Fletcher 409, 421
Ledger v. Ewer 187, 190
Lee v. Levi 415
Lee Bank v. Spencer 287
—— v. Muggeridge 185
—— v. Wilcocks 396
—— v. Zagury 178
Leeds v. Lancashire 23
Lefevre v. Loyd 65
Leffingwell v. White 148, 161, 271, 357
Legg v. Legg 88
Legge v. Thorpe 359, 498
Leggett v. Raymond 480, 484
Lehman v. Jones 237
Leicester v. Rose 427
Lenox v. Prout 415, 419
——— v. Roberts 265, 324, 325, 331
Leonard v. Gary 148, 274, 275, 357, 359, 361
——— v. Vredenburgh 133, 457, 459, 472, 473
——— v. Walker 51
Leroy v. Johnson 72
Le Roy v. Crowninshield 169
Lester v. Garland 211
Leiber v. Goodrich 18
Levy v. U. States Bank 379
Lewis v. Brewster 460
——— v. Burr 219
——— v. Cosgrave 187, 190
——— v. Gompertz 352, 353
——— v. Jones 426, 427
——— v. Lee 85
——— v. Ord 27
——— v. Owen 168
——— v. Peake 262
——— v. Petavin 111, 448
Lickbarrow v. Mason 191
Liggett v. Bank of Pennsylvania 411

Section
Lightbody v. The Ontario Bank 119, 389
Lincoln and Kennebec Bank v. Page 271
Lindenberger v. Beall 320
Lindo v. Unsworth 220, 320, 321
Lindon v. Hooper 265
Lindus v. Bradwell 87
Little v. O'Brien 125, 138, 246
—— v. The Phenix Bank 489, 492, 497, 498
Littlefield v. Shee 185
Lloyd v. Scott 193
Lobdell v. Niphler 413, 422
Lockwood v. Crawford 207, 242, 299, 348, 349, 354
Lodge v. Dicas 425
—— v. Phelps 176
Long v. Bailie 106, 451
—— v. Colburn 69, 71
Longley v. Griggs 133
Lonsdale v. Church 263
Lord Gallway v. Mathew 188
Louisiana State Bank v. Ellery 309
—— v. Hennen 332
—— v. Rowel 312, 320, 322
—— Insurance Co. v. Shamburg 235, 236
Loveland v. Shepard 460, 472, 480
Lovell v. Evertson 126, 138
—— v. Hill 12
Lowe v. Walker 192
Lowes v. Mazzaredo 192, 193
Lowndes v. Anderson 191, 500
Lowney v. Perham 126
Lowry v. Murrell 119, 389
Loyd v. Lee 185
Ludlow v. Van Rensselaer 158
Luqueer v. Prosser 14, 59, 468, 470, 472
Lundie v. Robertson 275, 359, 362, 364
Lynch v. Reynolds 423
Lysaght v. Bryant 306 a
—— v. Walker 458

M.

Macartney v. Graham 445
Macintosh v. Haydon 201
Mactier v. Frith 430
Magruder v. Union Bank of Georgetown 198, 241
Maillard v. Duke of Argyle 404
Maisonnaire v. Keating 96
Mallet v. Thompson 409, 419, 425

Section
Maltby v. Carstairs 424, 426
Manadue v. Kitchen 322
Maneely v. McGee 104, 438
Mann v. Chandler 69
—— v. Lent 187
—— v. Moore 346
Manrow v. Durham 59, 457–459, 468, 470, 478, 480, 484
Manuf. Co. (Dutchess Cotton) v. Davis 3
Manuf. & Mechanics' Bank v. Winship 73
Many v. Beekman Iron Co. 69
Marchington v. Vernon 375
Margesson v. Goble 415
Margetson v. Aitken 364, 426
Markle v. Hatfield 118, 502
Marlow v. Pitfield 79
Marsh v. Maxwell 303, 330, 332
—— v. Ward 57
Marshall v. Rutton 85, 86
Marston v. Allen 120 a, 137, 138, 178
Martel v. Tureauds 281
Martin v. Boyd 476
—— v. Bank of the U. S. 448
—— v. Chauntry 17
—— v. Franklin 399
—— v. Ingersoll 274, 275, 280, 321, 361, 362
—— v. Long 264
—— v. Winslow 274, 275, 362
Mason v. Franklin 231
—— v. Hunt 402
—— v. Morgan 87
—— v. Rumsey 73
Masters v. Barretts 16, 49
Matheson's Administrator v. Grant's Administrator 72
Mauran v. Lamb 125, 246
May v. Coffin 272, 275, 280, 361, 362
Mayhew v. Crickett 421, 485
—— v. Prince 71
Mayor v. Johnson 111, 449
McConnell v. Thomas 127
McCormick v. Trotter 18
McClure v. Dunkin 263
McCrummen v. McCrummen 322
McCullock v. Eagle Ins. Co. 430
McDonald v. Bovering 427
McGrudder v. Bank of Washington 235, 236, 264, 316, 317, 340
McHenry v. Ridgeley 127
McLain v. Waters 316
McLanahan v. Brandon 316, 335

Section
McLaren v. Watson's Ex'rs 59, 147, 457, 470, 483, 484
McLemore v. Powell 415
McMurtrie v. Jones 316, 317, 335, 344
McNair v. Gilbert 106, 111
McNairy v. Bell 288
McNeilage v. Holloway 88, 89, 124, 306
Mead v. Engs 336
—— v. Small 180, 281
Mechanics Bank v. Griswold 281
—————— of Alexandria v. Bank of Columbia 69
Mechanics & Traders Bank v. Compton 342, 343
Medbury v. Hopkins 155
Meech v. Churchill 59, 472, 480
—— v. Smith 71
Meeker v. Jackson 111, 448
Mellish v. Rawdon 208
—— v. Simeon 399
Mellen v. Race 501
Mellon v. Croghan 228
Mendez v. Carreroon 106, 452
Merchants Bank v. Birch 310
Merritt v. Benton 297
Merwin v. Camp 295
Messenger v. Southey 350, 351, 353
Michael v. Myers 415
Mickles v. Colvin 195
Miers v. Brown 335, 353
Miles v. Hall 341
—— v. Williams 124, 130
Millaudon v. Arnous 413
Miller v. Gaston 59, 133, 147, 458, 459, 468–470, 480, 484
—— v. Hackley 275, 287, 361, 362
—— v. Hennen 135
—— v. Irvine 459
—— v. Race 113, 137, 191, 382
—— v. Thomson 16
—— v. Webb 111, 448
Mills v. Bank of U. S. 265, 348, 349, 354
—— v. Rouse 361
—— v. Wyman 362
Milne v. Graham 173, 174
Milnes v. Duncan 386
Minard v. Mead 70
Minet v. Gibson 36, 39
Minor v. Mechanics Bank 127
Mirando v. City Bank 322
Mitchell v. Culver 37 a, 122

Section
Mitchell v. Degrand 217
Moffat v. Edwards 13, 27, 28
Moggridge v. Jones 187
Mohawk Bank v. Broderick 220, 490, 492, 496, 497, 500
Moies v. Bird 58, 459, 473, 476, 477
Mondel v. Steele 187
Montgomery v. Bridge 167
Montillet v. Duncan 309
Montross v. Clark 191, 195
Moodie v. Morrall 344
Moore v. Paine 3
—— v. Manning 139, 142
Morgan v. Davison 226
—— v. Jones 22
—— v. Reintzel 111, 448
—— v. Richardson 187
—— &c. v. Their Creditors 438
Morice (or Morris) v. Lee 12, 59, 472
Morley v. Boothby 133, 458
—— v. Stacey 117
Morse v. Earl 89
—— v. Green 69
Moseley v. Hanford 25
Moshop v. Eaton 111, 446, 451
Mottram v. Mills 246, 452
Mott v. Hicks 69, 70, 146
Muilman v. D'Eguino 208, 337, 338
Muldon v. Whitlock 104
Mule v. Brown 493
Mulherrin v. Hannum 228
Munn v. Baldwin 324, 328
—— v. Commission Co. 74, 193
Murray v. Carret 111
—— v. East India Co. 74
—— v. Governeur 104, 438
—— v. Judah 418, 492, 497, 498
—— v. King 357
Mutford v. Walcott 178
Myrick v. Hasey 147, 471, 480, 484

N.

Nash v. Brown 187
—— v. Harrington 202
—— v. Nash 89
—— v. Russell 185
—— v. Skinner 476
Nashville Bank v. Bennett 343
Nelson v. Dubois 133, 459, 463, 473, 476, 477, 480
—— v. Nelson 120 a
Nevins v. De Grand 138
Newbury v. Armstrong 458

Section

N. E. Mar. Ins. Co. *v.* De Wolf 69
Newsome *v.* Bowyer 86
New York State Bank *v.* Fletcher 104
Nicholls *v.* Bowes 228
——— *v.* Webb 297
Nichols *v.* Goldsmith 243
——— *v.* Fearson 193
——— *v.* Norris 416, 418, 423
Nicholson *v.* Chapman 141
——— *v.* Gouthit 276, 286, 288
——— *v.* Marders 343
——— *v.* Patton 197
——— *v.* Revill 425, 435
Nightingale *v.* Withington 79, 80
Nisbet *v.* Smith 427
Noble *v.* Adams 188
——— *v.* His Creditors 413
North American Coal Co. *v.* Dyett 418
North Bank *v.* Abbott 225, 229, 232, 243
Norton *v.* Eastman 484, 485
——— *v.* Lewis 148, 357
——— *v.* Pickering 268, 292
——— *v.* Waite 195
Norris *v.* Badger 452
Nott *v.* Downing 308
Nugent *v.* Roland 20

O.

Oakey *v.* Beauvais 235
Oakley *v.* Boorman 459, 470, 480
——— *v.* Johnston 457, 474, 476, 480
Obbard *v.* Betham 187
Ogden *v.* Dobbin 228 234, 243, 326
——— *v.* Glidewell 297
——— *v.* Saunders 135, 159, 168, 215
O'Keefe *v.* Dunn 193
Oliver *v.* Houndlet 77
Ontario Bank *v.* Lightbody 502
——— *v.* Worthington 195
Oriental Bank *v.* Blake 310
Orr *v.* Maginnis 498
Orvis *v.* Newell 58
Ory *v.* Winter 168, 172
Osborne *v.* Rogers 185
Otis *v.* Gibbs 265
——— *v.* Hussey 275
Owen *v.* Barnum 17
——— *v.* Barrow 246
Owens *v.* Dickenson 85
Owenson *v.* Morse 104, 117, 119, 389, 438, 500, 502

Section

Oxford Bank *v.* Haynes 133, 421, 459, 460, 467, 469, 471–474, 476, 480
——— *v.* Lewis 416

P.

Pack *v.* Thomas 492
Packard *v.* Nye 70
——— *v.* Richardson 459
Packer *v.* Willson 470
Palmer *v.* Grant 57, 468, 480
——— *v.* Hughes 227, 228
——— *v.* Pratt 22, 28
Paradine *v.* Jane 259
Parker *v.* Gordon 226
——— *v.* Norton 265
——— *v.* Riddle 128
——— *v.* Willson 459
Parkes *v.* Bates 264
Parks *v.* Brinkerhoff 470, 474
Parr *v.* Eliason 193
Parson *v.* Gloucester Bank 419
Partridge *v.* Davis 11, 121, 147, 148
Pasmore *v.* North 48, 122
Passmore *v.* Mort 69
Pate *v.* M'Clure 275
Patience *v.* Townley 258, 261, 262
Patton *v.* State Bank 111
Payne *v.* Cutler 195
Payson *v.* Whitcomb 228
Peabody *v.* Denton 111
——— *v.* Harvey 275, 362
Peacock *v.* Banks 166
——— *v.* Rhodes 138, 191, 192
Pearsall *v.* Dwight 155, 156
Pearson *v.* Crallon 338, 443
——— *v.* Garrett 27
Peaslee *v.* Robbins 101
Peay *v.* Pickett 17
Penn *v.* Glover 243
——— *v.* Poumeirat 275, 365
Penny *v.* Innes 128, 129
Pentz *v.* Stanton 69
Pessoon *v.* Stagg 12
Percival *v.* Frampton 186, 195
Perfect *v.* Musgrave 425
Perkins *v.* Washington Ins. Co. 71
Pfiel *v.* Van Batenberg 106, 452
Phillip *v.* Paget 79
Phillips *v.* Astling 237, 251, 284, 460, 485
——— *v.* Gould 351
——— *v.* Smith 264
Philliskirk *v.* Pluckwell 87, 124, 126, 306

Section

Philpot v. Bryant 253, 413-416, 419
Piatt v. Eads 6
Pickard v. Bankes 500
Pickin v. Graham 364
Picquet v. Curtis 228
Pierce v. Benjamin 265
—— v. Whitney 288, 291, 295
Pierson v. Dunlap 26
—— v. Hooker 275, 362
—— v. Hutchinson 106, 446, 449
Pike v. Street 146, 190
Pilkington v. Commissioners 391
Pillans v. Mierop 195
—— and Rose v. Mierop and Hopkins 195
Pinder v. Nathan 336
Pintard v. Tackington 106, 111, 438
Pitcher v. Livingston 264
Pitt v. Chappelow 80
—— v. Smith 101, 188
Pitts v. Tilden 263
Planters Bank v. Sellman 415
Pletts v. Johnson 132
Plimley v. Westley 128, 129
Polhill v. Walter 71
Pool v. McCrary 23
Poole v. Dicas 324
—— v. Smith 446
Poplewell v. Wilson 186
Porter v. Boyd 322
—— v. Ingraham 410
—— v. Nekervis 127
—— v. Sayward 265
Porthouse v. Parker 239, 308
Posey v. Decatur Bank 214, 448
Potter v. Rayworth 276, 362
Potts v. Bell 94, 97, 262
—— v. Reed 145, 146
Powel v. Roach 446
Powell v. Waters 48, 194, 419
Power v. Finnie 143
Powers v. Lynch 168
Prentiss v. Danielson 281
—— v. Savage 161
Presbrey v. Williams 211
Preston v. Dowson 316, 335
—— v. Jackson 192
Prestwick v. Marshall 87, 306
Price v. Easton 362
—— v. Edmonds 413, 415, 419, 421, 422
—— Neal 387
—— v. Young 253
Prideaux v. Collier 289, 365
Pring v. Clarkson 416
Pritchard v. Scott 322

Section

Pritt v. Fairclough 297
Prosser v. Edmonds 130
Puckford v. Maxwell 104, 117, 438, 502
Pugh v. The Duke of Leeds 211
Putnam v. Lewis 104
—— v. Sullivan 122, 237

R.

Raggett v. Axmorr 418
Rahm v. The Philadelphia Bank 297
Raikes v. Todd 465
Ramuz v. Crowe 446
Randall v. Van Vetchen 69
Ranelaugh v. Champante 166
Ran v. Hughs 361
Ransom v. Mack 219, 220, 312, 316, 320, 322, 335, 344, 347-349, 354
Rawdon v. Redfield 316
Rawlinson v. Stone 123
Rawson v. Walker 24, 148
Rawstone v. Parr 57
Read v. Bank of Kentucky 297
—— v. Wheeler 14
Reading v. Weston 193
Reed v. Bachelor 77, 79
—— v. White 425
Reedy v. Seixas 348, 349, 354
Rees v. Abbott 57
—— v. Berrington 427
—— v. Marquis of Headfort 188
Reid v. Morrison 236
—— v. Paine 344
Renner v. Bank of Columbia 106, 111, 148, 448
Reynolds v. Davies 201
—— v. Douglass 274, 275, 362, 364
Rex v. Box 3, 9
—— v. Briggs 152
—— v. Randall 36, 37
Rhett v. Poe 284, 308
Rice v. Catlin 411
—— v. Gove 69, 70
—— v. Stearns 145
—— v. Wesson 207
Richards v. Richards 22, 24, 87, 88, 126, 306
Richter v. Selin 275, 278, 282, 361, 362
Rickford v. Ridge 493
Ricord v. Bettenham 96
Riddle v. Mandeville 302
Rideout v. Bristow 186
Ridley v. Taylor 73
Ripley v. Green 411

	Section
Ripley *v.* Greenleaf	416
Roach *v.* Ostler	16
Robbins *v.* Pinckard	321, 324
Roberts *v.* Peake	22
Robertson *v.* Banks	63
——— *v.* Kensington	148
Robins *v.* Maidstone	191
——— *v.* May	22
Robinson *v.* Abell	469
——— *v.* Ames	208
——— *v.* Bland	156, 166, 190
——— *v.* Blen	201, 265
——— *v.* Read	117
——— *v.* Reynolds	191
——— *v.* Yarrow	380
Robson *v.* Bennett	493
——— *v.* Curlewis	352
——— *v.* Oliver	476
——— *v.* McGregor	352
Roche *v.* Campbell	227
Rogers *v.* Crombie	265
——— *v.* Kneeland	470
——— *v.* Langford	500, 502
——— *v.* Stephens	276, 362, 364
Rogerson *v.* Hare	302
Rohde *v.* Proctor	307
Rolfe *v.* Caslon	186
——— *v.* Wyatt	418
Rolt *v.* Watson	106, 451
Roosevelt *v.* Woodhull	260
Rosa *v.* Brotherson	195
Roscow *v.* Hardy	303, 334, 338
Rose *v.* Clarke	128
Rosher *v.* Kieran	303
Rothschild *v.* Barnes	317
——— *v.* Corney	178, 491
——— *v.* Currie	176, 339
Routh *v.* Robertson	349
Rowan *v.* Odenheimer	349
Rowe *v.* Young	227–229
Rowley *v.* Ball	106, 111, 445, 448
——— *v.* Stoddard	425
Ruggles *v.* Patten	228, 410, 422
Rumball *v.* Ball	29, 201
Russell *v.* Brooks	87
——— *v.* Cook	186
——— *v.* Hadduck	195
——— *v.* Langstaffe	10, 48, 122, 201, 241, 286, 480
——— *v.* Moseley	458, 465
——— *v.* Whipple	14
——— *v.* Wiggin	482

S.

	Section
Safford *v.* Wickoff	316, 335
Sage *v.* Wilcox	459, 480
Salem Bank *v.* Gloucester Bank	379
Salisbury *v.* Hale	460
Salter *v.* Burt	220, 489, 490
Samuell *v.* Howarth	485
Sanderson *v.* Bowes	227, 228
Sandford *v.* Dillaway	241, 286
Sanford *v.* Mickles	125
——— *v.* Norton	474, 477
Sanger *v.* Stimpson	128
Sargeant *v.* Morris	459
Sargent *v.* Appleton	400, 413, 422
Saul *v.* Brand	322
Saunders *v.* Wakefield	458, 459
Saunderson *v.* Judge	234, 235, 328
——— *v.* Piper	21
Savage *v.* Merle	143
Savings Bank of New Haven *v.* Bates	178
Sayer *v.* Frick	125
——— *v.* Wagstaff	389, 438
Sayre *v.* Frick	255
Scafford *v.* Bulkly	130
Scarpellini *v.* Atcheson	88
Schofield *v.* Bayard	258
Scholefield *v.* Eichelberger	94, 262
Scofield *v.* Day	166, 399
Scott *v.* Bevan	396
——— *v.* Gillmore	190
——— *v.* Lifford	194, 319, 320, 323, 326
Scruggs *v.* Gass	119, 389
Seabury *v.* Hungerford	133, 138, 472, 476, 477, 480
Seago *v.* Deane	185
Searight *v.* Calbraith	168, 391
Sears *v.* Brink	459
Seaver *v.* Lincoln	246, 324
Seely *v.* Bisbee	18
Selby *v.* Eden	235
Seneca Co. Bank *v.* Neass	195, 297, 322, 324, 343
Sentance *v.* Poole	101
Serle *v.* Norton	497
Sewall *v.* Russell	326, 335
Seymour *v.* Van Slyck	128, 480
Sharrington *v.* Strotten	183
Sharp *v.* Bailey	268, 275, 276
——— *v.* Emmit	65
Shaw *v.* Croft	303
——— *v.* Pratt	410
——— *v.* Reed	229, 241, 243
——— *v.* Thompson	246
Shearm *v.* Burnard	438
Shed *v.* Brett	235, 238, 239, 243, 246, 247, 320, 322, 328, 343
——— *v.* Pierce	409

Section

Sheehy v. Mandeville 104, 404, 405, 409
Sheldon v. Benham 312, 322, 329
Shelton v. Braithwaite 344, 351
——— v. Darling 69, 70
Shepard v. Hall 320
——— v. Hawley 239, 255, 308
Sherwood v. Roys 126, 246
Shillito v. Theed 192
Shirriff v. Wilks 73, 188
Shoomaker v. Roosa 186
Shortrede v. Cheek 458, 465
Shrivel v. Payne 12
Shuttleworth v. Stephens 16
Siddell v. Rancliffe 409
Sigourney v. Lloyd 143
——— v. Wetherell 485, 486
Simmons v. Guttridge 444
Simonds v. Heard 70
Simpson v. Vaughan 12
Sinclair v. Lynch 354
Skelding v. Warren 190
Skofield v. Haley 460
Slacum v. Pomery 129, 172
Slater v. West 197
Smallwood v. Vernon 128, 129, 480
Smedberg v. Simpson 192, 381
——— v. Whittlesey 381
Smedes v. Utica Bank 312, 320, 322
Smith v. Bartholomew 410
——— v. Becket 288, 413
——— v. Boheme 18, 22, 27
——— v. Boulton 352
——— v. Bromley 427
——— v. Buchanan 169
——— v. Chester 379
——— v. Clark 139
——— v. De Witts 195
——— v. Gibbs 297
——— v. Kendall 3, 9, 41, 375
——— v. Knox 194, 401, 420, 423
——— v. Lusher 72
——— v. M'Clure 36, 142
——— v. Mead 155
——— v. Merier 135, 380
——— v. Mullet 303, 320, 323, 24, 331
——— v. Nightingale 20
——— v. Pedley 87
——— v. Pickering 120
——— v. Prestige 381
——— v. Robinson 228
——— v. Rockwell 111, 244, 445, 448
——— v. Runnells 381
——— v. Shaw 399
——— v. Smith 169

Section

Smith v. Thatcher 307
Smyth v. Hawthorn 316, 328
Snaith v. Mingay 122
Snow v. Peacock 197
Soares v. Glyn 142
Solarte v. Palmer 297, 348, 350, 351, 353
Solomon v. Turner 187
Solomons v. Bank of Eng. 192, 501
South Carolina Bank v. Case 73
Sowerby v. Brooks 375
Sparrow v. Carruthers 86
——— v. Chisman 187, 190
Spencer v. Bank of Salina 316, 344, 345
——— v. Sterling 337
Spering's Appeal 195
Spies v. Gilmore 236, 264, 476
Spittle v. Lavender 69
Spring v. Lovett 148
Staats v. Ten Eyck 264
Stadt v. Lill 458, 459
Stafford v. Yeates 302, 303, 419
Standage v. Creighton 362, 363
Stalker v. McDonald 195
Stanton v. Blossom 303
Staples v. Franklin Bank 226
——— v. Okines 287
Starke v. Cheeseman 16
State Bank v. Fearing 380
——— v. Hennen 235
——— v. Hurd 232, 234, 235
Stead v. Liddard 458, 459
Stedman v. Gooch 234
Steers v. Lashley 190
Steinman v. Magnus 410, 426
Stephens v. Foster 197
——— v. Wilkinson 187
Sterling v. Marietta and Susq. Trading Co. 126, 246
——— v. Peet 264
Stetson v. Patten 71
Stevens v. Blunt 22, 29
——— v. Lynch 275, 419
——— v. Strong 40
——— v. West 295
Stevenson v. Lynch 360
Stewart v. Donnelly 18
——— v. Eden 264, 310, 315, 335, 416, 419
——— v. Kennett 301
——— v. Lee 145
——— v. Lord Kirkwall 85
——— v. Steward 362
Stillwell v. Robb 230
Stirling v. Forrester 425
Stock v. Mawson 427

	Section
Stocken *v.* Collins	328, 352
Stockman *v.* Parr	349, 352
Stokes *v.* Lewis	185
Stone *v.* Dennison	77, 78
—— *v.* Freeland	39
Stout *v.* Jackson	264
Strange *v.* Price	350, 351, 353
—— *v.* Wigney	197
Sturdy *v.* Henderson	207, 217
Sturtevant *v.* Ford	194
Styles *v.* Wardle	45
Suckley *v.* Furse	416
Sumner *v.* Brady	190
—— *v.* Gay	468
Sutton *v.* Toomer	224
Swan *v.* Steele	73
Swasey *v.* Vanderheyden	78
Sweetser *v.* French	12, 58, 128
Swetland *v.* Creigh	18
Swett *v.* Patrick	264
Swift *v.* Stevens	111
—— *v.* Tyson	178, 186, 187, 195
Swinyard *v.* Bowes	284, 357, 438, 485, 500
Sylvester *v.* Downer	134, 473, 476, 477

T.

Talbot *v.* Gay	460
Tapley *v.* Martens	117
Tappan *v.* Ely	148
Tassell *v.* Lewis	213, 500
Tate *v.* Hilbert	187
Taunton Bank *v.* Richardson	148, 271, 279, 291, 357-359, 364
Taylor *v.* Binney	147, 148, 471
—— *v.* Croker	80
—— *v.* Dobbins	34
—— *v.* Jones	362
—— *v.* Mather	178, 190
—— *v.* Young	493
—— *v.* M'Cune	134
—— *v.* Snyder	236, 237, 264
Ten Eyck *v.* Vanderpoel	186
Tenny *v.* Prince	58, 133, 138, 459, 467, 471, 474, 476, 477
Terrell *v.* Smith	403, 409
Terry *v.* Parker	268
Thackeray *v.* Blackett	244, 290, 498
Thatcher *v.* Dinsmore	63, 104, 438
—— *v.* Winslow	126, 246
Thayer *v.* King	244, 448
Thicknesse *v.* Bromilow	73
Thomas *v.* Bishop	65
—— *v.* Breedlove	357
—— *v.* Courtney	409, 416, 427

	Section
Thomas *v.* Davies	460
—— *v.* Roosa	17
—— *v.* Todd	389
—— *v.* Jennings	476
Thompson *v.* Cook	228
—— *v.* Gibson	178
—— *v.* Hale	190
—— *v.* Powles	166
—— *v.* Robertson	139
Thomson *v.* Ketcham	166, 168
Thornton *v.* Wynn	271, 274, 275, 358-360, 362
Thurston *v.* McKown	191
Tibetts *v.* Dowd	274, 275
Tillman *v.* Wheeler	133, 476, 477, 480
—— *v.* Ailles	132
Tindal *v.* Brown	301, 302, 324, 325, 348, 353
Tippets *v.* Walker	70
Titus *v.* Lady Preston	213
Toby *v.* Barber	104, 438
Tombeckbee Bank *v.* Stratton	416, 423
Tooker *v.* Bennett	427
Touro *v.* Cassin	156
Tower *v.* Durell	275, 278, 282, 365
Townsend *v.* Derby	51
—— *v.* Hubbard	69
Townsley *v.* Springer	324
—— *v.* Sumrall	186, 195
Thrasher *v.* Ely	460
—— *v.* Everhart	155, 157
Trecothick *v.* Edwin	227
Treuttel *v.* Barrandon	143, 146
Triggs *v.* Newnham	226
Trimbey *v.* Vignier	140, 155, 170, 174, 175
Trimble *v.* Thorne	274, 275, 362, 419
True *v.* Fuller	484
Truesdell *v.* Thompson	132
Truman *v.* Hurst	78
Trustees in Hanson *v.* Stetson	148
Tucker *v.* Moreland	77
—— *v.* Smith	190
Tuckerman *v.* Newhall	425
Tunno *v.* Lague	260
Tunstall *v.* Walker	316
Turner *v.* Hayden	227, 235
—— *v.* Leach	356
—— Leech	303, 330, 332, 334, 388
Twopenny *v.* Young	409, 416, 425
Tye *v.* Gwynne	187
Tyler *v.* Binney	484

Section

U.

U. States v. Barker 312, 324, 341, 452
——— v. Buford 41, 130
——— v. Cushman 409, 421
——— v. Davis 326
——— v. White 41, 130
U. States Bank v. Bank of Georgia 379
——— v. Binney 72, 73
——— v. Goddard 303, 326, 330
——— v. Lyman 115 b
——— v. Smith 228, 229
Ulen v. Kittredge 58, 459, 467, 471, 473, 474, 176, 477
Union Bank of Louis. v. Brown 342
Union Bank v. Hyde 148, 272, 291, 297
Upham v. Prince 128, 147, 148, 471, 480, 484
Usher v. Dauncey 48
—— v. Rich 382
Uther v. Rich 109, 113, 197

V.

Valette v. Mason 191
Van Derveer v. Wright 274, 275
Vancleef v. Therasson 104, 438
Van Reimsdyk v. Kane 156
Van Schaick v. Edwards 156
Van Straphorst v. Pearce 129
Van Waat v. Woolley 284, 357, 485
Varner v. Nobleborough 104
Vaughan v. Fuller 276, 362
Vent v. Osgood 77
Vernon v. Boverie 389
Violett v. Patton 10, 122

W.

Wagner v. Kenner 213a
Wain v. Bailey 106, 446, 451
—— v. Warlters 458, 459, 467
Waithman v. Elsee 14
Walker v. Bank of Montgomery 423
——— v. Perkins 190
——— v. Tunstall 316
——— v. McDonald 207
Wallace v. Angry 104, 339
——— v. M'Connell 228, 230
Walter v. Haynes 345
Walton v. Dodson 484
——— v. Murcall 460

Section

Walton v. Watson 268
Walwyn v. St. Quintin 316, 415, 419, 422
Ward v. Evans 117, 389
—— v. Johnson 409, 425, 727
Warden v. Arell 168, 391
——— v. Howell 195
Warder v. Tucker 268, 280, 288, 361, 362
Wardner v. Thurlo 263
Ware v. Weathnall 264
Warren v. Allnutt 228
——— v. Lynch 55, 195
Warrender v. Warrender 155, 158
Warrington v. Furbor 284, 458, 460, 484, 485, 500
Warwick v. Bruce 78
Wathen v. Blackwell 352
Watkins v. Crouch 228
——— v. Hill 104, 438
——— v. Maule 120, 123
Watson's Ex'rs v. McLaren 133, 458, 465, 480, 484
Wagnam v. Bend 132
Weakley v. Bell 343
Webb v. Plummer 161
Weed v. Houten 228
Welch v. Lindo 146, 452
Weld v. Passamaquoddy Bank 127, 413
Wells v. Girling 427
Welsh v. Barrett 297
Wemple v. Dangerfield 324
Wennall v. Adney 185
Westcott v. Price 425
Wheaton v. Wilmarth 348
Wharton v. Wright 315, 317
Wheatley v. Williams 12
Wheeler v. Field 236
——— v. Guild 191
Whiston v. Stodder 155, 157
Whitaker v. Morris 364
——— v. Bank of England 226
Whitcomb v. Williams 104
White v. Englehard 297
——— v. Hildreth 67, 127
——— v. Hopkins 422, 423
——— v. Howland 59, 459, 468, 480
——— v. Ledwick 51
——— v. Low 128
——— v. North 12
——— v. Richmond 18
——— v. Skinner 71
Whiteman v. Childress 18
Whitehead v. Walker 178, 190
Whiting v. Walker 297

Section

Whitney v. Dutch 77
Whittier v. Graffam 237
Whittlesey v. Dean 198, 320, 324
Whitwell v. Brigham 226, 411
——— v. Johnson 111, 232, 243, 324
——— v. Kennedy 265
Wiffin v. Roberts 190
Wiggin v. Tudor 425
Wigglesworth v. Dallison 161
Widgery v. Munroe 237
Wilbour v. Turner 132
Wilcox v. Hunt 155
——— v. McNutt 312
——— v. Routh 307
Wild v. Rennards 228
Wilks v. Back 68, 73
Wilkes v. Jacks 276, 362
Wilkins v. Jadis 226
Wilkinson v. Adams 353
——— v. Henderson 310
Williams v. Bank of U. States 235, 307, 312, 315, 316, 322, 341
——— v. Grangers 480
——— v. Putnam 297
——— v. Smith 191, 195, 324
——— v. Wade 171
——— v. Waring 49, 201
Williamson v. Bennet 23
——— v. Watts 78
Willings v. Consequa 155
Willis v. Green 255, 308, 310, 329
Willison v. Patterson 94, 262
Wilson v. Holmes 126, 143
——— v. Swaybey 302, 303
——— v. Foot 421
Winship v. Bank of U. States 72
Wintle v. Crowther 73, 187
Wiseman v. Lyman 104
Wood v. Benson 465

Section

Wood v. Bodwell 438
——— v. Brown 362
——— v. Day 305
——— v. Fenwick 77
——— v. Jefferson Co. Bank 413, 416
——— v. Mullen 213a
——— v. Mytten 16
Woodcock v. Houldsworth 328
Woodbridge v. Brigham 211, 229, 243
——— v. Spooner 24, 25, 148
Woodes v. Dennett 71, 72
Woodfolk v. Leslie 12
Woodford v. Dorwin 45
Woodruff v. Merchants Bank of City of New York 488, 489
Woodward v. Winship 73
Wolcott v. Van Santvoord 228
Wolfe v. Jewett 237
Worcester Bank v. Wells 171
Worden v. Dodge 25
Worley v. Harrison 22, 28
Wooley v. Clements 220
Wright v. Hay 148
——— v. Shawcross 320, 324, 331
——— v. Simson 427
Wyatt v. Bulmer 192
——— v. Campbell 192
Wynn v. Alden 349
Wynne v. Jackson 158

Y.

Yarborough v. Bank of England 152
Young v. Adams 18, 118, 119, 389
——— v. Bryan 297
Yeates v. Grove 255
Yeatman v. Erwin 343
Yates v. Hall 96
——— v. Thomson 158
Yrisarri v. Clement 166

COMMENTARIES

ON

PROMISSORY NOTES.

COMMENTARIES

ON

PROMISSORY NOTES.

CHAPTER I.

NATURE AND REQUISITES OF PROMISSORY NOTES.

§ 1. A Promissory Note may be defined to be a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein.[1] The definition given by Mr. Justice Blackstone is, that Promissory Notes or notes of hand, are a plain and direct engagement in writing to pay a sum specified at a time limited therein, to a person therein named or sometimes to his order, or often to the bearer at large.[2] Perhaps this definition may be thought faulty in not stating that the engagement is to be absolute and unconditional. Mr. Justice Bayley more succinctly states that a Promissory Note is a written promise for the payment of money at all events.[3] Mr. Chancellor Kent follows the

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1 See Thomson on Bills, ch. 1, p. 1, (2d edit.)

2 2 Black. Comm. 467; Kyd on Bills, p. 18, (3d edit.) follows the definition of Blackstone; and Chitty, in substance, adopts it. Chitty on Bills, 548, (8th edit. 1833.) See Thomson on Bills, ch. 1, p. 1.

3 Bayley on Bills, ch. 1, p. 1, (5th London edit.); Smith on Merc. Law, 184, (3d edit.)

definition of Mr. Justice Bayley;[1] and perhaps each is open to the objection, that while it seeks brevity it is incomplete, as it does not state that the promise is made by one person to pay the money to another person specified.[2]

§ 2. The definitions of a Promissory Note to be found in the foreign law do not essentially differ (as might reasonably be supposed) from that in the Common Law.[3] Promissory Notes are, however, distinguished into various classes in France, the principal of which are notes not negotiable, called *Les Billets Simples,* and those which are negotiable, which are called *Les Billets à Ordre,* or *Billets au Porteur.*[4] The former are treated as mere acknowledgments of a debt, with a promise to pay it, answering very nearly to our Due Bill, and they do not carry with them the ordinary privileges annexed to negotiable notes.[5] Still, however, *Les Billets Simples* are assignable.[6] Heineccius designates a Promissory Note by the name of *Chirographum,* (borrowing the word from the Roman Law,) or *Cambium Proprium;* as to which he says, *Quum itaque in cambio proprio duæ tantum personæ inter se, debitor et creditor, contrahant, necesse est, ut uterque*

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1 3 Kent, Comm. Lect. 44, p. 74, (5th edit.)

2 See Brown *v.* Gilman, 13 Mass. R. 158.

3 Pothier, De Change, n. 216.

4 Merlin, Répertoire, *Billets,* § 1, (edit. 1825); Id. *Ordre, Billets à,* § 1; Savary, Le Parfait Négociant, Tom. 1, p. 888; Pothier, De Change, n. 216–218; Pardessus, Droit Comm. Tom. 2, art. 477, 478, 483; Chitty on Bills, ch. 5, p. 181, (8th edit. 1833); Jousse, Sur L'Ord. de 1673, tit. 5, p. 126; Savary, Le Parfait Négoc. Tom. 1, Pt. 1, Liv. 3, ch. 7, p. 195, 196, 200, 201; Nouguier, Des Lettres de Change, Tom. 1, Liv. 4, § 1, p. 492, 493, 496, 498; Id. § 2, p. 513; Code de Comm. art. 138, 637, 638.

5 Ibid.

6 Story on Bills, § 19; Post, § 15.

duarum personarum vicem sustineat, adeoque debitor se simul trassantem, simul, acceptantem; creditor vero simul remittentem, simul præsentantem esse fingat.[1] He manifestly here refers to a negotiable Promissory Note; for he immediately adds, "*Quamvis ergo ejus modi litteræ cambiales vere sint Chirographa, cambiorum schemate induta: tamen ideo permagni momenti sunt, quod* 1) *uti alia cambia possunt indossari,* 2) *facillime præscribuntur, et* 3) *non sequuta solutione locus est processui et exsequutioni cambiali.*[2]

§ 3. Although a Promissory Note is, in contemplation of law, entitled to all the privileges belonging to such an instrument by the Commercial Law, as well as by Common Law, without being negotiable;[3] yet, it is the

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[1] Heinecc. de Camb. cap. 2, § 2.

[2] Id. cap. 2, § 3.

[3] Bayley on Bills, ch. 1, § 10, p. 33, 34, (5th edit.) and note 73; Chitty on Bills, ch. 5, p. 180, (5th edit. 1833); Id. ch. 12, p. 557; Smith *v.* Kendall, 6 Term R. 123; Rex *v.* Box, 6 Taunt. R. 325; Burchell *v.* Slocock, 2 Ld. Raym. 1545; Downing *v.* Backenstoes, 3 Caines, R. 137; Dutchess Cotton Manuf. *v.* Davis, 14 Johns. R. 238; Moore *v.* Paine, Cas. Temp. Hard. 280. Yet it remained a doubt, down to the time of the decision in Smith *v.* Kendall, 6 Term R. 123, whether a Promissory Note, not negotiable, was within the Statute of 3 and 4 Anne, ch. 9. Lord Kenyon there said: "If this were *res integra*, and there were no decision upon the subject, there would be a great deal of weight in the defendant's objection; but it was decided in a case in Lord Raymond, on demurrer, that a note payable to B without adding 'or to his order,' or 'to bearer,' was a legal note within the act of parliament. It is also said in Marius, that a note may be made payable either to A or bearer, A or order, or to A only. In addition to these authorities, I have made inquiries among different merchants respecting the practice in allowing the three days' grace, the result of which, is, that the Bank of England and the merchants in London allow the three days' grace on notes like the present. The opinion of merchants, indeed, would not govern this Court in a question of law, but I am glad to find that the practice of the commercial world coincides with the decision of a court of law. Therefore, I think that it would be dangerous now to shake that practice, which is warranted by a solemn decision of this Court, by any speculative reasoning upon the subject." I have not, after some research, been able to find the passage referred to by

latter quality which gives it its principal importance and value in modern times, and makes it a circulating credit, so extensively useful and so generally resorted to in the commerce of the world. Promissory Notes are now generally made negotiable, by being stated therein to be payable to A or order, or to the order of A, or to A or bearer, or to the bearer generally.[1] Perhaps the silent but steady progress in England, from the simple use of the non-negotiable Notes, before the reign of Queen Anne, to the present almost universal negotiability of such instruments in our day, cannot be better expressed than by referring to the language of Blackstone above cited, where he adverts to the fact that Promissory Notes are payable "to a person therein named," and then cautiously adds, "or sometimes to his own order or often to the bearer." [2] The reverse language might be far more justly used in the present day; and it might be correctly stated that Promissory Notes are now generally negotiable by being payable to order, or to the bearer; and that they are rarely limited to be payable only to a particular person named therein. We may add in this connection, that the person who makes the Note is called the maker, and the person to whom it is payable is called the payee; and when it is negotiable by indorsement, and is indorsed by the payee, he is called the indorser, and the person to whom the interest is transferred by the indorsement is called the indorsee.[3] Every indorsee is of course deemed the holder, and so is

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his Lordship in Marius. Perhaps he referred to Marius, p. 14, or p. 34. See also, Com. Dig. *Merchant*, F. 15.

[1] Chitty on Bills, ch. 5, p. 181, (8th edit. 1833); Id. ch. 6, p. 219.

[2] 2 Black. Comm. 467.

[3] Chitty on Bills, ch. 12, p. 548, (8th edit. 1833); Bayley on Bills, ch. 1, § 1, p. 4, (5th edit.)

every person, who, by a transfer of a note payable to the bearer, becomes entitled thereto.[1] The Scottish Law seems precisely coincident with the English Law as to Promissory Notes, except so far as respects the remedial process thereon; there being some peculiar privileges annexed thereto in Scotland.[2]

§ 4. It seems scarcely necessary to point out the distinction between Bills of Exchange and Promissory Notes in their general structure and character. In a Bill of Exchange, there are ordinarily three original parties, the drawer, the payee, and the drawee, who, after acceptance, becomes the acceptor. In a Promissory Note, there are but two original parties, the maker and the payee. In a Bill of Exchange, the acceptor is the primary debtor in the contemplation of law to the payee; and the drawer is but collaterally liable. In a Promissory Note, the maker is, in contemplation of law, the primary debtor. If a Note be negotiable, and is indorsed by the payee, then there occurs a striking

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[1] The usual form of a Promissory Note in England, according to Mr. Chitty, is: — " £50 (or the other proper sum.) — London, (or other place,) 1st of January, 1832, (or the proper date.) Two months after date, (or on demand, or at any other specified time,) I promise to pay to Mr. A B, or order, fifty pounds, value received." Signed, C D. Chitty on Bills, ch. 12, p. 548, (8th edit. 1833.) The common form in America is: — "Boston, January 1, 1844. For value received, I promise to pay A B, or order, (or to the order of A B,) one thousand dollars, in ——— days after date, (or on demand, &c.") Signed, C D. The common form in France, according to Nouguier, is : — " Au dix Novembre prochain (ou a toute autre échéance.) Je paierai à M. Jacques, ou à son ordre, la somme de mille francs, valeur reçue comptant (ou de toute autre manière.) Paris, ce (la date) 18—. Paul. [B. P. f. 1000."] Nouguier, Des Lettres de Change, Liv. 4, § 1, p. 497. Terms substantially the same, are given in Dupuy de la Serra, Des Lettres De Change, ch. 19, p. 192, 193, (edit. 1789); Savary, Parfait Négociant, Pt. 1, Liv. 3, ch. 10, p. 244, 245. A place of payment is often mentioned in Promissory Notes, as, for example, it is made payable at a particular place, or at a particular bank or banker's.

[2] 1 Bell, Comm. B. 3, ch. 2, § 5, p. 386, 387, (5th edit.)

resemblance in the relations of the parties upon both instruments, although they are not in all respects identical.[1] The indorser of a Note stands in the same relation to the subsequent parties as the drawer of a Bill, and the maker of the Note is under the same liabilities as the acceptor of a Bill.[2]

§ 5. The origin of Promissory Notes is quite as obscure as that of Bills of Exchange. There is no doubt that Promissory Notes in writing (*Chirographa*) were well known and in use among the Romans. Of this, we have an instance in the Digest. *Ab Aulo Agerio Gaius Seius mutuam quandam quantitatem accepit hoc Chirographo: Ille scripsit, me accepisse, et accepi ab illo mutuos et numeratos decem: quos ei reddam kalendis illis proximis cum suis usuris placitis inter nos: Quæro, an ex eo instrumento usuræ petipossint, et quæ? Modestinus respondit, si non appareat de quibus usuris conventio facta sit, peti eas non posse.*[3] But this instrument never seems to have been known as a negotiable instrument among the Romans, or as a general medium used in purchases and sales with that superadded quality; but its negotiability seems to be exclusively the invention of modern times. Probably the origin of negotiable Promissory Notes is somewhat later than that of Bills of Exchange, and grew out of the same general causes as the latter, viz.: to facilitate the operations of commerce, and to extend the negotiability of debts. Mr. Kyd's remarks on this subject seem at once well founded and satisfactory, at least as conjectures. "As com-

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1 Post, § 379, § 380, § 387.

2 Chitty on Bills, ch. 6, p. 266, (8th edit. 1833); Buller *v.* Crips, 6 Mod. R. 29, 30; Bayley on Bills, ch. 5, § 3, p. 169, (5th London edit.); Id. ch. 1, § 15, p. 42; Heylyn *v.* Adamson, 2 Burr. R. 669, 676.

3 Dig. Lib. 22, tit. 1, l. 41, § 2; Dig. Lib. 2, tit. 14, l. 47, § 2.

merce," says he, "advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment than by Bills of Exchange. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer, who supplied him with goods, absolutely necessary, might have so limited a connection with the commercial world at large, that he could not easily furnish his creditor with a Bill of Exchange on another man. But his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader. Hence, it may reasonably be conjectured, Promissory Notes were at first introduced." [1]

§ 6. Undoubtedly, negotiable Promissory Notes were well known upon the continent of Europe, long before their introduction into England.[2] They were, probably, first brought into use in England about the middle of the 17th century, although Lord Holt has been thought to assign to them a somewhat later origin.[3] They seem

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[1] Kyd on Bills, p. 18. — I have made some researches into other works to ascertain the origin of Promissory Notes, but have not been successful. The subject is merely incidentally touched, under the head of *Exchange*, in Anderson's History of Commerce, (Vol. i. p. 221, 266, 360, 541, 557, Dublin edit. 1790,) and in the Encyclopedia Britannica, art. *Exchange;* and in Malynes, Lex. Merc. ch. 11, § 6, p. 71, (edit. 1636.) Malynes hear speaks of Promissory Notes, called Bills of Debt, or Bills Obligatory, which were negotiable, as being "altogether used by the merchants adventurers at Amsterdam, Middleborough, Hamborough, and other places." See also Malynes, Lex. Merc. ch. 12, p. 72, 73, (edit. 1636); Id. ch. 13, p. 74, 75. Malynes adds, that this laudable custom is not practised or established in England. See also, Scaccia, Tract. de Comm. § 1, Quest. 2, p. 150-154; Id. § 1, Quest. 6, p. 194.

[2] Malynes, Lex. Merc. ch. 11, p. 71, (edit. 1636); Id. ch. 12, p. 72; Id. ch. 13, p. 74, 75. See Nouguier, Des Lettres de Change, Tom. 1, p. 279-285, 296.

[3] Buller *v.* Crips, 6 Mod. R. 29; Malynes, Lex. Merc. ch. 11, p. 71,

at first to have been called Bills of Debt, or Bills of Credit, indifferently.[1] Indeed, as Lord Mansfield has observed, there seems much confusion in the Reports in the times of King William and Queen Anne, so that it is difficult, without consulting the records, to ascertain, whether the action arose upon a Bill or Note, as the words "Bill" and "Note" were used promiscuously.[2] There was a long struggle in Westminster Hall, as to the question whether Promissory Notes were negotiable or not at the Common Law; for there could be no doubt that they were by the Law Merchant, at least as recognized upon the continent of Europe. Lord Holt most strenuously, and with a pride of opinion not altogether reconcilable with his sound sense and generally comprehensive views, maintained the negative.[3] The controversy was finally ended by the Statute of 3 and 4 Anne, ch. 9, (1705,) (made perpetual by the Statute of 7 Anne, ch. 25, § 3,) which, after reciting, that Promissory Notes had been held not negotiable, proceeded to enact, "That all Notes in writing, made and signed

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ch. 12, p. 72, (edit. 1636.) There is a very learned note by Mr. Chief Justice Cranch, in the Appendix to the first volume of his Reports, in which he has traced the history of Promissory Notes and inland Bills, in England, with great minuteness and apparent accuracy. A scrupulous examination of this Appendix will well reward the diligence of the attentive reader. See 1 Cranch, R. App'x, p. 367, note A, and especially p. 380-405. See also, Com. Dig. *Merchant*, F. 1, F. 2; Malynes, Lex Merc. ch. 11, p. 71, 72, ch. 12, p. 72, 73; Godbolt, R. 49.

1 Com. Dig. *Merchant*, F. 1, F. 2; Malynes, Lex Merc. ch. 11, p. 71, ch. 12, p. 72, (edit. 1636); Id. ch. 13, p. 74.

2 Grant *v.* Vaughan, 3 Burr. R. 1525.

3 Clerk *v.* Martin, 2 Ld. Raym. 757; 1 Salk. 757. The history of this struggle, as well as the conflicting adjudications, are fully stated in the Appendix to Judge Cranch's Reports, note A, p. 367, and especially p. 380-418; Brown *v.* Harraden, 4 Term R. 148; Chitty on Bills, ch. 12, p. 548-550, (8th edit. 1833.)

by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such Promissory Notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such Note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also every such Note payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland Bills of Exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such Note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon any inland Bills of Exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid signed the same; and that any person or persons, body politic and corporate, to whom such Note, that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such Note, or against any of the persons that indorsed the same, in like manner as in cases of inland Bills of Exchange."[1] In most of the States of America, this statute has been either expressly adopted by statute, or recognized as part of their Common Law. A few only have deemed it inapplicable to their situation; and in some States the circulation of Promissory Notes still remains clogged with positive restrictions, or practical difficulties, which greatly impede their use and value, and circulation.[2]

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[1] Chitty on Bills, ch. 12, p. 550, (8th edit.)

[2] Mr. Chancellor Kent, in the last (5th) edition of his Commentaries, (3 Kent, Comm. Lect. 44, p. 72, note *a*,) upon this subject, says: — "In Massachusetts, Connecticut, Vermont, Ohio, North Carolina, South Carolina, Alabama, Illinois, Michigan, Missouri, and most of the States, the indorsee has all the privileges of an indorsee under the Law Merchant. But in New Jersey, Pennsylvania, Kentucky, Indiana, and Mississippi, his rights, under the Law Merchant, are to be taken with some qualification, and especially in the States last mentioned. See Griffith's Law Register, *passim;* 1 Miner, Alabama R. 5, 296; Revised Statutes of North Carolina, (1837,) vol. 1, p. 93; Revised Statutes of Vermont, 1839, 336; Revised Code of Mississippi, (1822,) 464. Notes or Bills discounted at a Bank, or deposited for collection, are placed by statute, in Pennsylvania, on the footing of foreign Bills of Exchange as to payment and remedy. Purdon, Dig. 108. As the English statute has not been adopted in Virginia, the last assignee of a Promissory Note cannot maintain an action against a remote indorser, there being neither consideration nor privity. Dunlop *v.* Harris, 5 Call, R. 16. In New Hampshire, the Statutes of 9 and 10 William III., and 3 & 4 Anne, respecting inland Bills and Promissory Notes, were reënacted during the colony administration. In Indiana, Promissory Notes, payable at a chartered bank within the State, are by statute placed on the same footing as inland Bills of Exchange by the Law Merchant; Revised Statutes of Indiana, (1838,) 119. But other Promissory Notes are not governed by the Law Merchant, which has never been applied in that State by statute to them; Bullitt *v.* Scribner, 1 Blackford, Ind. Rep. 14. The Lex Mercatoria, applicable to foreign and inland Bills of Exchange, is considered to be adopted in Indiana as part of the Common Law of England, which has been adopted by statute. Piatt *v.* Eads, Ibid. 81. In Pennsylvania, Virginia, Arkansas, Missouri, and Mississippi, sealed instruments, as well as notes, are made negotiable by statute; and in Arkansas, all agreements and contracts in writing, for

§ 7. Most, if not all commercial nations have annexed certain privileges, benefits, and advantages to Promissory Notes, as they have to Bills of Exchange, in order to promote public confidence in them, and thus to insure their circulation as a medium of pecuniary commercial transactions.[1] In England and America, they partake, in a very high degree, of the character of specialties, and are deemed to import, *primâ facie*, to be founded upon a valuable consideration, and may be generally declared on without specially stating what the particular consideration is; in which circumstance they differ from other unsealed contracts, whether written or unwritten. Between the original parties, the consideration may, indeed, as a matter of defence be inquired into. But where they are negotiable, and in the possession of a *bonâ fide* holder for a valuable consideration, without any notice of any inherent infirmity or vice in their original concoction, they are binding upon the antece-

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the payment of money or property, are made assignable. But these assignments in some of these last mentioned States, expressly reserve to the debtor all matters of defence existing prior to the notice of the assignment. In Georgia, by statute of 1799, Promissory Notes are made negotiable, though given for specific articles. Daniel *v.* Andrews, Dudley, R. 157; Gamblin *v.* Walker, 1 Arkansas R. 220; Henning, Statutes, vol. 12; Block *v.* Walker, 2 Arkansas R. 7; Revised Statutes of Arkansas, 107; Revised Code of Mississippi, (1824,) 464." By the laws of New York, (Revised Statutes, vol. 1, p. 768, § 1,) "Promissory Notes payable in money to any person, or to the order of any person, or to bearer, are negotiable in like manner as inland Bills of Exchange, according to the custom of merchants. The payee and indorsee of every such Note, payable to them or their order, and the holder of every such Note, payable to bearer, may sue thereon in like manner as in cases of inland Bills of Exchange. If such notes are made payable to the order of the maker, or to the order of a fictitious person, and be negotiated by the maker, they have the same effect and validity, as if made payable to bearer."

[1] Story on Bills of Exchange, § 14; Thomson on Bills, ch. 1, p. 1-5.

dent parties, and the consideration is not inquirable into, and becomes immaterial.[1] In Scotland, they are entitled to all the privileges of Bills of Exchange, among which besides the common privileges in England and America, is the privilege of a summary process to enforce payment upon their dishonor, differing from the ordinary process.[2] The like summary process is given by the French Law.[3] Heineccius, in the passages already referred to,[4] states that they are indorsable like Bills of Exchange, and are subject to the law of prescription, and, in case of dishonor, are open to the same process and mode of execution, as Bills of Exchange.

§ 8. Having stated the general nature of Promissory Notes, their definition, origin, and privileges, in brief terms, let us now proceed to a more exact consideration of the qualities which are essential to their true operation and structure, and without which they cease to possess the proper attributes of commercial paper.

§ 9. In the first place, a Promissory Note, as the very phrase denotes, is a written instrument.[5] A verbal or oral promise, however valid and obligatory in point of law, and however formal in its language, is not deemed a Promissory Note; nor is it capable of being trans-

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1 Story on Bills of Exchange, § 14, 15; Post, § 181.

2 Thomson on Bills, p. 3.

3 Story on Bills of Exchange, § 14; Pothier, De Change, n. 124 – 127; Jousse, Comm. sur L'Ord. 1673, art. 12, p. 102; Code de Comm. de France, art. 187; Nouguier, Des Lettres De Change, Tom. 1, Liv. 4, § 2, art. 1, p. 513, &c.; Savary, Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 9, p. 209. In Nouguier, (Tom. 2,) the regulations respecting Bills of Exchange and Promissory Notes in the different countries of Europe, are very fully stated.

4 Ante, § 2; Heinecc. de Camb. ch. 2, § 3, p. 11.

5 Bayley on Bills, ch. 1, § 1, p. 1, (5th edit.); Id. § 3, p. 10; Thomson on Bills, ch. 1, p. 1.

ferred at law, although the promise be to pay to the payee or his order, or to the bearer, the sum stipulated. This is obvious enough upon the slightest consideration. A verbal promise cannot be indorsed, that is, written upon, for there is nothing *in esse* to which the indorsement can be attached. It is equally incapable of passing to the bearer, because it has no corporeal existence, or corporeal representative, by which it can be identified to be in the possession of one person more than another. But if the promise be in writing, and it has all the other requisites, it is not essential to its character as a Promissory Note, (as we have already seen,[1]) that it should be negotiable, that is, that it should be payable to order, or to bearer. It is true that it will not be negotiable, unless these, or other words of the same legal effect, are found in the written instrument; but it will nevertheless, in contemplation of law, be a Promissory Note.[2]

§ 10. This requisite, that a Promissory Note should be in writing, is, from what has been already said, founded in the very nature and design and operation of the instrument. Hence it is equally true in the law of France and of the other commercial countries of the continent of Europe, and indeed may properly be deemed the rule throughout the commercial world. The Code of Commerce of France only embodies the general understanding of all nations where Bills of Ex-

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[1] Ante, § 3.

[2] Ante, § 3; Chitty on Bills, ch. 5, p. 181, (8th edit.); Id. ch. 6, p. 219; Id. ch. 12, p. 548; Bayley on Bills, ch. 1, § 10, p. 33, 34, (5th edit.); Smith *v.* Kendall, 6 Term R. 123; Chadwick *v.* Allen, 2 Str. R. 706; Rex *v.* Box, 6 Taunt. R. 325; Burchell *v.* Slocock, 2 Ld. Raym. 1545; Story on Bills of Exchange, § 60, 199.

Exchange and Promissory Notes are in use.[1] When, however, it is said that a Promissory Note must be in writing, we are to understand the doctrine with this qualification, that it does not acquire that character until it is reduced to writing. But it is very common for persons to sign their names in blank to a paper, for the purpose of having a Promissory Note written over it; and in such a case, the note, when written, will bind the party, if done by a person properly authorized in the same manner, and to the same extent, and from the same time, as if it had been originally filled up before the signature was made.[2]

§ 11. We have seen that a Promissory Note must be in writing. But such writing need not, it seems, be in ink; for it has been held, that it may be in pencil.[3] It is perhaps to be regretted, that this doctrine has been established, since pencil marks are so easily altered and erased; and one of the great objects of negotiable paper is to acquire general credit, by being expressed in language clear and permanent in its character and verification. The writing may, without doubt, be on paper or parchment; but whether it may be on any other

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[1] Code de Comm. art. 110, 187; Pardessus, Droit Comm. Tom. 1, art. 23; Id. Tom. 2, art. 318, 330, 478; Jousse, Sur L'Ord. 1673, tit. 5, p. 58, 59, 67; Id. p. 126, 127; Pothier, De Change, n. 30, 216; Thomson on Bills, ch. 1, p. 1; Heinnec. de Camb. cap. 2, § 1-4; Dupuy de la Serra, De Change, ch. 19, p. 191.

[2] Bayley on Bills, ch. 1, § 7, p. 25, (5th edit.); Id. § 11, p. 36, 37, 39; Id. ch. 5, § 3, p. 168; Id. ch. 9, p. 382; Chitty on Bills, ch. 2, p. 33, (8th edit.); Id. ch. 5, p. 186, 215; Mech. & Farm. Bank *v.* Schuyler, 7 Cowen, R. 337; Russel *v.* Langstaffe, 2 Doug. R. 514; Violett *v.* Patton, 5 Cranch, R. 142.

[3] Bayley on Bills, ch. 1, § 3, p. 10, (5th edit. 1830); Geary *v.* Physic, 5 Barn. & Cresw. 234; Closson *v.* Stearns, 4 Vermont R. 11; Brown *v.* Butchers & Drovers' Bank, 6 Hill, N. Y. R. 443; Partridge *v.* Davis, 20 Vermont R. 499.

material, as for example, on silk, or cotton cloth, or on wood, or metal, or with a style or a graver, is a mere matter of speculation, which it is useless to discuss, since, practically, in our age, paper or parchment are the only materials in general use. When, however, it is said that a Promissory Note must be in writing, we are not to understand that the instrument is required to be in the handwriting of some individual. It may all, except the signature, be in printed letters; but the signature must be in the handwriting of the party executing it, or if it be by the mark of the maker, that mark must be verified by the handwriting or attestation of some person who acts for the marksman, or attests it at his request. If signed by an agent, it is, of course, in order to bind the principal, to be signed by the agent in the name of his principal, adding his own signature thereto, or, at least, signed by him in his character as agent. But of this more will be said hereafter.[1]

§ 12. In the next place, as to the form of a Promissory Note. The common form has been already given.[2] But no particular words are necessary, and the form may be varied at the pleasure of the individual, so always that it amounts, in legal effect, to a written promise for the payment of money absolutely and at all events,[3] and it interferes with no statute regulation.[4] Thus, an order or promise to deliver a certain sum of money to A, or to be accountable or responsible to A for a certain sum

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[1] Post, § 65, § 66, § 67, § 68.

[2] Ante, § 3, note.

[3] Bayley on Bills, ch. 1, § 1, p. 1, (5th edit. 1830); Id. § 2, p. 4; Chitty on Bills, ch. 12, p. 557, 558, (8th edit.); Brooks *v.* Elkins, 2 Mees. & Wels. 74; Hitchcock *v.* Cloutier, 7 Verm. R. 22; Brown *v.* De Winter, 6 Manning, Gr. & Scott, R. 336.

[4] Chitty on Bills, Pt. 1, ch. 12, p. 558, 559, (8th edit.)

of money, or that A shall receive it from the maker, is a good Promissory Note.[1] So a receipt for money "to be returned when called for,"[2] or an acknowledgment, "due to A a certain sum of money, payable on demand,"[3] or a promise "to pay, or to cause to be paid to A," a certain sum of money,[4] or an instrument acknowledging the receipt of money of A, promising to pay it on demand with interest;[5] or acknowledging the receipt of money to be repaid in one month;[6] or acknowledging to have borrowed a certain sum of money, in promise of payment thereof;[7] [or saying, "I guaranty to pay A B, or his order" a certain sum.[8]] The doctrine has even been pressed farther; and where A signed a note in these words: "Borrowed of I. S. £50, which I promise *not* to pay," it was held to be a good Promissory Note, and that the word *not* ought to be rejected,[9] as it well might, upon the ground of being inserted by mistake, or by fraud; in either of which cases, it ought equally to be held inoperative. [And a paper with the following

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1 Ibid.; Morris *v.* Lee, 2 Ld. Raym. R. 1396, 1397; S. C. 8 Mod. R. 362. But see Horne *v.* Redfearn, 4 Bing. N. Cas. 433; White *v.* North, 3 Welsby, Hurlstone & Gordon, R. 689.

2 Woodfolk *v.* Leslie, 2 Nott & M'Cord, S. Car. R. 585.

3 Pepoon *v.* Stagg, 1 Nott & M'Cord, S. Car. R. 102; Kimball *v.* Huntington, 10 Wend. R. 675.

4 Lovell *v.* Hill, 6 Carr. & Payne, 238; Chadwick *v.* Allen, 2 Str. R. 706.

5 Green *v.* Davies, 4 Barn. & Cressw. 235; Ashly *v.* Ashly, 3 Moore & Payne, R. 186. See also, Wheatley *v.* Williams, 1 Mees. & Wels. 533.

6 Shrivel *v.* Payne, 8 Dowl. Pract. Cas. 441; 4 (English) Jurist, 485.

7 Ellis *v.* Mason, 7 Dowl. Pract. Cas. 598; S. C. 3 (English) Jurist, 406; 2 Will. Wool & Hodges, R. 70. But see Horne *v.* Redfearn, 4 Bing. N. Cas. 433.

8 Bruce *v.* Westcott, 3 Barbour, Sup. Ct. R. 374.

9 Bayley on Bills, ch. 1, § 2, p. 6, (5th edit. 1830); Chitty on Bills, ch. 5, p. 150, 151, (8th edit.); Simpson *v.* Vaughan, 2 Atk. 32.

words and letters, but omitting the word dollars has been held to be a good note, viz.: "$300. For value received, I promise to pay F. & Co. three hundred."[1] And it also seems that a writing in these words: "For value received of C. & M., or order, thirty dollars and eighty-three cents on demand and interest annually," is by intendment a good note.[2]] In all these, and the like cases, it is not necessary that the payee should be expressly named, as will be more fully seen hereafter; but it is sufficient that it can be fairly implied to whom the promise is made.[3] The French Law, as laid down by Pothier, is to the same effect.[4]

§ 13. However, sometimes very nice cases arise, in which it may well become a matter of controversy, whether a particular instrument is a Promissory Note, or not, where the parties are already stated, and the sum is fixed. Thus, for example, where an instrument was in these words: "I undertake to pay to R. I., the sum of £6. 4, for a suit of, ordered by D. P.," and signed by the promisor, a question was made whether it was a Promissory Note or a guaranty; and the Court held it to be the latter.[5] So an instrument in these words: "I, A B, owe Mrs. B, the sum of £6, which is to be paid by instalments, for rent," was held not to be a Promissory Note, because no time of payment was stipulated.[6]

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[1] Sweetser *v.* French, 13 Metc. R. 262; Coolbroth *v.* Purinton, 16 Shepley, 469.

[2] Cummings *v.* Gassett, 19 Vermont R. 308.

[3] Greene *v.* Davies, 4 Barn. & Cressw. 235; Chadwick *v.* Allen, 2 Str. R. 706.

[4] Pothier, De Change, n. 31.

[5] Jarvis *v.* Williams, 7 Mees. & Wels. 410.

[6] Moffat *v.* Edwards, 1 Carr. & Marsh. R. 16.

§ 14. But it seems that to constitute a good Promissory Note, there must be an express promise upon the face of the instrument, to pay the money; for a mere promise implied by law, founded upon an acknowledged indebtment, will not be sufficient. Hence, it has been held, that the mere acknowledgment of a debt, without a promise to pay, is not a good Promissory Note.[1] Thus, where A wrote on a slip of paper, "I. O. U. [I owe you] eight guineas," it was held to be a mere due bill, and not a Promissory Note.[2] So, in a written bargain for buying goods, a promise to pay the seller the price in a limited time is not a Promissory Note; but a memorandum of the terms of the bargain.[3] But if the promise were, "Due to A B, £20, payable to him or order," or to him or bearer, it would be a Pro-

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[1] Bayley on Bills, ch. 1, § 2, p. 5, (5th edit.); Fisher *v.* Leslie, 1 Esp. R. 426; Chitty on Bills, ch. 12, p. 558, (8th edit.); Guy *v.* Harris, Ibid. note.

[2] Ibid; Curtis *v.* Richards, 1 Mann. & Grang. 46; Read *v.* Wheeler, 2 Yerger, R. 50, note. The distinction between the cases on this point is extremely nice, not to say sometimes very unsatisfactory. In Kimball *v.* Huntington, 10 Wend. R. 675, the words of the instrument were, "Due A B, three hundred dollars payable on demand," and it was held a good Promissory Note. In Russell *v.* Whipple, 2 Cowen, R. 536, the words were, "Due A B, or bearer, &c. two hundred dollars and 26-100, for value received;" and it was held a good Promissory Note. Here there was no express promise to pay; but the promise was implied by law. The case of Luqueer *v.* Prosser, 1 Hill, N. Y. R. 256, is to the same effect. The case of Brooks *v.* Elkins, 2 Mees. & Wels. 74, is also, on this point, not unimportant. In that case the instrument was, "I. O. U. £20, to be paid on the 22d instant." And the Court held it to be either a Promissory Note, or an agreement for the payment of £10, and upwards; and in either case required a stamp. In Waithman *v.* Elsee, 1 Carr. & Kirw. 35, it was held that the words "I. O. U. £85, to be paid May 5th," made the instrument a Promissory Note. See Brown *v.* Gilman, 13 Mass. R. 158.

[3] Bayley on Bills, ch. 1, § 2, p. 6, (5th edit. 1830); Ellis *v.* Ellis, Gow, R. 216.

missory Note, for it contains more than the law would imply, and becomes negotiable.[1] So a due bill, payable at a specific time, would be held a good Promissory Note for the like reason.[2]

§ 15. A distinction partaking somewhat of a like character exists in the French Law. There, a written acknowledgment of a debt, with a promise to pay it, constitutes a mere simple contract or evidence of debt, and is called *Billet Simple*, and is distinguished in its character and effects from a Bill of Exchange, and a Promissory Note, each of which is supposed to be negotiable, and therefore entitled to peculiar privileges.[3]

§ 16. Sometimes the language of the instrument is ambiguous, and is capable of being interpreted either as a Bill of Exchange, or as a Promissory Note. In such a case, the person who receives it may, at his own option, treat it as a Bill of Exchange, or as a Note against the maker.[4] Therefore, an instrument, which is in the form of a Note, but which, in addition, is addressed to a third person, who accepts it, is a Promissory Note, and may be so declared on accordingly.[5] So, if a person draws an order upon himself, or payable by himself, [and indorses it over to a third person,] it is, or at

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1 Curtis *v.* Rickards, 1 Mann. & Grang. 46; Russel *v.* Whipple, 2 Cowen, R. 536.

2 Waithman *v.* Elsee, 1 Carr. & Kirw. 35.

3 Merlin, Répertoire, *Billet*, § 1, p. 148, (edit. 1827); Id. *Ordre Billet à*, § 1, p. 229; Pothier, De Change, n. 32; Ante, § 2.

4 Bayley on Bills, ch. 1, § 2, p. 9. (edit. 1830); Edis *v.* Bury, 6 Barn. & Cressw. 433; Shuttleworth *v.* Stephens, 1 Camp. R. 407; Chitty on Bills, ch. 2, § 2, p. 28, 29, (8th edit.); Id. ch. 5, p. 150, 151, 187; Allan *v.* Mawson, 4 Camp. R. 115; Roach *v.* Ostler, 1 Mann. & Ryan, R. 120.

5 Edis *v.* Bury, 6 Barn. & Cressw. 433; Block *v.* Bell, 1 Mood. & Rob. R. 149.

least, may, although in form a Bill, be treated as a Promissory Note;[1] [and such a note, if indorsed in blank, and put in circulation by the maker, becomes in effect a note payable to the bearer.[2]] So, an order drawn by A B, as manager of a company, on the company for a certain sum, payable without acceptance to C D, or order, may be declared on as a Promissory Note.[3]

§ 17. In the next place, the instrument, in order to be a valid Promissory Note, must be for the payment of money, and for the payment of money only; for if it be a promise to pay money, and to do any other act, or a promise to do any act, and not to pay money, it is not, in the sense of the Commercial Law, a Promissory Note, and it is not negotiable, and does not enjoy the common privileges applicable to such negotiable paper.[4] Therefore, a written promise to deliver up horses and a wharf, and to pay money on a particular day, has been held not be a valid Promissory Note.[5] So, a written promise for the delivery or payment of merchandise or chattels, or other things in their nature susceptible of

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[1] Bayley on Bills, ch. 1, § 2, p. 8, (5th edit.); Chitty on Bills, ch. 2, p. 28, (8th edit.); Starke *v.* Cheesman, Carth. R. 509; Dehers *v.* Harriot, 1 Shower, R. 163; Josceline *v.* Laserre, Fort. R. 282; Roach *v.* Ostler, 1 Mann. & Ryan, R. 120.

[2] Brown *v.* De Winton, 6 Manning, Gr. & Scott, R. 336; Masters *v.* Barrets, 8 Ibid. 433; S. C. 2 Carrington & Kirw. R. 715; Word *v.* Mytton, 10 Adolph. & Ell. N. S. R. 805; Hooper *v.* Williams, 2 Welsb. Hurlstone & Gordon, R. 13; Furniss *v.* Gilchrist, 1 Sanford, Superior Ct. N. Y. R. 53. But see Flight *v.* McLean, 16 Mees. & Welsby, 51; Heywood *v.* Wingate, 14 N. Hamp. R. 73; Post, § 36, *a*.

[3] Miller *v.* Thomson, 4 Scott, R. 204; S. C. 3 Mann. & Grang. 576.

[4] Bayley on Bills, ch. 1, § 4, p. 10, (5th edit.); Chitty on Bills, ch. 5, p. 152, 153, (8th edit.); Id. ch. 12, p. 560; Story on Bills, § 43; Carleton *v.* Brooks, 14 N. Hamp. 149.

[5] Bayley on Bills, ch. 1, § 4, p. 10, (5th edit.); Chitty on Bills, ch. 5, p. 152, 153, (8th edit.); Id. ch. 12, p. 560; Martin *v.* Chauntry, 2 Str. R. 1271. But see Owen *v.* Barnum, 2 Gilman, Illinois, R. 461.

deterioration and loss, and variation in quality or value, is not a valid Promissory Note.[1] So, a written promise to pay the bearer a certain sum of money in goods, [or in grain,] is not a valid Promissory Note.[2] But, provided the note be for the payment of money only, it is wholly immaterial in the money or currency of what country it is made payable. It may be payable in the currency or money of England, or France, or Spain, or Holland, or Italy, or of any other country. It may be payable in coins, such as guineas, ducats, doubloons, crowns, or dollars, or in the known currency of the country, as in pounds sterling, livres, tournoises, francs, florins, &c.; for in all these and the like 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.[3] Heineccius, upon this subject, adds, that the species of money should be expressed, otherwise the current money will be intended.[4]

§ 18. It is upon the like ground that it is held essential to a Promissory Note, that it should be for the payment of money in specie.[5] Therefore, a promise to pay a certain sum of money "in good East India Bonds,"[6] or "in cash, or Bank of England notes,"[7] or "in bank

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1 Ibid.; Jerome *v.* Whitney, 7 John. R. 321; Thomas *v.* Roosa, 7 John. R. 461; Peay *v.* Pickett, 1 Nott & M'Cord, R. 254; Rhodes *v.* Lindly, 3 Hamm. Ohio, R. 51; Atkinson *v.* Manks, 1 Cowen, R. 691; Jones *v.* Fales, 4 Mass. R. 245; Lawrence *v.* Dougherty, 5 Yerger, R. 435; Ellis *v.* Ellis, Gow, R. 216.

2 Clark *v.* King, 2 Mass. R. 524.

3 Story on Bills, § 43, 44, 45; Chitty on Bills, ch. 5, p. 153, (8th edit.); Pardessus, Droit Comm. Tom. 2, art. 204.

4 Heinnecc. de Camb. cap. 5, § 5, 12.

5 Bayley on Bills, ch. 1, § 4, p. 10, (5th edit.)

6 Anon. Bull. N. P. 272.

7 Bayley on Bills, ch. 1, § 4, p. 10, (5th edit.); Chitty on Bills, ch. 5,

bills or notes,"[1] or "in foreign bills,"[2] or "in current bank notes,"[3] or to pay a sum of money or surrender I. S. to prison,[4] is not a good Promissory Note. So, the note must not only be for the payment of money, but of money only. Therefore a written promise to pay a certain sum of money, "and all fines according to rule," is not a valid Promissory Note.[5]

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p. 154, (8th edit. 1833); Ex parte Imeson, 2 Rose, R. 225; Ex parte Davison, Buck, R. 31.

1 M'Cormick *v.* Trotter, 10 Serg. & Rawle, R. 94; Leiber *v.* Goodrich, 5 Cowen, R. 186.

2 Jones *v.* Fales, 4 Mass. R. 245; Young *v.* Adams, 6 Mass. R. 182, 183; Springfield Bank *v.* Merrick, 14 Mass. R. 322.

3 Gray *v.* Donahoe, 4 Watts, R. 400; Whiteman *v.* Childress, 6 Humph. R. 303; Foy *v.* Rousseau, 3 McLean, R. 106. In some of the American States this doctrine has not been strictly adhered to. Thus, in New York, it has been held, that a Note "payable in York State Bills or specie," is a good Promissory Note, upon the ground that the language meant the same as lawful current money of the State, that is, as bank bills of banks of the State, which, in common usage and understanding, are regarded as cash. Keith *v.* Jones, 9 John. R. 120. So, in a subsequent case in New York, a Note, "payable in bank notes current in the city of New York," was held a good Promissory Note upon the like ground. And the Court said, that if payable in bank notes generally, the same doctrine would apply. Judah *v.* Harris, 19 John. R. 144. [So, also, in Ohio, a note payable "in current Ohio bank notes," has been held to be negotiable. Swetland *v.* Creigh, 15 Ohio R. 118; White *v.* Richmond, 16 Ohio, 5. So, also, in Mississippi, with a note payable "in notes of the banks of Mississippi, payable and negotiable in any bank" in that State. Besancon *v.* Shirley, 9 Smedes & Marshall, R. 457. See, also, Cockrill *v.* Kirkpatrick, 9 Missouri, R. 697; Bizzell *v.* Williams, 3 English, Arkansas, R. 138.] It is very difficult upon principle or authority to sustain these decisions; for bank notes are not in reality money, nor are they a good tender, if objected to; and, although treated in common business as cash, they are distinguishable from it, and often pass at a variable discount. See also, Stewart *v.* Donelly, 4 Yerger, R. 177; Deberry *v.* Darnell, 5 Yerger, R. 451; Seeley *v.* Bisbee, 2 Vermont R. 105.

4 Chitty on Bills, ch. 5. p. 154, (8th edit.); Smith *v.* Boheme, 3 Ld Raym. 67, cited 2 Ld. Raym. 1362, 1396; Bayley on Bills, ch. 1, § 6, p. 16, (5th edit.)

5 Ayrey *v.* Fearnsides, 4 Mees. & Wels. 168.

§ 19. The French Law proceeds upon similar grounds. In order to constitute the note a valid Promissory Note, it must be for the payment of money, and mention the sum to be paid.[1] Indeed, this seems so fundamental a principle in all negotiable paper designed to circulate as currency, that it may well be presumed to be a matter of universal adoption in the commercial world. Heineccius so manifestly understands the doctrine, and holds it to be a promise to pay a certain sum of money, *certam pecuniæ summam*.[2]

§ 20. In the next place, to make a written promise a valid Promissory Note, it must be for a fixed and certain amount, and not for a variable amount.[3] Therefore, if it be for a certain sum of money, with all other sums that may be due to the payee, it is not a valid Promissory Note, even for the sum which it specifies.[4] So, a promise to pay a specified sum of money and interest, and also "the demands of the Sick Club at H., in part of interest, and the remaining stock and interest to be paid on demand" to the payee, is not a valid Promissory Note.[5] So, a written promise to pay a certain sum, "first deducting thereout any interest or money which I. S. might owe the maker on any account," is, on the same account, not a good Promissory Note.[6] So, a

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1 Pothier, De Change, n. 30; Code de Comm. art. 188; Pardessus, Droit Comm. Tom. 2, art. 334, 478; Dupuy de la Serra, De Change, ch. 19, p. 191, 192; Jousse, Sur L'Ord. 1673, tit. 5, art. 1, p. 67, 68; Nouguier, De Change, Tom. 1, Liv. 4, § 1, p. 493, 494, 496.

2 Heinnec. de Camb. cap. 1, § 9; Id. cap. 2, § 1-4; Scaccia, De Comm. § 1, Quest. 5, p. 169, n. 2.

3 Bayley on Bills, ch. 1, § 4, p. 11, (5th edit.); Story on Bills, § 42.

4 Smith *v.* Nightingale, 2 Stark. R. 375.

5 Bolton *v.* Dugdale, 4 Barn. & Adolph. 619.

6 Chitty on Bills, ch. 5, p. 153, (8th edit.); Barlow *v.* Broadhurst, 4 Moore, R. 471; Ante, § 18.

written promise to pay a certain sum, "and all fines according to rule,"[1] or a written promise to pay certain sums in instalments, a part "to go as a set off for an order of R. to G., and the remainder of his debt from C. D. to him,"[2] or a written promise "to pay $1000, or what might be due after deducting all advances and expenses," fall under the same category, and are void as Promissory Notes.[3] The amount to be paid, however, if it be a fixed sum, need not be expressed in words; but it will be sufficient if it be in figures.[4]

§ 21. The French Law, like ours, requires the sum which is to be paid to be certain and fixed.[5] The sum is usually expressed in letters, rather than by ciphers or figures, so as to avoid the peril of any alteration of the sum. But if it is expressed in ciphers or figures, it will be good by our law, as well as by the French Law.[6] Heineccius lays down the same as the general law, although he admits, that in some countries, the sum is required to be written in letters and words, as well as in ciphers or figures.[7] Where the sum in figures on the superscription differs from the sum in words in the body of the instrument, the latter is by our law deemed the true sum.[8] Marius gives as a reason for

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1 Ayrey *v.* Fearnsides, 4 Mees. & Wels. 168; Ante, § 18.

2 Davies *v.* Wilkinson, 10 Adolp. & Ellis, 98; Clarke *v.* Percival, 2 Barn. & Adolp. 661.

3 Cushman *v.* Haynes, 20 Pick. R. 132.

4 Nugent *v.* Roland, 12 Martin, R. 659; Post, § 21.

5 Code de Comm. art. 188; Pardessus, Droit Comm. Tom. 2, art. 334, 478; Pothier, De Change, n. 35; Story on Bills, § 44.

6 Pothier, De Change, n. 35; Story on Bills, § 42, note; Locré, Esprit, du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, p. 336, 337; Chitty on Bills, ch. 5, p. 181, (8th edit.)

7 Heinnec. de Camb. cap. 4, § 5; Id. § 12.

8 Chitty on Bills, ch. 5, p. 182, (8th edit.); Saunderson *v.* Piper, 5 Bing. N. Cas. 425; Id. 560; Story on Bills, § 42, and note.

such a decision, which certainly seems founded in common sense and experience, that a man is more apt to commit an error with his pen in writing a figure than he is in writing a word.[1] Whether the same rule would apply if the sum were in figures in the body of the instrument, and in words in a memorandum or marginal note on the same, does not appear to have been decided; but it should seem that the words ought to be deemed the better and more solemn statement, and therefore ought to govern.[2]

§ 22. In the next place, to make a written Note for the payment of money a valid Promissory Note, the money must be payable absolutely, and at all events, and not be subject to any condition or contingency.[3] Thus, a written promise to pay money, "provided the terms mentioned in certain letters shall be complied with,"[4] or "provided A shall not be surrendered to prison within a limited time,"[5] or "provided A shall not pay the money by a particular day,"[6] or "provided A shall leave me sufficient, or shall be otherwise able to pay it."[7] or "when A shall marry,"[8] or "if A shall marry,"

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1 Marius on Bills, 33, 34.

2 Story on Bills, § 42, and note.

3 Bayley on Bills, ch. 1, § 6, p. 16, (5th edit. 1830); Chitty on Bills, ch. 5, p. 154, 155, (8th edit.); Id. ch. 12, p. 560, 561; Palmer *v.* Pratt, 2 Bing. R. 185; 9 Moore, R. 358; Carlos *v.* Fancourt, 5 Term, R. 482; Richards *v.* Richards, 2 Barn. & Adolp. 447; Drury *v.* Macaulay, 16 Meeson & Welsby, R. 140; Story on Bills, § 42, 48.

4 Ibid.; Kingston *v.* Long, 4 Doug. R. 9.

5 Ibid.; Smith *v.* Boheme, Gilb. Cas. Law & Eq. 93; 3 Ld. Raym. 67, cited 2 Ld. Raym. 1362, 1396; 7 Mod. R. 418.

6 Ibid.; Appleby *v.* Biddolph, cited 8 Mod. 363; 4 Vin. Abr. 240, pl. 16; Robins *v.* May, 11 Adolp. & Ellis, 213; S. C. 3 Perr. & Davis. 1479; Ferris *v.* Bond, cited Bailey on Bills, ch. 1, § 6, p. 17, (5th edit.)

7 Ibid.; Roberts *v.* Peake, 1 Burr. R. 323.

8 Ibid.; Chitty on Bills, ch. 5, p. 155, (8th edit.); Beardsley *v.* Bald-

or "if I shall marry within two months," or "four years after date, if I am then living, otherwise this Note to be null and void,"[1] or "provided A shall not return to England, or his death be certified, before" the day appointed for payment,[2] or "to pay when my circumstances will admit, without detriment to myself or family,"[3] or to pay, "provided the ship Mary arrives free from capture or condemnation,"[4] or to pay when the payee "completes the building according to contract,"[5] or "when certain carriages are sold,"[6] or to pay a certain sum by instalments at certain specified future periods, but all installed payments to cease at the death of the payee,[7] or to pay A (a sailor) his wages, "if he do his duty as an able seaman,"[8] or "to pay on the sale or produce immediately when sold of the White Hart Inn, and the goods, &c."[9] is not a valid Promissory Note; for it purports to make the payment depend upon a contingency or uncertainty. In all these cases, it will make no difference that the contingency does in

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win, 2 Str. R. 1151; Pearson *v.* Garrett, 4 Mod. R. 242; S. C. Carth. R. 227; Colehan *v.* Cooke, Willes, R. 397.

[1] Chitty on Bills, ch. 5, p. 155, (8th edit.); citing Braham *v.* Bubb; Worley *v.* Harrison, 3 Adolp. & Ellis, 669; S. C. 3 Nev. & Mann. 173.

[2] Morgan *v.* Jones, 1 Cromp. & Jerv. 162; S. C. 1 Tyrw. R. 29; Chitty on Bills, ch. 5, p. 155, (8th edit.)

[3] Ex parte Tootell, 4 Ves. 372.

[4] Palmer *v.* Pratt, 2 Bing. R. 185; Coolidge *v.* Ruggles, 15 Mass. R. 387.

[5] See Stevens *v.* Blunt, 7 Mass. R. 240. This case turned upon another point, that the money was, upon the true construction of the Note, payable at a fixed day.

[6] De Forrest *v.* Frary, 6 Cowen, R. 151.

[7] Worley *v.* Harrison, 3 Adolp. & Ellis, 669.

[8] Chitty on Bills, ch. 5, p. 155, (8th edit.); Alves *v.* Hodgson, 7 Term, R. 242.

[9] Hill *v.* Halford, 2 Bos. & Pull. 413.

fact happen afterwards, on which that payment is to become absolute; for its character as a Promissory Note cannot depend upon future events, but solely upon its character when created.[1]

§ 23. The like rule will apply to promises in writing for money, which *per se* might properly be deemed Promissory Notes, if there is upon the same paper a contemporaneous memorandum, which shows it to be for a specific purpose, involving contingencies and uncertainties.[2] Thus, a memorandum on a Note, that it is taken "for securing the payment of all such balances as shall be due from one of the makers, to the extent of the sum mentioned therein,"[3] or that "if any dispute shall arise respecting the subject, which is the consideration of it, it shall be void,"[4] will deprive the instrument of the character of a Promissory Note. For the like reason, an instrument, acknowledging the receipt of drafts for the payment of money, and promising to pay the money specified in the drafts, is not a Promissory Note; for the payment of the money is contingent, and depends upon the payment of the drafts.[5]

§ 24. However, in order to make a Note invalid as a Promissory Note, the contingency to avoid it must be

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[1] Hill *v.* Halford, 2 Bos. & Pull. 413.

[2] Bayley on Bills, ch. 1, § 14, p. 41, 42, (5th edit.); Chitty on Bills, ch. 5, p. 160, (8th edit.); Id. 163. See Pool *v.* McCrary, 1 Kelly, R. 319.

[3] Bayley on Bills, ch. 1, § 6, p. 20, (5th edit.); Leeds *v.* Lancashire, 2 Camp. R. 205; Chitty on Bills, ch. 5, p. 160, (8th edit.); Id. 161.

[4] Bayley on Bills, ch. 1, § 6, p. 20, (5th edit.); Id. § 14, p. 41, 42; Hartley *v.* Wilkinson, 4 Camp. R. 127; S. C. 4 Maule & Selw. 25; Chitty on Bills, ch. 5, p. 161, (8th edit.)

[5] Bailey on Bills, ch. 1, § 6, p. 21, (5th edit.); Williamson *v.* Bennett, 2 Camp. R. 417; Chitty on Bills, ch 5, p. 155, (8th edit.); Id. 161.

apparent, either upon the face of the Note, or upon some contemporaneous written memorandum on the same paper;[1] for, if the memorandum is not contemporaneous, or if it be merely verbal in each case, whatever may be its effect as a matter of defence between the original parties, it is not deemed to be a part of the instrument, and does not affect, much less invalidate, its original character.[2] This is a general rule, not confined to Bills of Exchange, but it extends to all written contracts;[3] and the same law prevails in France with respect to Bills, where parol evidence is not ordinarily admitted to extend or qualify the terms of those instruments.[4] Therefore, where a Promissory Note, on the face of it, purported to be payable on demand, it was held, that parol evidence was not admissible to show that, at the time of making it, it was agreed that it should not be payable until after the decease of the testator,[5] or until certain estates of maker had been sold;[6] or that it should not be payable, if the maker's allowance under a commission against him should not be sufficient to pay the amount;[7] or, that it should not be payable until a final dividend of a bankrupt's estate should have been made.[8] So, if a note be payable at nine months after date, parol evidence of the holder's

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1 Richards *v.* Richards, 2 Barn. & Adolp. 447, 454, 455.

2 Chitty on Bills, ch. 5, p. 160, 161, 163, (8th edit.)

3 Sugd. Vend. & Purch. tit. *Evidence;* Phillips & Ames on Evid. p. 753, (edit. 1838.)

4 Pardessus, Droit Comm. Tom. 2, art. 262.

5 Woodbridge *v.* Spooner, 3 Barn. & Ald. 233; S. C. 1 Chitty, R. 661.

6 Free *v.* Hawkins, 8 Taunt. 92; S. C. Holt, C. N. P. 556.

7 Rawson *v.* Walker, 1 Stark. R. 361; and Campbell *v.* Hodgson, Gow, C. N. P. 74.

8 Rawson *v.* Walker, 1 Stark. R. 361. See Ante, § 22.

agreement to give the maker time, if, at maturity it was not convenient to pay, is inadmissible.[1] So, where a Promissory Note, was on the face of it made payable on demand, it was decided that oral evidence of an agreement, entered into when it was made, that it should not be paid until a given event happened, is inadmissible.[2]

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[1] Dukes *v.* Dow, cited Chitty on Bills, ch. 5, p. 162, note, (8th edit.)

[2] Mosely *v.* Hanford, 10 Barn. & Cressw. 729. Declaration against the maker of a Promissory Note for £233, payable to the bankrupt or his order on demand. Plea, general issue. At the trial before Alexander, Ld. C. B., at the last assizes for the county of Derby, the handwriting of the defendant to the Note set out in the declaration was proved. Evidence was given on the part of the defendant, that he and one Richardson, being in partnership as booksellers, at Derby, agreed to purchase certain premises belonging to the bankrupt, and it was stipulated that the bankrupt should deliver up possession by the 1st of August, 1825, or pay for the time he should keep possession beyond that day a rent agreed upon between the parties. That on the 1st of August, 1825, Richardson and the defendant paid up the whole of the purchase-money, except £233; and that the defendant, with the consent of the bankrupt, gave his sole note for the balance, it being expressly stipulated, that it was to be paid on the bankrupt's delivering up possession of the premises, and accounting for the rent on the 1st of August. It was further proved, that part of the premises continued in possession of the bankrupt's sister down to and since the commencement of the action. A verdict having been found for the plaintiff, Denman, on a former day in this term, moved for a new trial, on the ground that the verdict was against the weight of evidence. But the Court intimated a doubt whether parol evidence could be given to restrain the effect of a Promissory Note absolute on the face of it, and referred to Woodbridge *v.* Spooner, 3 Barn. & Ald. 233, as an authority to the contrary; and Parke, J. observed, that every Bill or Note imported two things: value received, and an engagement to pay the amount on certain specified terms; that evidence was admissible to deny the receipt of value, but not to vary the engagement. Lord Tenterden, C. J. afterwards delivered the judgment of the Court, and, after stating the facts of the case, proceeded as follows: — "When this application for a new trial was made, it occurred to the Court, that the evidence given on behalf of the defendant ought not to have been received, on the ground that evidence of an agreement that the note was not to be put in suit until a given event happened was not admissible; the effect of it being to contradict by parol the Note itself; and upon consideration we are of opinion, that upon principle

§ 25. The like rule will apply in cases, where a written promise for money, which otherwise would be a good Promissory Note, is made payable out of a particular fund, so that the payment is to depend upon the existence or sufficiency of that fund; for that will render it invalid as a Promissory Note.[1] Thus, a Note for the payment of money "out of my growing subsistence,"[2] or "out of the fifth payment when due,"[3] or "out of money when received,"[4] or "out of rents,"[5] ["or out of

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as well as authority that evidence was not admissible." Chitty on Bills, ch. 5, p. 163, (8th edit.) Several cases to that effect are collected in Selwyn's Nisi Prius, 394; Hoare v. Graham, 3 Camp. R. 57; Free v. Hawkins, 8 Taunt. R. 92.

[1] Bayley on Bills, ch. 1, § 6, p. 18, 19, 20, (5th edit.); Chitty on Bills, ch. 5, p. 157, 158, 159, (8th edit.); Story on Bills, § 46.

[2] Ibid.; Josceline v. Lassere, Fortes. R. 281; 10 Mod. R. 294, 316.

[3] Ibid.; Haydock v. Lynch, 2 Ld. Raym. 1563.

[4] Ibid.; Dawkes v. Lord Deloraine, 2 W. Black. R. 782; 3 Wils. R. 207; Yeates v. Grove, 1 Ves. jr. R. 280, 281; Carlos v. Fancourt, 5 Term R. 482.

[5] Ibid. See Jenny v. Herle, 2 Ld. Raym. 1362; 1 Str. R. 591, 592; 8 Mod. R. 265; Fortes. R. 282; Dawkes v. Lord Deloraine, 3 Wils. R. 207, 213. In this last case, Lord Chief Justice De Grey, in delivering the opinion, speaking of a Bill of Exchange, (and the same rule is applicable to a Promissory Note,) said: — "The instrument or writing, which constitutes a good Bill of Exchange, according to the law, usage, and custom of merchants, is not confined to any certain form or set of words, yet it must have some essential qualities without which it is no Bill of Exchange; it must carry with it a personal and certain credit, given to the drawer, not confined to credit upon any thing or fund; it is upon the credit of a person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it; he to whom such Bill is made payable or indorsed takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same. In the present case, the drawer did not make this writing, or instrument, upon his own personal general credit, that in all events he would be liable in case Brecknock should not pay it out of William Steward's money; but both the drawer and the person to whom payable, look only at the fund, and no personal credit is given to the defendant, the drawer."

the net proceeds of ore to be raised and sold from a certain ore bed,"][1] is not a valid Promissory Note, on account of the uncertainty, whether the subsistence, or rents, or payments, or money, will become due or be received.

§ 26. But here it is important to bear in mind the distinction between cases where a Note is payable out of a particular fund, and it rests in contingencies whether there will be any such fund or not, or whether it will be sufficient, and cases where the fund is only referred to as an absolute existing fund, as the consideration of the promise, and on account of which the money is to be paid.[2] In the latter cases, no contingency is contemplated; the money is to be paid at all events; and the fund is referred to only to show why the promise is made, and so *pro tanto* to discharge the maker of the Note. Thus, a Note promising to pay A B or order a sum of money, "being money which I have received on his account,"[3] or "which I have received as his half-pay,"[4] or "which I owe him for freight,"[5] or "which is a portion of his money deposited with me in security for the payment thereof,"[6] or to pay to A B a certain sum of money, "so much being to be due from me to C D, my landlady, at Lady Day next, who is indebted in that sum to A B,"[7] or to pay A B or order

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[1] Worden *v.* Dodge, 4 Denio, R. 159.

[2] Bayley on Bills, ch. 1, § 6, p. 22, 23, (5th edit.); Chitty on Bills, ch. 5, p. 158, 159, (8th edit.); Story on Bills, § 47.

[3] Ibid. See Haussoullier *v.* Hartsinck, 7 Term R. 733.

[4] Ibid. See Goss *v.* Nelson, 1 Burr. R. 226.

[5] Ibid.; Pierson *v.* Dunlop, Cowp. R. 571.

[6] Ibid.; Haussoullier *v.* Hartsinck, 7 Term R. 733.

[7] Ibid.; Anon. Select Cases, 39, cited Chitty on Bills, ch. 5, p. 159, (8th edit.)

"on account of wine had from him,"[1] will be a valid Promissory Note, as importing the consideration only, for which it is given. So, a promise to pay A B or bearer a certain sum at sight, "by giving up clothes and papers, &c." will be a good Promissory Note, if it can be gathered from the attendant facts, that the clothes and papers had been previously given up to the maker; for, under such circumstances, the words would only import the value received.[2]

§ 27. In the next place, to constitute a valid Promissory Note, it should be for the payment of money at some fixed period of time, or on some event which must inevitably happen.[3] This is indeed sufficiently apparent and may be deduced as a corollary from what has been already said. Therefore, a written promise to pay a certain sum of money at the death of a party to the instrument, or at a limited time after the death of such party, or of a third person, is a valid Promissory Note; because it must inevitably become due at some future time, since all men must die, although the exact period is uncertain.[4] Upon a supposed like ground, it has been

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[1] Buller *v.* Crips, 6 Mod. R. 29.

[2] Dixon *v.* Nuttall, 1 Cromp. Mees. & Rosc. 307; S. C. 1 Carr. & Payne, 320; 4 Tyrwh. R. 1013.

[3] Story on Bills, § 50. See Ante, § 22; Moffat *v.* Edwards, 1 Carr. & Marsh. R. 16. See also, Walker *v.* Roberts, 1 Carr. & Marsh. R. 590.

[4] Story on Bills, § 47; Bayley on Bills, ch. 1, § 6, p. 24, 25, (5th edit.); Chitty on Bills, ch. 5, p. 156, (8th edit.); Id. ch. 12, p. 561, Bristol *v.* Warner, 19 Connect. R. 7; Colehan *v.* Cooke, Willes, R. 396; 2 Str. R. 1217. In this last case, the Note was payable ten days after the death of the maker's father. The case was argued several times, and Lord Chief Justice Willes, in delivering the opinion of the Court, said: — "I will here take notice of all the cases which were cited to the contrary, and will show that they all stand on a different foot, and are plainly distinguishable from the present. For they are all of them cases where either the fund

held, that a written promise to pay a certain sum in two months after a certain ship in the government service

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out of which the payment was to be made is uncertain, or the time of payment is uncertain, and might or might not ever happen; whereas, in the present case, there is no pretence that the fund is uncertain, and the time of payment must come, because the father, after whose death they are made payable, must die one time or other. The case of Pearson *v.* Garrett, 4 Mod. R. 242, and Comb. 227, was thus: the defendant gave a Note to pay sixty guineas when he married B, and judgment was given for the defendant, because it was uncertain whether he would ever marry her or not, so the time of payment might never come. In the case of Jocelyn *v.* Lacier, P. 1 Geo. 1, B. R. (10 Mod. R. 294, 316,) the Bill was drawn on Jocelyn to pay so much every month out of his growing subsistence; how long that would last no one could tell, or whether it would be sufficient for that purpose; and therefore the Bill was holden not to be good, because the fund was uncertain. In the case of Smith *v.* Boheme, M. 1, Geo. 1, B. R. cited 2 Ld. Raym. 1362, the promise in the Note was to pay £70, or surrender a person therein named; if, therefore, he surrendered the person, there was no promise to pay any thing, and therefore, the Note was uncertain and not negotiable. In the case of Appleby *v.* Biddulph, P. 2 Geo. 1, cited 8 Mod. 363, a promise to pay if his brother did not pay by such a time; held not to be within the statute, because it was uncertain whether the drawer of the Note would ever be liable to pay or not. In the case of Jenny *v.* Herle, Tr. 10 Geo. 1, (2 Ld. Raym. 1361,) a promise to pay such a sum out of the income of the Devonshire mines; held not a promise within the statute, because it was uncertain whether the fund would be sufficient to pay it. So in the case of Barnsley *v.* Baldwin, P. 14 Geo. 2, B. R. (7 Mod. R. 417,) the promise was, as in the case of Pearson *v.* Garrett, to pay such a sum on marriage; and held not to be within the statute, for the same reason. And as these Notes are plainly not within the intent of the statute, because not negotiable *ab initio*, so, when the words themselves come to be considered, they are not within the words of it, because the statute only extends to such notes where there is an absolute promise to pay, and not a promise depending on a contingency, and where the money at the time of the giving of the Note becomes due and payable by virtue thereof, (so are the words of the statute,) and not where it becomes due and payable by virtue of a subsequent contingency, which may perhaps never happen, and then the money will never become payable at all. And it can never be said, that there is a promise to pay money or that money becomes due and payable by virtue of a note, when, unless such subsequent contingency happen, the drawer of the Note does not promise to pay any thing at all. But the present Notes, and those cases shall be paid off, has been held to be a good Promissory Note; because, it is said, it is morally certain that the government will pay off its ships.[1] There is certainly some reason to doubt, whether this last case falls properly within the doctrine; for it can scarcely be affirmed as a general truth, that governments will or do pay all their just debts; and unless this can be affirmed, there is no moral certainty that any particular debt will be paid.[2]

§ 28. It is this certainty, either moral or physical, at

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where such Notes have been holden to be within the statute, do not depend on any such contingency, but there is a certain promise to pay at the time of the giving of the Notes, and the money by virtue thereof will certainly become due and payable one time or other, though it is uncertain when that time will come. The Bills, therefore, of Exchange, commonly called *Billæ Nundinales* were always holden to be good, because, though these fairs were not always holden at a certain time, yet it was certain that they would be held. The case of Andrews *v.* Franklin, H. 3 Geo. 1, B. R. (1 Str. R. 24,) depends on the same reason; for there the Note was to pay such a sum two months after such a ship was paid off; and held good because the ship would certainly be paid off one time or other. The case of Lewis *v.* Ord. T. 8 & 9 Geo. 2, B. R. (Cunn. on Bills, 113,) was exactly the like case, and determined on the same reason. As to the objection, that these are not negotiable Notes, because the value of them cannot be ascertained, the argument is not founded on fact, because the value of a life, when the age of a person is known, is as well settled as can be; and there are many printed books in which these calculations are made. But if it were otherwise, the life of a man may be insured, and by that the value will be ascertained. And the same answer will serve to the objection which I before mentioned against such Bills of Exchange. There was another objection taken, that the drawer might have died before his father, and then these Notes would have been of no value; but there is plainly nothing in this objection, for the same may be said of any Note payable at a distant time, that the drawer may die worth nothing, before the Note becomes payable."

[1] Andrews *v.* Franklin, 1 Str. R. 24; Evans *v.* Underwood, 1 Wils. R. 262.

[2] See Bayley on Bills, ch. 1, § 6, p. 24, (5th edit.); Chitty on Bills, ch. 5, p. 156, (8th edit.); Id. ch. 12, p. 501.

least to the extent of human foresight, which lies at the foundation of the rule.[1] Hence, a written promise to pay a certain sum of money by instalments at future specified periods, but the instalments to cease at the payee's death, is not a valid Promissory Note; for it may be, that the payee may die before any instalment becomes due, and therefore the money is payable only on a contingency.[2] So, a promise to pay money by instalments, not stating when, is not a good Promissory Note, on account of the uncertainty of the time.[3] Hence, also, a written promise to pay money, when the maker or the payee shall come of age, will not be a good Promissory Note; for *non constat*, that he will ever arrive at that period of life.[4] But it will be otherwise, if, from the other language of the instrument, it can be gathered that a period is absolutely fixed for the payment of the money at all events, and that the age of the party is referred to, not as a contingent event, but merely as a mode of ascertaining that period. Thus, if the maker promises to pay, when the payee shall come of age, to wit, on the first day of January, 1850, it will be held a valid Promissory Note; for, in such a case, the Note is absolutely payable on the day specified, whether the payee be then living or not.[5] It is to this same principle of interpretation, that we are to attribute the decision in another case,

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[1] Palmer *v.* Pratt, 2 Bing. R. 185; Carlos *v.* Fancourt, 5 Term R. 482.

[2] Worley *v.* Harrison, 3 Adolp. & Ellis, 669.

[3] Moffat *v.* Edwards, 1 Carr. & Marsh. R. 16.

[4] Goss *v.* Nelson, 1 Burr. R. 226; Bayley on Bills, ch. 1, § 6, p. 23, 24, (5th edit.); Chitty on Bills, ch. 5, p. 156, (8th edit.); Id. ch. 12, p. 561.

[5] Goss *v.* Nelson, 1 Burr. R. 226; Bayley on Bills, ch. 1, § 6, p. 23, (5th edit.); Chitty on Bills, ch. 5, p. 156, (8th edit.); Id. ch. 12, p. 561.

where the maker promised to pay a certain sum "by the 20th of May, 1807, or when he (the payee) completes the building according to contract," and the Court held the instrument to be a valid Promissory Note, it being payable absolutely at a day certain (meaning the 20th of May.)[1] So, where a Note was made payable by instalments, with a proviso, that if default be made in payment of any part of the first instalment, the whole shall become immediately payable, has been held to be a good negotiable note; for the time is absolutely fixed, and must inevitably occur at the time when the last instalment becomes due, if not by the prior event of non-payment of the first instalment.[2]

§ 29. Perhaps there may be thought to be some nicety in the application of this doctrine to some particular classes of cases, which, at first view, seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet, which are uniformly held to be absolutely payable at all events. Thus, if a Note be made payable at sight, or at ten days after sight, or in ten days after notice, or on request, or on demand; in all these and the like cases, the Note will be held valid as a Promissory Note, and payable at all events, although, in point of fact, the payee may die without ever having presented the Note for sight, or without having given any notice to, or made any request or demand upon the maker for payment.[3] But the law

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1 Stevens *v.* Blunt, 7 Mass. R. 240.

2 Carlow *v.* Kinealy, The (English) Jurist for Dec. 16, 1843, p. 1115.

3 Chitty on Bills, ch. 5, p. 156, (8th edit.); Dixon *v.* Nuttall, 1 Cromp. Mees. & Rosc. 307; S. C. 6 Carr. & Payne, R. 320; 4 Tyrwh. R. 1013; Clayton *v.* Gosling, 5 Barn. & Cressw. 360; Rumball *v.* Ball, 10 Mod. R. 38. See also, Jousse, Sur L'Ord. 1673, tit. 5, art. 1, p. 67, 68; Pothier, De Change, n. 32.

in all cases of this sort, deems the Note to admit a present debt to be due to the payee, and payable absolutely and at all events, whenever or by whomsoever the Note is presented for payment, according to its purport.[1] Nay, where a Note is payable on demand, no other demand need be made, except by bringing a suit thereon.[2] So, where a Note does not specify any day or time of payment, it is by law deemed payable on demand, and therefore is construed as if it contained the words "payable on demand" on its face.[3]

§ 30. Promissory Notes are not only valid when payable at sight, or at a fixed period after sight, or on request, or on demand; but they are also valid when the payment is to be made at any other fixed period either established by law or ascertained by usage, even when it may be affected by some variations in its application to time. Thus, a Note payable at Christmas, or New Year's Day, or upon any other holyday will be

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[1] Chitty on Bills, ch. 5, p. 156, (8th edit.); Clayton *v.* Gosling, 5 Barn. & Cressw. 360. In this case, which was a note for £200, payable "on having twelve months' notice," for value received, the Court held it a good Promissory Note, and provable in bankruptcy against the maker, although he became bankrupt before any notice was given to him by the payee. Upon that occasion, Lord Tenterden said: — "We have decided on more than one occasion, that the expression 'value received' in a Note imports, 'received from the payee.' The Note in question may, therefore be read thus: — 'We acknowledge to owe the payee £200, and promise to pay him that sum with interest, twelve months after notice.' If so, there is not any contingency as to the debt, for that is admitted to be due. Nor is the time of payment contingent, in the strict sense of the expression: for that means a time which may or may not arrive; this Note was made payable at a time which we must suppose would arrive."

[2] Bayley on Bills, ch. 9, p. 402, (5th edit.); Chitty on Bills, Pt. 2, ch. 2, p. 590, (8th edit.); Id. ch. 4, p. 608, 609; Rumball *v.* Ball, 10 Mod. R. 38.

[3] Thomson on Bills, ch. 1, § 2, p. 32; Bayley on Bills, ch. 3, § 14, p. 109, (5th edit.); Green *v.* Drebilbis, 1 Greene, Iowa, R. 55.

valid, because the period is fixed by law or usage. So, a Note payable at one usance, or at two usances, or at a half usance, which are periods fixed in different countries by usage, would be equally valid.[1]

§ 31. The French Law positively requires, that every Bill of Exchange, and every Promissory Note, shall express the time when it is to be paid, otherwise it is held not to be valid as a Bill or Note, but only as a simple contract.[2] But in other respects it does not seem to differ from our law, as to the mode of expressing the time of payment; for it may be at sight or at a certain number of days after sight, or after the date of the Bill, or at the expiration of a certain number of weeks or months, or on a certain day of a month, or at a fixed feast, fair, or holyday civil or religious; or at one or more usances.[3] Heineccius also takes notice of the like doctrine as generally prevailing on the subject of the time of payment of Bills. *Cambia platearum sunt, vel a Vista, quando solutio injungitur aliquot diebus post visum cambium, vel a Dato, quando acceptans solvere jubetur intra certum tempus a datis litteris cambialibus; vel denique a Uso, quando tempore consueto solvere tenetur acceptans.*[4] Usance, he after-

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[1] Story on Bills, § 50, 144, 332; Bayley on Bills, ch. 7, § 1, p. 250, 251, (5th edit.); Chitty on Bills, ch. 9, p. 404, (8th edit.); Pothier, De Change, n. 15, 16, 32; Com. Dig. *Merchant*, F. 5; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, ch. 4, p. 816, 817; Nouguier, Des Lettres De Change, Tom. 1, Liv. 3, ch. 1, § 5, p. 87–91.

[2] Code de Comm. art. 110; Pardessus, Droit Comm. Tom. 2, art. 336; Jousse, Sur L'Ord. 1673, art. 1, p. 67, 68; Pothier, De Change, n. 12–16, 32; Delvincourt, Droit Comm. Tom. 1, Liv. 1, tit. 7, p. 76, 77, (2d edit.)

[3] Pardessus, Droit Comm. Tom. 2, art. 336; Id. art. 183; Code de Comm. art. 129–131; Pothier, De Change, n. 15, 16, 32; Jousse, Sur L'Ord. 1673, art. 1, p. 67–69.

[4] Heinecc. de Camb. cap. 2, § 13; Id. cap. 4, § 6.

wards remarks, differs in different places in Germany, the usance being at Leipsic, Brandenburg, Frankfort, and Dantzic, fourteen days, and in some other places, fifteen days.[1] But, in whatever mode or way the time of payment is to be ascertained, whether it be payable at or after sight or date, or at a feast, or usance, or otherwise, Heineccius holds it of primary importance, that every Bill should clearly express the time of payment. *In ipsis litteris cambialibus primo omnium exprimendus est dies solutionis.*[2]

§ 32. Upon the same ground, Bills of Exchange, payable at fairs, commonly called *Billæ Nundinales,* were formerly held good, (and the like rule will apply to Promissory Notes payable at fairs,) because, although these fairs were not always holden at a certain time; yet, it was certain that they would be held.[3] The same rule exists in France. Thus, for example, there are at Lyons four fairs held, each of a month, commonly called *Les Paiemens de Lyon,* and Bills of Exchange payable at such fairs never make mention of any other time than the time of the fair, without naming any precise day; yet, they are held to be good Bills of Exchange, and are payable after the first and before the seventh day of the fair.[4] Bills of Exchange of a similar character, and payable at fairs, prevail in Germany and other parts of

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[1] Ibid.

[2] Ibid. cap. 4. § 6.

[3] Colehan *v.* Cooke, Willes, R. 393, 398, 399; Chitty on Bills, ch. 5, p. 156, (8th edit.)

[4] Pothier, De Change, n. 16; Dupuy de la Serra, L'Art de Change, p. 29, n. 33, (edit. 1789); Jousse, Comm. Sur L'Ord. 1673, tit. 5, p. 69, (edit. 1802); Pardessus, Droit Comm. Tom. 2, § 183, p. 65; Code de Comm. art. 129, 133; Nouguier, De Change, Tom. 1, § 5, n. 5, 6, p. 90; Scaccia, De Comm. § 2, Gloss. 4, p. 494.

the continent of Europe, and are called by Heineccius, *Cambia Feriarum.*[1] He adds that in Germany they are to be presented within a certain time, otherwise they are no longer admitted; and at Leipsic they are presentable at the vernal and autumnal fairs, and are then payable on the Thursday of the last week of the fair, without any allowance of days of grace.[2]

§ 33. In the next place, it is essential to the validity of a Promissory Note, that it should contain no contingency or uncertainty as to the person, by whom it is payable or to whom it is payable.[3] This is, indeed, but a mere application of a general rule, which governs in respect to other contracts.[4] In the first place, the name of the particular person to whom it is payable, should be given; and it should not be in the alternative, as payable to A. B. or to C. D. Therefore, a Note whereby the maker should promise to pay "to A. B, or to C. D. or his or their order," is not a valid Promissory Note; for it is not payable to A. B. and C. D. but to either of them, and that only on the contingency of its not having been paid to the other.[5] [It is the same, also, with a note payable to "the heirs, administrators, or assigns of A. deceased."[6]]

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1 Heinecc. de Camb. cap. 2, § 12, 13.

2 Heinecc. de Camb. cap. 2, § 15. See also, Nouguier, De Change, Tom. 2, p. 556.

3 Chitty on Bills, ch. 5, p. 159, (8th edit.); Id. 160; Id. 177; Bayley on Bills, ch. 1, § 10, p. 34, (5th edit.); Story on Bills, § 54; Per Chief Baron Eyre in Gibson *v.* Minet, 1 H. Black. 608.

4 Ibid.; Champion *v.* Plummer, 4 Bos. & Pull. 252; Cooper *v.* Smith, 15 East, R. 103.

5 Bayley on Bills, ch. 1, § 10, p. 34, 35, (5th edit.); Chitty on Bills, ch. 5, p. 177, (8th edit.); Id. ch. 12, p. 560, 561; Blanckenhagen *v.* Blundell, 2 Barn. & Ald. 417.

6 Bennington *v.* Dinsmore, 2 Gill, R. 348.

§ 34. In the next place, as to the person or persons, by whom the Promissory Note is payable. It seems indispensable that the maker's name should be signed to a Promissory Note, in order at once to ascertain the identity of the person who signs it, and also to secure public confidence in its negotiability and circulation.[1] It should also state in unambiguous terms, who is the maker or person liable to pay it; and, if it be in the alternative, and is signed, that it is to be paid "by A. B. or else C. D." it is void as a Promissory Note.[2] But, provided the name of the maker who is to pay it, be clearly seen as such, on the face of the instrument, it does not seem to be of any importance, either in our law or in the foreign law, whether it is found at the bottom or at the top, or on the margin thereof.[3] It may also be written in ink or in pencil.[4] The signature may be by the maker himself, or by any one authorized by him, and signing for him and in his name.[5] Whether a signature by the initials of the maker's name will be a sufficient subscription, does not seem to have been directly decided by our law;[6] but its sufficiency is com-

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1 Bayley on Bills, ch. 1, § 11, p. 37, (5th edit.)

2 Ferris *v.* Bond, 4 Barn. & Ald. 679; Chitty on Bills, ch. 5, p. 160, 177, (8th edit.); Bayley on Bills, ch. 1, § 6, p. 17, (5th edit); Id. § 11, p. 39.

3 Bayley on Bills, ch. 1, § 11, p. 37, 38, (5th edit.); Chitty on Bills, ch. 5, p. 185, 186, (8th edit.); Story on Bills, § 53; Heinecc. de Camb. cap. 4, § 17; Pardessus, Droit Comm. Tom. 2, art. 330; 3 Kent, Comm. Lect. 44, p. 78, (5th edit.); Taylor *v.* Dobbins, 1 Str. 399; Elliot *v.* Cooper, 2 Ld. Raym. 1376.

4 Chitty on Bills, ch. 5, p. 146, 185, (8th edit.); Story on Bills, § 53; Thomson on Bills, p. 8, (2d edit.); Geary *v.* Physic, 5 Barn. & Cressw. 234.

5 Bayley on Bills, ch. 1, § 11, p. 37, 38, (5th edit.); Chitty on Bills, ch. 5, p. 185, 186, (8th edit.); Story on Bills, § 53.

6 But see Merchants' Bank *v.* Spicer, 6 Wend. R. 443.

pletely established in the Law of Scotland.[1] The subscription, also, by the maker by his mark, if he cannot write will be good, if it is established by proper attestation or proof.[2]

§ 35. In the next place, it is equally essential that the person to whom the Note is payable, should be clearly expressed, and made known upon the face of the Note; for parol evidence is not admissible to show to whom it is payable; and in instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can be securely derived. The same rule pervades the whole foreign law. In the French Code of Commerce, it is enumerated as one of the essential requisites of a Promissory Note, that it should contain the name of the payee, to whose order it is payable.[3] And this is but an affirmance of the antecedent law.[4] Heineccius lays down the doctrine in strong terms: *Nec prætermittendum Exactoris prænomen et nomen; vel ideo quippe necessarium, quod nemo ex litteris agere potest, cujus in illis nulla fit mentio.*[5] A similar rule prevails as to the name of the maker of the Note.[6] Heineccius, speaking of the importance of the signature of the drawer to a bill, and that even a seal will not supply the defect, (and the same ground applies to the signature of the maker of a Promissory Note,) quotes with approbation the opinion

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1 Thomson on Bills, ch. 1, § 2, p. 46, (2d edit.)

2 Thomson on Bills, ch. 1, § 2, p. 46, 48-51, (2d edit.); Chitty on Bills, Pt. 2, ch. 5, p. 621, (8th edit.)

3 Code de Comm. art. 188.

4 Pothier De Change, n. 30, 31; Pardessus, Droit Comm. Tom. 2, art. 338; Jousse, Sur L'Ord. 1673, tit. 5, art. 1, p. 67.

5 Heinecc. de Camb. cap. 4, § 11; Story on Bills, § 54.

6 Pothier, De Change, n. 30; Heinecc. de Camb. cap. 4, § 17.

of Sprengerus, and says: *Et id quidem omnino verissimum est, (1) quia periculosa est contraria sententia, ob falsa, quæ ita facile possent committi, (2) quia ita non facile fieri posset cambialium litterarum recognitio. Idem dicendum videtur de casu, si loco nominis subscripti crucis signum subjiciatur.*[1]

§ 36. But here, again, the general rule of our law, as to the person to whom a Note is payable, must be understood with proper limitations and qualifications. It is not necessary that the name of the payee should expressly be stated on the face of the Note; but it will be sufficient, if, from the language used, the person can be certainly ascertained.[2] Thus, for example, a Note payable to the order of A. is a valid Promissory Note, for, in contemplation of law, it is payable to A. or his order.[3] So, a Note payable to A. or bearer, or payable to bearer, is a valid Promissory Note; for, in contemplation of law, it is solely payable to the person, who is, or may become, the bearer; and *Id certum est, quod certum reddi potest.*[4] So, a Note thus expressed:—"Received of B. £50, which I promise to pay on demand,"—is a good Promissory Note; for the promise will be interpreted to be a promise to pay B.[5] Pothier gives a similar interpre-

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1 Heinecc. de Camb. cap. 4, § 18.

2 Chitty on Bills, ch. 5, p. 155, 160, (8th edit.); Bayley on Bills, ch. 1, § 10, p. 32–35, (5th edit.); Story on Bills, § 54; Rex *v.* Randall, Russ. & Ryan, Cr. Cas. 195.

3 Chitty on Bills, ch. 11, p. 582, (8th edit.); Bayley on Bills, ch. 9, p. 388. 389, (5th edit.); Frederick *v.* Cotton, 2 Show. R. 8; Fisher *v.* Pomfrett, Carth. R. 403; 12 Mod. R. 125; Anon. Comb. R. 401; Smith *v.* M'Clure, 5 East, R. 476.

4 Bayley on Bills, ch. 1, § 10, p. 30, 31, (5th edit.); Chitty on Bills, ch. 5, p. 178, (8th edit.); ch. 11, p. 582; Grant *v.* Vaughan, 3 Burr. R. 1516; Minet *v.* Gibson. 3 T. R. 481; S. C. 1 H. Black. R. 569.

5 Green *v.* Boaz, 4 Barn. & Cressw. 235.

tation to the like language;[1] but Pardessus considers, that under the present commercial code of France, the interpretation would not hold good, but the Note would be fatally defective.[2] Upon the other point, where a note is made payable to the order of A. the French Law partly agrees, and partly differs from our own. A Note payable to the order of A. is valid and negotiable, as a Promissory Note, as soon as it is made payable to any person in particular, and he may maintain a suit upon it, as holder in the same manner, as if it were originally made payable to him.[3] But it is not deemed, as in our law, payable to A. but only to his order. And Heineccius puts precisely the same interpretation upon the words, and holds the same doctrine.

[§ 36 *a*. We have already seen that a note payable to the order of the maker, and by him indorsed and put in circulation, is treated as a note to the bearer.[4] This principle has received a new illustration in a recent case in New Hampshire. It was here decided that though a Note signed by several persons, and payable to one of their number, cannot be enforced at law in the name of the payee, as a joint promise against all the makers, yet, where such Note is indorsed by the individual payee, who was one of the makers, it immediately becomes operative as a valid contract, from the date of the transfer, and may be enforced by a joint action against all the makers, in the name of the indorsee.[5]]

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1 Pothier, De Change, n. 31; Story on Bills, § 54.

2 Pardessus, Droit Comm. Tom. 2, art. 338.

3 Story on Bills, § 56; Locré Esprit du Code de Comm. Tom. 1, Liv. 3, tit. 8, p. 242; Pardessus, Droit Comm. Tom. 2, art. 339; Heinecc. de Camb, cap. 2, § 8.

4 See Ante, § 16.

5 Heywood *v.* Wingate, 44 N. Hamph. 73.

§ 37. A Note, issued with a blank for the payee's name, may be filled by any *bonâ fide* holder with his own name as payee, and then it will be treated as a good Promissory Note to him from its date.[1] Indeed, the law proceeds much farther; for, if a blank paper, intended to be a Promissory Note, is signed by the maker, [or if a person indorses his name upon it,[2]] it may afterwards be filled up by any authorized person, according to the intent for which it is signed, [or indorsed,] and, in the possession of a *bonâ fide* holder, it will be held valid.[3]

[§ 37 *a*. And where a blank space has been left in a note, which renders it imperfect, the holder may, it seems, in some special cases fill the blank.[4] But, if a Note is perfect when delivered, no alteration can be made therein but by consent of the parties; nor will the law imply an authority to the holder to make an addition thereto which will render it negotiable. Accordingly, the insertion of the words "or his order" in a note, after the execution and delivery thereof to the payee, without the maker's knowledge and consent, although in a blank place, has been held to be a material altera-

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1 Bayley on Bills, ch. 1, § 10, p. 36, 37, (5th edit.); Chitty on Bills, ch. 5, p. 160, 177, 178, (8th edit.); Cruchely *v.* Clarance, 2 Maule & Selw. 90; Cruchley *v.* Mann, 5 Taunt. R. 529; Atwood *v.* Griffin, 1 Ryan & Mood. 425; Story on Bills, § 54. See Rex *v.* Randall, 1 Russ. & Ryan, Cr. Cas. 193.

2 Ferguson *v.* Children, 9 Humphrey, Tenn. R. 382.

3 Bayley on Bills, ch. 1, § 11, p. 39, (5th edit.); Chitty on Bills, ch. 2, p. 33, (8th edit.); Id. ch. 5, p. 186, 215; Story on Bills, § 53; 3 Kent, Comm. Lect. 44, p. 77, (5th edit.); Johnson *v.* Blasdale, 1 Smedes & Marshall, R. 17; Hemphill *v.* Bank of Alabama, 6 Ibid. 44; Wilson *v.* Henderson, 9 Ibid. 375.

4 Cruchley *v.* Clarance, 2 Maule & S. 9; Contelly *v.* Mann, 5 Taunt. R. 529; Atwood *v.* Griffin, 2 Carring. & Payne, R. 368; Boyd *v.* Brotherson, 10 Wend. R. 93; Mitchell *v.* Culver, 7 Cowen, R. 336.

tion, rendering such Note invalid in the hands of an innocent holder.[1]]

§ 38. The law of France upon this subject, is somewhat different. Originally, Bills of Exchange drawn with a blank, for the name of the payee, might be filled up (as in our law,) in the name of any *bonâ fide* holder, and thereby the other parties to the Bill would be bound to him in the same manner, as if his name had been originally inserted therein.[2] But this having been found to be a cover for fraud and usury, the practice was afterwards disallowed.[3] Soon afterwards, Bills, payable to the bearer, came into use; but, being found productive of the like ill consequences, they also were declared illegal.[4] Their validity seems afterwards to have been reëstablished;[5] but, according to Pardessus, by the present law of France, a Bill, payable to the bearer is not valid.[6] If á Bill of Exchange contains any fiction or falsity in the names, or quality, or domicil, or place, where it is drawn, or where it is payable, it loses its distinctive character as a Bill, and becomes only a simple promise.[7] Upon a somewhat similar policy, Promissory Notes, with a blank for the name of the payee, were formerly held valid, and were in use in France;

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[1] Bruce *v.* Westcott, 3 Barbour, Sup. Ct. R. 374; Clute *v.* Small, 17 Wend. 242; Kershaw *v.* Cox, 3 Esp. R. 246; Bathe *v.* Taylor, 15 East, R. 412; Edè *v.* East India Co. 2 Burr. 1216.

[2] Pothier, De Change, n. 223.

[3] Ibid; Savary, Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 7, p. 201.

[4] Ibid.; Dupuy de la Serra, ch. 19, p. 196, 197.

[5] Ibid.

[6] Pardessus, Droit Comm. Tom. 2, art. 338. Post, § 173; Story on Bills, § 58.

[7] Code de Comm. art. 112. See also, Chitty on Bills, ch. 5, p. 178, (8th edit.)

but they are now prohibited, and have fallen into disuse.[1]

§ 39. It has sometimes happened that Notes import to be payable to a fictitious person, or to a person not *in esse*, or to his order, and are issued with an indorsement in blank, purporting to be made by such person thereon. Under such circumstances, as against the real maker of the Note, who assumes the character of the indorser in the transaction, the Note will, in the hands of a *bonâ fide* holder, be held payable to bearer, and have the same legal operation, as if it was originally made payable to bearer.[2] [So, also, if put in circulation by the maker, with the indorsement of the payee forged upon it.[3]] We have just seen that in respect to Bills of Exchange, a different rule prevails in France under the present Code of Commerce;[4] and the like rule is applicable to Promissory Notes. But, if a Note is made payable to a fictitious person or order, it seems, that as between the original parties who put the instrument into circulation with a knowledge of the fiction, it might be held void as an inoperative instrument.[5]

§ 40. These are the essential qualities required in Promissory Notes, by the Law of England and America.

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[1] Savary, Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 7, p. 199.

[2] Bayley on Bills, ch. 1, § 10, p. 31, 32, (5th edit.) and note; Chitty on Bills, ch. 5, p. 179, 180, (5th edit.); Stevens *v.* Strong, 2 Sandford, Sup. Ct. R. 138; Stone *v.* Freeland, cited 1 H. Black. R. 316, note; Minet *v.* Gibson, 3 T. R. 481; S. C. 1 H. Black. R. 569; Collis *v.* Emett, 1 H. Black. R. 313; Cooper *v.* Meyer, 10 Barn. & Cressw. R. 469; Bennett *v.* Farnell, 1 Camp. R. 130, *contra*. But see Id. Addenda, p. 180, *b.* § 9; Stevens *v.* Strong, 2 Sandford, Superior Ct. N. Y. R. 138.

[3] Coggill *v.* American Exchange Bank, 1 Comstock, R. 113.

[4] Ante, § 37; Code de Comm. art. 112.

[5] See Bennett *v.* Farnell, 1 Camp. R. 130; Hunter *v.* Jeffery, Peake, Addit. Cas. 146. See Chenot *v.* Lefevre, 3 Gilman, Illinois R. 637.

There are others, again, which are indispensable under particular circumstances, and others, again, which are usual and common, although not indispensable, but which yet will require some notice in the present connection. In certain cases, by statute, no Note is valid as a Promissory Note, unless it is made in strict compliance with the statute regulations. Thus, for example in England, Promissory Notes are, in general, required by statute to be on stamped paper.[1] So, certain descriptions of Promissory Notes are required to be attested, otherwise they are void.[2] Others, again, for certain purposes, require the words "value received" to be inserted therein, in order to give a title to interest and damages;[3] and others again formerly required, under a penalty, the words "value received" to be inserted on their face, such as Notes given for the payment of coals, which on their face were required to purport to be given "for value received in coals."[4] But upon these it is unnecessary to dwell, as they exclusively belong to positive legislation, and vary, as well in the same country, as in different countries.

§ 41. A far more important, and in a practical sense, the most distinguishing characteristic of Promissory Notes, is their negotiability. It is this quality which gives a ready circulation and currency to them among the community at large, and enables them to perform in a vast variety of cases, the functions of money.[5] Never-

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1 Bayley on Bills, ch. 3, § 1 – 14, p. 77 – 103, (5th edit.)
2 Bayley on Bills, ch. 1, § 12, p. 40, (5th edit.)
3 Chitty on Bills, ch. 5, p. 183, (8th edit.)
4 Bayley on Bills, ch. 1, § 13, p. 40, (8th edit.); Chitty on Bills, ch. 5, p. 182, (8th edit.)
5 Ante, § 1 – 3.

theless, this is not by our law an indispensable quality, although it is so general an attendant that it is difficult to separate in our minds the notion of a Promissory Note from that of negotiability. A Note, not negotiable, enjoys by our law, all the privileges of a Note which is negotiable, so far as the maker and payee are concerned.[1] It is only when a transfer of such a Note is accomplished, that the distinction between an assignment at law and an assignment in equity is felt and understood.[2] Hence, it was formerly thought, that unless a Promissory Note was negotiable, it was but the assignment of a chose in action which was generally incapable of being transferred at the common law, although held assignable in equity, and therefore was a mere evidence of a contract.[3] But the validity of such a Note, as a Promissory Note, is now fully established.[4] Indeed, the rule never did apply to Promissory Notes or Bills of Exchange, assigned to the King or Government by the payee, although not originally payable to bearer or to order; for these, like all other choses in action, always were assignable to the King or Government upon principles of public policy, so as, upon the assignment thereof, to be suable in the name of the King or Government.[5] And Bills of Exchange and

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[1] Bayley on Bills, ch. 1, § 10, p. 33, (5th edit.); Chitty on Bills, ch. 5, p. 181, 218, (8th edit.); Ante, § 1, 2; Story on Bills, § 60.

[2] Story on Bills, § 60, 199.

[3] Chitty on Bills, ch. 5, p. 181, (8th edit.); Dawkes *v.* Ld. De Lorane, 3 Wilson, R. 207, 213; Story on Bills, § 60.

[4] Ibid.; Smith *v.* Kendall, 6 Term R. 124; Ante, § 1-3; Story on Bills, § 60; The King *v.* Box, 6 Taunt. R. 328; Bishop of Derry *v.* Chambers, Hudson & Brooke, R. 433; U. States *v.* Buford, 3 Peters, R. 12, 30. See Post, § 128.

[5] Story on Bills, § 60, 199; U. States *v.* White, 2 Hill, N. Y. R. 59.

Promissory Notes, originally made payable to the King or Government, are, upon the like policy held assignable to third persons, without any words of negotiability in the instrument.[1]

§ 42. The French Law, as has been already suggested,[2] in respect to non-negotiable Bills and Notes, differs essentially from ours; for the privileges annexed by that law to Promissory Notes are limited to those which are negotiable, viz.: those which are payable to the payee or his order, or to his order generally, or that some other equivalent words should be used.[3] The law

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[1] Ibid.; Lambert *v.* Taylor, 4 Barn. & Cressw. 138; Chitty on Bills, ch. 6, p. 219, 252, (8th edit.); U. States *v.* Buford, 3 Peters, R. 30; U. States *v.* White, 2 Hill, N. Y. R. 59.

[2] Ante, § 2.

[3] Story on Bills, § 62; Pardessus, Droit Comm. Tom. 2, art. 339; Pothier, De Change, n. 216-219; Jousse, Sur L'Ord. 1673; tit. 5, art. 31, p. 126; Dupuy de la Serra, De Change, ch. 19, § 1, 2, p. 191, 192; Nouguier, De Change, Tom. 1, Liv. 4, § 1, n. 7, p. 498; Chitty on Bills, ch. 5, p. 181, (8th edit.); Id. ch. 6, p. 218, 219. Mr. Nouguier thinks, that he has ascertained the precise time when the words "or order" were added in France, in Bills of Exchange. He says: — "Estienne Cleirac, lequel, comme on sait, écrivait en 1569, est le premier auteur qui parle *de l'ordre*, comme moyen de transférer la propriété d'une lettre de change. Dans son ch. 5, n. 4, page 62, il donne un modèle de lettre contenant l'ordre; puis, au même chapitre, n. 12, page 66, il explique la valeur de cette expression. Plus tard, Savary, *Parère* 82, t. 2, page 602, prétend que l'usage de cette clause a pris naissance en 1620; tandis que Mareschal, dans son ouvrage sur les changes et rechanges, publié en 1625, ne dit rien qui confirme cette opinion. Son silence ne la détruit pas, car son traité succinct est principalement destiné à rechercher la nature des diverses espèces de changes, et la constitution faite par Cleirac trentequatre ans après, semble lui donner une certaine force. J'ai même retrouvé, dans *l'Instruction sur les Lettres de Change*, ch. 1, p. 4, un renseignement précieux, qui déterminerait l'époque précise de l'invention de l'ordre. Suivant l'auteur de cette instruction, avant le ministère du Cardinal de Richelieu on ne se servait pas du mot *ordre;* mais l'embarras des procurations qu'il fallait passer, donna lieu à ce terme, pour faciliter le commerce des Lettres de Change, dont ce ministre faisait un trés-grand usage. Or, on sait que le

of the Neapolitan dominions is to the same effect.[1] It is highly probable that the same rule prevails generally upon the continent of Europe, although the elementary writers do not seem directly to discuss the point.[2] In Scotland, a Bill of Exchange or Promissory Note, is held to be indorsable and negotiable, although it bears no words of assignability on its face.[3] In this respect, it differs both from our law and the foreign continental law.

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ministère du cardinal a duré de 1624 à 1642, époque de sa mort. Ce serait donc vers cette époque et pendant cet espace de dix-huit ans, que l'ordre, inventé, en 1620, aurait pris son développement. Quoiqu'il en soit, le commerce accueillit cette innovation avec une faveur marquée: il comprit à merveille combien ses ressources s'augmentaient par la facilité de régler ses opérations immédiatement, sans frais, et d'assurer un rapide paiement. Aussi le transport des lettres par un simple ordre devint d'un usage presque général. Cependant, vers la fin du dix-septième siècle, et après, l'ordonnance de 1673, quelques places de commerce, tenant par tradition à leurs anciennes formalités, ne purent se résoudre à autoriser les transports par endossement, et Dupuy de la Serra, (ch. 13, n. 12, p. 467 et 468; Id. ch. 13, § 12, p. 92, edit. 1789,) cite quelques pays où il y avait défense d'agir ainsi: 'Dans quelques villes particulières, dit-il, comme Venise, Florence, Novi, Bolzan, par des réglemens qui ont force de lois, il est défendu de payer les Lettres de Change en vertu des ordres: mais il faut qu'elles soient payables *à droiture* à ceux qui les doivent exiger, ou bien ceux à qui elles sont payables envoient une procuration conçue en certaine forme précise, sans quoi on ne saurait en exiger le paiement, ni faire un protêt valable, parce qu'il ne serait pas fait par la faute du tireur ni de l'acceptant.'" Nouguier, Des Lettres de Change, Tom. 1, p. 273, 274. Doubtless, they were introduced into Promissory Notes about the same period.

1 Codice per lo Regno delle due Sicilie, Del Comm. tit. 7, cap. 1, § 109; Id. cap. 2, § 187.

2 See Heinnecc. de Camb. cap. 2, § 1-3; Baldasseroni (P.) Del Cambio, Pt. 1, art. 2, and Comm. Code of Russia, 1833; 1 Louis. Law Journal, 1842, p. 64; Da Silva Lisboa Principes de Diritto Mercantil, Tom. 2, ch. 6, p. 17.

3 1 Bell, Comm. B. 3, ch. 2, § 4, p. 401, (5th edit.); Story on Bills, § 62.

§ 43. As to the mode of negotiation of Promissory Notes, it depends in our law upon the form in which they are originally made. If they are payable to bearer generally, or to A. or bearer, the title thereto passes by mere delivery from hand to hand, and, of course, possession of the same is *primâ facie* proof of title.[1] If they are payable to order, or to A. or order, then the title will pass by the indorsement of the payee to the person named in the indorsement. If they are indorsed in blank, then the title passes by mere delivery to the holder in the same manner, as if the indorsement were to the bearer.[2]

§ 44. In order to make a Promissory Note negotiable, it is not essential, that it should in terms be payable to bearer or to order. Any other equivalent expressions, clearly demonstrating the intention to make it negotiable, will be of equal force and validity.[3] Thus, for example, a Promissory Note payable to A. or assigns is negotiable. The French Law is equally liberal in its exposition of this subject; for, although the Code of Commerce requires Promissory Notes to be payable to a party or his order;[4] yet, it is held a sufficient compliance with the terms of the article, if other equivalent words are used. Thus, for example, if the Note is made

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[1] Story on Bills, § 60; Chitty on Bills, ch. 5, 180; Id. ch. 6, p. 252, (8th edit.); Bayley on Bills, ch. 1, § 10, p. 31, (5th edit.)

[2] Story on Bills, § 60; Chitty on Bills, ch. 6, p. 252, 253, (8th edit.); Bayley on Bills, ch. 1, § 10, p. 31, (5th edit.) Id. ch. 5, § 1, p. 121, 123, 124.

[3] Chitty on Bills, ch. 5, p. 180, (8th edit.); Id. ch. 6, p. 219; Bayley on Bills, ch. 5, § 1, p. 120, (5th edit.); Story on Bills, § 60; 3 Kent, Comm. Lect. 44, p. 77, (5th edit.); Com. Dig. *Merchant*, F. 5.

[4] Code de Comm. art. 188.

payable to A. or at his disposal, (*ou à sa disposition,*) that will be sufficient to establish its negotiability.[1] So, if it be payable to A. or to the lawful bearer thereof, it will be deemed equivalent to the words "or to his order."[2] But, if the words are payable to A. or in his favor, (*ou en sa faveur,*) they will not be deemed to intend to make the Note negotiable.[3]

§ 45. In the next place, as to the date. Promissory Notes ordinarily state the date or time of making the same; but it is not, in general, essential that they should be dated, unless positively required by some statute.[4] Great practical difficulties must, however, arise in many cases, from the omission of the date, and therefore it rarely occurs, except from inadvertence or mistake. Thus, if a Note be payable in a certain number of days after the date, it is plain that the omission must create great embarrassment and difficulty in ascertaining when the Note was actually made and delivered to the payee. In such a case, the time will be computed from the day, when it was issued or made,[5] or, if that cannot be exactly ascertained, from the day when its existence can first be established.[6] Where a Note is payable at sight,

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[1] Pardessus Droit Comm. Tom. 2, art. 339.

[2] Ibid. [3] Ibid.

[4] Bayley on Bills, ch. 6, § 7, p. 25, (5th edit.); Chitty on Bills, ch. 5, p. 169, (8th edit.); Pasmore *v.* North, 13 East, 517, 521; M. & F. Bank *v.* Schuyler, 7 Cowen, R. 337.

[5] De la Courtier *v.* Bellamy, 2 Shower, R. 422; Hague *v.* French, 3 Bos. & Pull. 173; Giles *v.* Bourne, 6 Maule & Selw. 73; Chitty on Bills, ch. 5, p. 169, (8th edit.); Id. Pt. 2, ch. 2, p. 581; Bayley on Bills, ch. 7, § 1, p. 248; Id. ch. 9, p. 379, (5th edit.); Woodford *v.* Dorwin, 3 Verm. R. 82; Chamberlain *v.* Hopps, 8 Verm. R. 94.

[6] See Armitt *v.* Breame, 2 Ld. Raym. 1076, 1082; Bac. Abridg. *Leases and Terms for Years,* L. 1; Com. Dig. Fait. B. 3; Styles *v.* Wardle,

or at a certain number of days after sight, the same difficulty is not felt; for the time begins to run, not from the date, but from the time of the presentment thereof, and therefore is easily ascertainable.[1]

§ 46. By the old French Law, the date does not seem to have been positively required to be placed on the Note;[2] but the modern Code of Commerce expressly requires the note to be dated.[3] And by the date, we are to understand the day, the month, and the year.[4] A compliance with this requisite seems indispensable, under the modern Code, to give it the character of a Promissory Note, although it will not otherwise deprive it of being, as between the original parties, considered as a valid simple contract or promise.[5] The law of Naples is in precise coincidence with that of France.[6]

§ 47. Heineccius also holds that the date is indispen-

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4 Barn. & Cressw. 908, 911; Chitty on Bills, Pt. 2, ch. 2, p. 531, (8th edit.); Bayley on Bills, ch. 7, § 1, p. 248, (5th edit.); Id. ch. 9, p. 379; Beawes, Lex Mercat. § 190, p. 439; Thomson on Bills, p. 61, 62, (2d edit.)

1 Chitty on Bills, ch. 9, p. 406, (8th edit.); Thomson on Bills, p. 61, 62, (2d edit.); Bayley on Bills, ch. 7, § 1, p. 244, 245, 248; Pothier, De Change, n. 13; Story on Bills, § 37.

2 Pothier says, (speaking of the old Law, before the modern Code of Commerce,) the want of a date, or an error in the date of the Bill, cannot be objected on the part of the drawer or acceptor, any more than the omission of the place where it was drawn. Pothier, De Change, n. 36.

3 Code de Comm. art. 110, 188; Pardessus, Droit Comm. Tom. 1, art. 331, 333, 457, 458; Delvincourt, Inst. Droit Comm. tit. 7, ch. 1, p. 75; Merlin, Répert. *Lettre et Billet de Change*, § 1, n. 2, p. 161, 162, (edit. 1827); Jousse, Sur L'Ord. 1673, tit. 5, p. 58, 67; Locré, Esprit de Comm. Liv. 1, tit. 8, § 1, p. 332, (edit. 1829); Pothier, De Change, n. 36.

4 Ibid.

5 Ibid; Pardessus, Droit Comm. Tom. 1, art. 331, 333, 464, 477, 478; Chitty on Bills, 147, 148, (8th edit. 1833.)

6 Codice per lo Regno delle due Sicilie, Del Comm. tit. 7, cap. 1, § 109; Id. cap. 2, § 187.

sable. His language is, and it certainly has no small force in a practical view of the subject: *Sequitur diei, mensis, et anni mentio, quæ necessaria omnino videtur;* (1.) *quia pleræque leges cambiales tempus exprimi jubent, veluti Prussicæ, Brunsuicenses, et Austriacæ;* (2.) *quia sæpe dies solutionis a die scriptarum litterarum computandus est, ab eoque currere incipit, e. gr. vier Wochen à dato beliebe der Herr zu bezahlen;* (3.) *quia de præscriptione debiti cambialis judicari non potest sine die et consule. In aliis scripturis omissum diem et consulem regulariter non vitiare contractum, notum est.*[1]

§ 48. In respect to the date of Promissory Notes, two classes of cases may arise, which may involve questions of a very different nature from those which we have been considering. They may be, first, ante-dated; and secondly, post-dated. In both cases, the Notes will be valid in point of law, unless some statute exists to the contrary;[2] and, where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument.[3] Thus, if a Promissory Note should bear date before the maker came of age, and yet, in point of fact, it was actually made and given after he came of age, that fact might be shown and established as a good answer, to a plea of infancy. So, if a Note were given by a married woman after her marriage, but it was ante-dated before the marriage, the husband might successfully defend himself against the claim, founded upon such antecedent date, by

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[1] Heinnec. de Jur. Camb. cap. 4, § 4, (edit. 1769.)

[2] See Bayley on Bills, ch. 6, § 7, p. 25, (5th edit.); Id. ch. 3, § 7, p. 87–97; Chitty on Bills, ch. 5, p. 169, (8th edit.) See Powell *v.* Waters, 8 Cowen, R. 669.

[3] Ibid.

setting up the true date. On the other hand, if a Note should be post-dated, it would still be valid in the hands of the payee or any subsequent indorsee, although the maker should die before the day of the date arrived; for the instrument would still be deemed to have a legal effect from the time of its issue, and the date would be deemed to fix the period from which the time for its payment might be calculated or held fixed.[1] The like rule will apply, where, in a Promissory Note a blank is left for the date, and the maker dies before it is filled up, and afterwards it is filled up; for it will be valid, and furnish no ground of objection, either to the original parties, or to the person who filled it up.[2]

§ 49. In the next place, as to the place where a Promissory Note is made or is payable. By our law it is not essential that any place of making or of payment should be specified on the face of the Note, unless specially provided for by statute.[3] It is usual, indeed, in the date, to include the place where the Note is made; and this, in many cases, may be very important, in order to ascertain the proper rules by which it is to be interpreted; for the interpretation will be, or may be, essentially governed by the law of the State where it is made.[4] But, in the absence of any place stated on the

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[1] Pasmore *v.* North, 13 East, R. 517, 521; Chitty on Bills, ch. 5, p. 169, (8th edit.); Bayley on Bills, ch. 6, § 7, p. 25, (5th edit.); Id. ch. 5, § 3, p. 168, 169; Brewster *v.* McCardel, 8 Wend. R. 478.

[2] Bayley on Bills, ch. 1, § 7, p. 25, 26, (5th edit.); Id. ch. 5, p. 168; Chitty on Bills, ch. 6, p. 240, (8th edit.); Usher *v.* Dauncey, 4 Camp. R. 97; Russell *v.* Langstaffe, Doug. R. 514.

[3] Bayley on Bills, ch. 1, § 9, p. 29, 30, (5th edit.); Thomson on Bills, ch. 1, § 2, p. 69, (2d edit.); Chitty on Bills, ch. 5, p. 172-174, (8th edit.)

[4] Story on the Conflict of Laws, § 242-244, 266, 270, 307-318; Story on Bills, § 129-159.

face of the Note, resort may be had to parol evidence, to establish the validity of the Note, as well as to impeach it. But very different considerations will apply to the case of the place of payment; for, if the Note is intended to be paid at any particular place, that place must be stated in the instrument; and parol evidence is not admissible to show, that, although no place of payment is therein stated; yet the parties agreed that it should be payable at a particular place.[1] It is not sufficient to make a Note payable at a particular place, that there should be a memorandum of the place where it is payable; at the foot, or on the margin thereof, but it should be in the body of the Note itself, and constitute a part thereof.[2]

§ 50. By the law of France, Bills of Exchange are required to have the place, as well as the time of the date inserted therein. The place of payment, also, is required to be stated.[3] But it does not appear that the place of the date is positively required, in cases of Promissory Notes, or even the place of payment; but the time of payment only.[4]

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[1] Greenleaf on Evid. § 275, (2d edit.); Phillips & Amos on Evid. ch. 5, p. 756; 2 Starkie on Evid. 548, (2d edit. 1833); Chitty on Bills, ch. 5, p. 172, 173, (8th edit.)

[2] Chitty on Bills, ch. 5, p. 174, (8th edit.); Bayley on Bills, ch. 1, § 9, p. 29, 30, (5th edit.); Williams *v.* Waring, 10 Barn. & Cressw. 2; Exon *v.* Russell, 4 Maule & Selw. 505; Bayley on Bills, ch. 1, § 14, p. 41, (5th edit.); Masters *v.* Baretts, 8 Manning, Gr. & Scott, R. 433; Pierce *v.* Whitney, 16 Shepley, R. 188. But see Heywood *v.* Perrin, 10 Pick. R. 228.

[3] Code de Comm. art. 110; Pardessus, Droit Comm. Tom. 2, art. 333, 464; Story on Bills, § 49. Heinnec. de Camb. cap. 4, § 2, 3, affirms the same rule to exist in the general foreign law.

[4] Code de Comm. art. 188; Pardessus Droit Comm. Tom. 2, art. 498;

§ 51. In the next place, as to the expression of "value received" being on a Promissory Note. This, by our law, is clearly not essential, although it is commonly inserted, unless, indeed, it is positively required by some statute provision, in respect to some particular classes of Notes.[1] Indeed, although not essential, it has been thought that it may be important, in many cases, to insert the words "value received" in a Promissory Note; since the words, when inserted, import that value has been received by the maker from the payee, and hence they raise a positive presumption of a legal consideration sufficient to sustain the promise, liable, it is true, to be rebutted, but which, until rebutted, will prevail in favor of the payee and any subsequent holder.[2] But perhaps this is an overstrained refinement, since the law implies, from the nature of the instrument itself, and the relation of the parties apparent upon it, that it is for value received by the maker from the payee, and therefore it can make no difference whether the words be or be not inserted.[3] So true is this, that an action of debt will lie upon a Promissory Note, where the words are omitted by the payee against the maker.[4]

Codice delle due Sicilie, Del Comm. tit. 7, cap. 1, § 109; Id. cap. 2, § 187.

[1] Ante, § 39; Bayley on Bills, ch. 1, § 13, p. 40, (5th edit.); Chitty on Bills, ch. 5, p. 182, 183, (8th edit.); White *v.* Ledwick, 4 Doug. R. 247; Townsend *v.* Derby, 3 Metcalf, R. 363; Hatch *v.* Trayes, 11 Adolp. & Ellis, 702; Jones *v.* Jones, 6 Mees. & Wels. 84; Thomson on Bills, 86, 87, 91, 93, 100, 101, (2d edit.); 3 Kent, Comm. Lect. 44, p. 77, (5th edit.); Bishop of Derry *v.* Chambers, Hudson & Brookes, Irish R. 433; Leonard *v.* Walker, Brayton, Verm. R. 203.

[2] Chitty on Bills, ch. 5, p. 182–184, (8th edit.) Holliday *v.* Atkinson, 5 Barn. & Cressw. 503; Clayton *v.* Gosling, 5 Barn. & Cressw. 360.

[3] Hatch *v.* Trayes, 11 Adolp. & Ellis, 702. See Thomson on Bills, 93, 94, (2d edit.)

[4] Ibid.

§ 52. The French Law in respect to the expression of value upon the face of the Note is entirely different from ours. It requires, not only that the value received should be expressed on the face of the Note, but also, whether it is received in money or merchandise, in account, or in any other manner.[1] This rule had its origin not in the present commercial code of France, but it constituted a part of the policy of the old law. The Ordinance of 1673 positively required it in cases of Bills of Exchange, and the like rule was applied to Promissory Notes;[2] so that, without this expression of value, they lost their distinctive character as Bills of Exchange and Promissory Notes, and sank into mere simple contracts.[3]

§ 53. The like rule seems to prevail in some other nations, upon the continent of Europe; but it is not probably of universal adoption.[4] Heineccius, in treating of Bills of Exchange, (and he considers Promissory Notes, as but a species of Bills,) enumerates the essential parts as being, the invocation (*votum*,) the place of making, the day, month, and year, and lastly, the sum to be paid, without any suggestion as to the words "value received."[5] He afterwards, however, speaks of

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[1] Code de Comm. art. 188.

[2] Jousse, Sur L'Ord. 1673, tit. 5, art. 1, p. 67, 70; Id. art. 4, p. 82; Id. art. 31, p. 126; Pothier, De Change, n. 34, 222; Pardessus, Droit Comm. Tom. 2, art. 331, 340, 479; Story on Bills, § 64; Savary, Parfait Négociant, Tom. 1, pt. 1, Liv. 3, ch. 4, p. 133; Id. ch. 7, p. 200.

[3] Ibid.; Pothier, De Change, n. 34, 222.

[4] Codice delle due Sicilie, Del Comm. tit. 7, cap. 1, § 109; Id. cap. 2, § 187. The Code of the Two Sicilies seems to be founded upon the French Code of Commerce.

[5] Heinecc de Camb. cap. 4, § 2.

the words being commonly inserted;[1] and adds, that, whether the omission will render a Bill of Exchange invalid or not, must depend upon the law of the particular place where it is made. His language is: *Sitne valutæ mentio adeo necessaria, ut ejus omissio cambium vitiet, ex legibus singulorum locorum cambialibus judicandum est. Eam omnino exigunt leges cambiales Prussica, Danica, Gallica, Brunsuicensis; contra ea in Lipsiensi,* (§ 3,) *legimus: Und sollen dieselben* (*Wechsel Briefe*) *es mag der empfangenen Valuta, wie zwar an ihm selbst billig wäre, darrinnen gedacht seyn, oder nicht, einen Weeg, wie den andern, kräftig und gültig seyn. De eo tamen inter omnes constat, semel acceptato cambio solutionem exigi posse, si vel maxime nulla facta fuerit valutæ mentio.*[2]

§ 54. In the next place, as to the attestation of Promissory Notes. This is not required by our law in any case, except where it is positively required by statute.[3] It may be convenient, in many cases, to have the attestation of a witness to establish the genuineness of the signature, or the consideration of the Note, or the validity of the transaction, on account of which it was given.[4] In cases where a Note is signed by a marksman, or with the initials of the maker only, it may be very important to have the same attested by a witness, in order to establish the genuineness of the mark or initials, and the occasion of the execution of the instrument. By the law of some of the American States, as for example of Massachusetts, the statute of limitations does not

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1 Heinnec. de Camb. cap. 4, § 13.
2 Heinecc. de Camb. cap. 4, § 14.
3 Chitty on Bills, ch. 5, p. 188, 189, (8th edit.); Bayley on Bills, ch. 1, § 12, p. 40, (5th edit.)
4 Revised Statutes of Massachusetts, (1835,) ch. 120, § 4.

apply to any Promissory Notes signed in the presence of an attesting witness, where the action thereon is brought by the payee or by his executor or administrator. There is also occasionally some inconvenience in having a Promissory Note attested; because, in such a case, the signature must be proved by the attesting witness, and not otherwise, unless the witness be abroad, or dead, or from some other circumstance, he cannot be produced at the trial, and his absence can be properly accounted for.[1] In either of these events, by an anomaly in the jurisprudence of the Common Law, as it certainly must be called the next best evidence, that is, the proof of the signature of the maker, is not required; but the proof may be, nay, in some States must be, by proof of the handwriting of the attesting witness.[2]

§ 55. Promissory Notes are sometimes made under seal; and the question may then arise, whether they retain the distinctive character and privileges of Promissory Notes by our law, or thereby pass into another distinct class of contracts. It has been held, in some of the American States, that Notes under seal, although possessing in all other respects the characteristics of Promissory Notes, are not entitled to the privileges thereof, and are not negotiable.[3] Whether any rule of a similar nature prevails in the foreign law generally

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[1] Chitty on Bills, ch. 1, p. 188, 189, (8th edit.); Bayley on Bills, ch. 1, § 12, p. 40, (5th edit.); Greenleaf on Evid. § 569, 572, (2d edit.); 1 Starkie on Evid. p. 320, 321, 325-329, (2d edit. 1833.)

[2] 1 Starkie on Evid. p. 328, 329, (2d edit. 1833); Greenleaf on Evid. § 575; Phillips & Ames on Evid. 661, 662.

[3] Clark *v.* Farmer's Manuf. Comp. 15 Wend. R. 256. See Glyn *v.* Baker, 13 East, 509; Gorgier *v.* Melville, 3 Barn. & Cressw. 45; Warren *v.* Lynch, 5 John. R. 239; Story on Bills, § 61.

may be doubted. Heineccius manifestly considers the affixing of a seal as a mere superfluity, and of no effect. *Sigilli,* (says he,) *plane nullus usus est in hisce litteris ; et hinc si addatur, quod aliquando fieri videmus in cambiis propriis* (Promissory Notes,[1]) *id merito pro superfluo habetur.*[2]

§ 56. No attestation of a witness to Promissory Notes seems required by the foreign rule, any more than it is by our law; at least, no such rule is laid down by any of the elementary writers, whose works have fallen under my observation. The very omission to state such a qualification in works professing to treat the subject at large, would seem to be decisive upon the question. Neither Jousse, nor Dupuy de la Serra, nor Savary, nor Pothier, nor Pardessus, nor Heineccius, have taken notice of it. The Scottish Law has silently adopted the English rule.[3]

§ 57. In respect to the form of Promissory Notes another consideration seems proper to be taken notice of. A Promissory Note may be made by a single person, or by two or more persons. When it is made by two or more persons, it may be joint, or it may be joint and several. When two or more persons sign a Note written thus, "We promise to pay," it is a joint Note only, unless they add the words "jointly and severally" thereto.[4] When two or more persons sign a Note written thus, "I promise to pay," it is treated as a joint and several Note of them all, and they may be accordingly

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1 Heinecc. de Camb. cap. 2, § 1, 2.

2 Heinnec. de Camb. cap. 4, § 18.

3 Thomson on Bills, ch. 1, § 2, p. 43, 45, (2d edit.)

4 Chitty on Bills, ch. 12, p. 562, (8th edit.) ; Bailey on Bills, ch. 2, § 5, p. 50 – 52, (5th edit.) ; Bangor Bank *v.* Treat, 6 Greenl. R. 207.

sued jointly or severally thereon;[1] [and the agent who signs for them, as, in the following instance: "For I. C., R. M., J. P. and T. S." — "R. M." will not be held liable.[2]] If a Note be signed by a person in the name of a firm, whether that name represents in form more than one person, as "A. & Co." or represents in form one person only, as "A."; in both cases it is treated as the joint Note of the firm, and all the partners may be jointly sued thereon, whether the words be "We promise," or "I promise."[3] When a Note is signed by two persons, written, "We jointly *or* severally promise," "or" is construed to mean "and," and it is deemed a joint and several Note.[4] When a Note is signed by two persons, written thus, "We promise," and signed "A. B., principal, C. D., surety," it is still the joint Note of both; and if it were written, "I promise," and signed in the same manner, it would be the joint and several Note of both.[5] For, the language designating the principal and surety does not change the rights of the payee or subsequent holder, but merely ascertains the relation of the makers to each other; and operates as notice of that relation to the other parties thereto.

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[1] Ibid.; Clerk *v.* Blackstock, Holt, N. P. R. 474; Marsh *v.* Ward, Peake, R. 130; Hall *v.* Smith, 1 Barn. & Cressw. 407; Galway *v.* Matthew, 1 Camp. R. 403; Hemenway *v.* Stone, 7 Mass. R. 57.

[2] Ex parte Buckley, 14 Meeson & Welsby, 469; *In the matter of* Clarke, 1 Gex, Cases in Bankruptcy, 153. In the latter case, Parke, B. says: "Hall *v.* Smith, 1 Barn. & C. 407, cannot be supported."

[3] Ex parte Buckley, 14 Meeson & Welsby, R. 469.

[4] Chitty on Bills, ch. 12, p. 563, (8th edit.); Bayley on Bills, ch. 9, p. 380; (5th edit.), and note 93; Rees *v.* Abbott, Cowp. R. 832, Post, § 58.

[5] Hunt *v.* Adams, 5 Mass. R. 358; S. C. 6 Mass R. 519; Palmer *v.* Grant, 4 Connect. R. 389; Rawstone *v.* Parr, 3 Russ. R. 424.

§ 58. Promissory Notes are sometimes made in a very irregular manner, where the intention of the original parties is, that a third person should become a surety therefor. Thus, for example, if a person, not the payee of a Promissory Note, but intending to become a surety therefor, should at the time when it is made, instead of signing himself as a surety at the bottom of the Note, write at the bottom thereof, below the signature of the maker, or on the back thereof, "I acknowledge myself holden as a surety for the payment of the above Note," the question would arise, whether he would be bound thereby to the payee, and, if bound, in what manner. And it has been held upon such a Promissory Note, that the maker and the surety are to be deemed both original promissors, and the Note a joint and several Promissory Note to the payee, although, as between the maker and the other party, they should stand in the relation of principal and surety.[1] And it seems, that the same rule would apply, if the party indorsed his name in blank only on the Note at the time when it was made.[2] It would be otherwise, if the indorsement were at a subsequent period; for then other questions and considerations would intervene.[3]

§ 59. The doctrine has been pressed somewhat farther in New York; and it has been held, that where a person at the time of the making of a negotiable Note

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1 Hunt *v.* Adams, 5 Mass. R. 358; S. C. 6 Mass. R. 519; 7 Mass. R. 518; Josselyn *v.* Ames, 3 Mass. R. 274; Baker *v.* Briggs, 8 Pick. R. 122; Chaffee *v.* Jones, 19 Pick. R. 260; Austin *v.* Boyd, 24 Pick. R. 64; Moies *v.* Bird, 11 Mass. R. 436; Orvis *v.* Newell, 17 Conn. R. 97.

2 Ibid.; Sweetser *v.* French, 13 Metcalf, R. 262; S. C. 2 Cushing, R. 310

3 Tenney *v.* Prince, 4 Pick. R. 385; Ulen *v.* Kittredge, 7 Mass. R. 233; Birchard *v.* Bartlet, 14 Mass. R. 279.

wrote on the back of it, "For value received, I guaranty the payment of the within Note," or simply, "I guaranty the payment of the within Note," he was to be treated as a joint and several promissor with the maker thereof and not as a guarantor.[1] But, in other States, a different doctrine has been held, and the party treated as a mere guarantor.[2]

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[1] Luqueer *v.* Proser, 1 Hill, N. Y. R. 256; S. C. 4 Hill, N. Y. R. 420; Hough *v.* Gray, 19 Wend. R. 202; Douglass *v.* Howland, 24 Wend. R. 35; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; McLaren *v.* Watson's Exr's, 26 Wend. R. 430; Manvow *v.* Durham, 3 Hill, N. Y. R. 584, 585; Post, § 133.

[2] Oxford Bank *v.* Haynes, 8 Pick. R. 423; Green *v.* Dodge, 2 Hamm. Ohio R. 498. But see Arnsbaugh *v.* Gearhart, 1 Jones, Penn. R. 482; Post, § 134, 468. In the case of Luqueer *v.* Proser, 1 Hill, N. Y. R. 256, Mr. Justice Cowen, in delivering the opinion of the Court, reviewed the cases at large and said:—"In Hunt *v.* Adams, 5 Mass. R. 358, Chaplin made a Note payable to Bennet, the plaintiff's intestate, under which Adams wrote, 'I acknowledge myself holden as surety for the payment of the demand of the above Note.' The Court held an action to be sustainable by the payee against Adams, as upon a Promissory Note. One count set out a joint and several Note of him and Chaplin; and the other, a several Note of Adams. Parsons, C. J. said, that, as to the intestate, the two papers must be considered the joint and several Promissory Note of Chaplin and Adams; that it was the same thing in effect as if Adams's name had been signed directly to the Note as surety. In White *v.* Howland, 9 Mass. R. 301, one Tabor made his note payable to Wm. White, or order; on which the defendant, with another, indorsed, 'For value received, we jointly and severally undertake to pay the money within mentioned to the said Wm. White.' The Court said, the case was within the reason of Hunt *v.* Adams, and the effect of the defendant Howland's signature the same as if he had signed the Note on the face of it as surety; that is to say, according to Hunt *v.* Adams, the whole was to be taken as a joint and several Promissory Note by Tabor, Howland, and the co-signer with the latter. In Hough *v.* Gray, 19 Wend. 202, Moon made his Note payable to Cameron, or bearer, and Hough indorsed, 'This may certify that I guaranty the payment of the within Note.' We held that he was liable as maker, severally to Gray, who had purchased the paper of Cameron. I remarked that the Court below were clearly right in holding, that Hough was liable as a joint and several maker, with Moon, the admitted

maker; referring to the cases collected in Dean *v.* Hall, 17 Wend. 214, among which are the two cases I now cite from the Mass. Rep. If the respective papers in those cases were in effect joint and several Promissory Notes, it followed, that those in Hough *v.* Gray were such; and that they were negotiable like a Promissory Note. These cases decide the present. M. Prosser's guaranty was the same in legal effect as if he had signed with Edson and Arnold as surety. His promise was absolute; not a mere commercial indorsement. In Allen *v.* Rightmere, 20 John. R. 365, the Court said of such an undertaking, 'It is absolute that the maker shall pay the Note when due, or that the defendant (the indorser) will himself pay it.' How is this distinguishable from a direct signature as surety? In the latter case, both promised to see the money paid at the day. A man writes thus: — 'I promise that $ 100 shall be paid to A. or bearer;' who would doubt that such a promise would be a good Note? The use of the word guaranty, or warrant, or stipulate, or covenant, or other word importing an obligation, does not vary the effect. Read the obligation of a man who signs a note with his principal, 'A. B. surety;' both, and each, virtually stipulate in the language of the Note I have supposed. Both promise that the payee shall receive. In Morice *v.* Lee, 8 Mod. 362, 364, Fortescue, J. said, 'I promise that J. S. or order, shall receive £100,' is a good Note. Suppose it to stand, 'shall receive £100 of James Jackson;' or, 'I will see that £100 is paid by James Jackson;' all this, and the like, is no more than saying, I will pay so much by the hand of another. If there be in legal effect, an absolute promise that money shall be paid, all the rest is a dispute about words. A Note is payable to A. or order, and he indorses it to B. thus; — 'pay the contents to B. I waive presentment and notice as indorser;' this is a good Promissory Note. The law raises an absolute promise on such an indorsement. No doubt it enures as an indorsement for the purpose of transferring the principal Note; but it is moreover an absolute promise to pay. It is saying, 'So much is, without condition, due from the indorser to the indorsee.' And a common due bill is a Note. Kimball *v.* Huntington, 10 Wend. 675, 679, 680. The whole inquiry is, does the paper import an engagement that money shall be paid absolutely? If it do, no matter by what words, it is a good Note. Then, on the question whether this note be joint or several, or both: 'I promise to pay,' signed by two, is joint and several. Chitty on Bills, 561, (Am. edit. of 1839.) Each engages for himself and both. It is the same thing where one promises as principal, and the other as surety, and whether they both sign on the same side of the paper, or on different sides. Each engages, and both engage for the payment of the same sum, at the same time, and to the same person; their obligations are identical throughout; both papers make but one instrument. When the indorser says, 'I guaranty the payment of the within Note,' he promises the future holder, as well as the payee. The authorities say rightly, he has done the same as if he had signed as surety. By reference, the guaranty becomes a part of the principal Note. The guarantor becomes surety for the Note as it is, payable to bearer, without declaring that he will engage to any other than the payee. That the guaranty in question does not come up to the definition of a Promissory Note, we are referred to Oxford Bank *v.* Haynes, 8 Pick. 423. In that case, it was certainly held, that the words, 'I guaranty the payment of the within Note,' signed by the guarantor, made him liable as such, but not as surety; in other words, the Court denied to such an indorsement the operation of a Promissory Note. But the decision was based on a rule as to the mode of fixing guarantors, peculiar to that State. The Court admitted, that if the engagement were to be considered absolute, it was a Promissory Note; but they considered it conditional, and, under some circumstances at least, as requiring presentment and notice, to fix the guarantor; and such is the doctrine of some other States. It is, however, unknown here. It was repudiated in Allen *v.* Rightmere, and often since; in one case, very lately, on a review of several decisions by the Courts of the United States, and by the State Courts. This distinction prevailing in Massachusetts, of course makes all the difference. With our rules as to charging guarantors, the learned Court in Massachusetts virtually concede that the defendant's guaranty would be considered a Note, even there. Another case cited for the defendant proceeded on the same ground as that of Oxford Bank *v.* Haynes. It is Greene *v.* Dodge, 2 Hamm. Ohio R. 498. Another (Cumpston *v.* McNair, 1 Wend. 457) went on the ground that the guaranty was not, as in this case, absolute, but was made conditional by its own express provisions. All three of these cases will be found, when their principal is seen, to be in favor of the views I have expressed concerning the guaranty now in question. I am aware of no case the other way. Non constat, in Meech *v.* Churchill, what was the language of the guaranty. The case is very far from deciding the present." Post, § 133, 134.

CHAPTER II.

COMPETENCY AND CAPACITY OF PARTIES TO PROMISSORY NOTES.

§ 60. Having disposed of these considerations relative to the nature and requisites of Promissory Notes, let us next proceed to the inquiry, who are competent and capable of becoming parties thereto, as makers, payees, indorsers or indorsees, or holders thereof. For however in all other respects the instrument may have all the requisites to give it complete effect and operation, yet if it is not made by parties, who are competent to contract the obligations arising therefrom, or made to parties capable to take or hold any title derived therefrom, it must be deemed in law a mere nullity, and incapable of being enforced in any Court of Justice, as to those parties. Still, however, it may be binding and obligatory as between other parties thereto, who do possess such competency and capacity; and therefore the inquiry must necessarily be important, by and between whom, and in what cases, a particular Promissory Note is valid or not.

§ 61. In the first place, then, let us inquire who are competent to contract and bind themselves as makers of a Promissory Note. And here, the general rule applies that all persons are competent to bind themselves as makers of a Promissory Note, who are not incapacitated by some special provision or disability created by law. Hence, all persons of full age, *sui juris*, and of sound understanding, whether males or females, aliens or natives, whether acting in their own right, or acting as agents, guardians, trustees, executors or administrators, or otherwise, *en autre droit*, are capable of binding themselves as makers of a Promissory Note. So are partners and corporations, acting within the scope of the particular business of the partnership or corporation.[1]

§ 62. Originally, it is not improbable, that the same rule was applied to Promissory Notes, upon their first introduction into use upon the continent of Europe, as seems to have been adopted in relation to Bills of Exchange; that they were deemed to be strictly commercial instruments, and could be made only between merchants and other persons engaged in trade. But this, if it ever was a general rule, was soon disregarded in practice; and Bills of Exchange, and Promissory Notes, became obligatory as privileged instruments, upon all persons who were parties thereto, whether they were merchants or not, with certain special exceptions, such, for example, as, in France, Bills or Notes given by women, whether married or single, who were not merchants;[2] or by persons, not merchants, on account of other transactions than the operations of commerce, traffic, exchange, banking, or brokerage; in which cases they were reduced to the mere denomination of simple promises.[3] In England, Bills of Exchange seem, upon

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[1] Story on Bills, § 72; Chitty on Bills, ch. 2, p. 21, (8th edit.); Bayley on Bills, ch. 2, § 1, 5 – 9, p. 44 – 75, (5th edit.)

[2] Pothier, De Change, n. 27 – 29, 124; Jousse, Sur L'Ordin, 1673, tit. 12, art. 3, p. 227; Pardessus, Droit Comm. Tom. 1, art. 55; Merlin Répertoire, *Billet de Change*, § 3, p. 192, (edit. 1827); Id. *Ordre Billet à*, § 1, art. 4, p. 230; Code de Comm. art. 113, 636; Story on Bills, § 73.

[3] Ibid.

their first introduction therein, to have been held limited to merchants and traders; but the rule was soon expanded, so as to reach all other classes of persons.[1] And when Promissory Notes were recognized as negotiable instruments, by the Statute of 3 and 4 Anne, ch. 9, the language included all persons whatsoever, whether merchants or traders, or not.[2]

§ 63. As to trustees, guardians, executors, and administrators, and other persons, acting *en autre droit*, they are, by our law, generally held personally liable on Promissory Notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the Note, they must be deemed personally bound as makers.[3] It is true, that 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.[4] Thus, if an executor, or administrator, should make or indorse a Note in his own name, adding thereto the words, "as executor," or "as administrator," he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate.[5]

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1 Chitty on Bills, ch. 1, p. 13, (8th edit.); Story on Bills, § 7, note 1, sub finem.

2 Cunningham on Bills, p. 106; Kyd on Bills, p. 18, 19, (3d edit.); Bayley on Bills, ch. 1, p. 1, note 1, (5th edit.)

3 Story on Agency, § 280–287; Thacher *v.* Dinsmore, 5 Mass. R. 299; Foster *v.* Fuller, 6 Mass. R. 58; Hills *v.* Bannister, 8 Cowen, R. 31; Bayley on Bills, ch. 2, § 7, 8, p. 68–74, (5th edit. 1830.)

4 Bayley on Bills, ch. 2, § 7, 8, p. 69–74, (5th edit. 1830); Eaton *v.* Bell, 5 Barn. & Ald. 34.

5 Childs *v.* Monins, 2 Brod. & Bing. R. 460; King *v.* Thom, 1 Term

§ 64. In treating of trustees, and guardians, and other persons, acting *en autre droit*, who become parties to Promissory Notes, as personally responsible on such Notes, or on contracts generally, which they make in that quality or character, our law differs from the French Law; for that law treats all such contracts as strictly the contracts of the principal, through the instrumentality of the trustee, guardian, or other person, acting *en autre droit*. Thus, a tutor, when he contracts in that quality, may stipulate and promise for the minor; for it is the minor who is deemed to contract, stipulate, and promise for himself by the ministry of his tutor; the law giving a character to the tutor, which makes his acts to be considered as those of the minor, in all contracts relating to the administration of the tutelage. It is the same with respect to a curator, and every other legitimate administrator. It is the same with an attorney (*procureur*); for the procuration, (or power of attorney,) which gives him the right to use the name of the person for whom he contracts, makes the person giving it to be considered as contracting himself, through the ministry of the attorney.[1] But each law proceeds upon the same general principle; for, if the principal is incapable of contracting in the particular case, or is not bound by the contract, then the agent, contracting *en autre droit*, is bound by each law. Thus, for example, if the tutor of a minor, not being a merchant, were to draw a Bill of Exchange for the minor, the latter would

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R. 487; Bailey on Bills, ch. 2, § 8, p. 74, (5th edit. 1830); Carter *v.* Saunders, 2 Howard, Mississippi R. 851; Robertson *v.* Banks, 1 Smedes & Marshall, R. 666; Story on Bills, § 74.

[1] Pothier on Obligations, n. 74, 448.

not be bound as drawer, and, therefore, the tutor would be.[1]

§ 65. As to agents, if they draw, or indorse Notes in their own names, although on account, and for the benefit of their principals, they are held personally liable, because they alone can be treated on the face of the Notes as parties.[2] If they would bind their principals, they must draw, or indorse the Notes in the name of their principals, and sign for them and in their names.[3]

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[1] Code de Comm. art. 114; Locré, Esprit du Code de Comm. Liv. 1, tit. 8, § 1, Tom. 1, p. 356. The law of Scotland coincides with that of France. 1 Bell, Comm. B. 3, ch. 2, § 4, p. 396, (5th edit.) Story on Bills, § 75.

[2] Bayley on Bills, ch. 2, § 7, p. 69-74, (5th edit. 1830); Thomas *v.* Bishop, 2 Str. R. 955; Goupy *v.* Harden, 7 Taunt. R. 159. But see Sharp *v.* Emmet, 5 Whart. R. 288.

[2] Story on Agency, § 147-156, 275-278; Bayley on Bills, ch. 2, § 7, p. 69-74, (5th edit. 1830); Chitty on Bills, ch. 5, p. 186, (8th edit. 1833); Kyd on Bills, p. 33, 34, (3d edit.) Cases of agency often involve very nice and embarrassing considerations, from the peculiar language of the instrument to decide, whether the agent is personally bound or not. In order to bind the principal, and exonerate himself, the agent should regularly sign thus: "A. B. (the principal) by C. D. his agent" (or attorney as the case may be); or, what is less exact, but may suffice, "C. D. for A. B." Story on Agency, § 153; Chitty on Bills, ch. 2, p. 37, 38, (8th edit. 1833.) But, in practice, there are innumerable deviations from this simple and appropriate form; and the decisions upon the various cases which have arisen in courts of justice, involve much conflict of doctrine and opinion, and do not seem always to have proceeded upon any uniform principle of interpretation. Many of the cases, on this subject, will be found collected in Story on Agency, § 147-155; Id. § 269-280; Bayley on Bills, ch. 2, § 7, p. 69-76, (5th edit. 1830); Chitty on Bills, ch. 2, p. 37-39, (8th edit. 1833.) Even if an agent draws, in his own name, on his principal, for the account of the latter, the payee will be entitled to hold him personally bound as drawer. Bayley on Bills, ch. 2, § 7, p. 69-73, (5th edit. 1830); Story on Agency, § 156, 269. So, an agent, who should draw a Bill in favor of his principal on the purchaser of goods, sold on account of his principal, would be personally liable to the latter, as drawer of the Bill, upon its dishonor. Lefevre *v.* Lloyd, 5 Taunt. R. 749;

§ 66. Similar principles pervade the foreign law. Agents may draw Notes (and the same rule will apply to the indorsement of Notes) in the name of their principals. But then, in order to avoid personal responsibility, agents must there, also, draw the Notes in an appropriate manner; otherwise, they may become personally responsible to the payee. Thus Heineccius says of Bills, what is equally applicable to Notes; *Quid si institor cambium trassarit ad dominum, hic vero bonis labatur? Tunc distinguitur, domnine fidem sequutus sit remittens, an institoris. Hoc enim casu adversus institorem regressum habet, aliquando etiam finito officio; illo casu ipse damnum sentire tenetur. Quum vero parum plerumque constet, utrius fidem sequutus sit remittens: ejus jurejurando rem ad liquidum perducendam esse, censet Stryckius.*[1] Perhaps the true rule of the foreign law may be, (for some uncertainty seems to rest upon it,) that the question is one, which resolves itself into the simple consideration, not of the form of the instrument, but of the fact, to whom the credit, under all the circumstances, is given, whether to the principal, or to the agent.[2]

Story on Agency, § 156, 269. However, an exception is generally made in favor of a known public agent, who, if he draws on account of the public, is generally held not personally responsible on the Bill, unless under special circumstances. Chitty on Bills, ch. 2, p. 37-39, (8th edit. 1833); Story on Agency, § 302-307. See also, Eaton *v.* Bell, 5 Barn. & Ald. 37. See Fox *v.* Frith, 10 Mees. & Wels. 135, 136; Story on Bills, § 76.

[1] Heinecc. de Jure, Camb. 4, § 25, 26, (edit. 1769); Id. cap. 5, § 12; Pothier on Oblig. n. 74, 448.

[2] I have not found in the foreign writers, the question treated at large, when, and in what cases, and under what particular circumstances the agent will be personally bound or not, as drawer of a Bill, drawn on account of his principal, with the practical fulness, or distinctness, with which it has been treated by the English and American courts. It is not improbable that the doctrine of Heineccius, stated in the text, contains the

§ 67. One of the most important questions, in a practical sense, which can arise, is, when, and under what circumstances, an agent makes himself personally a party to a Promissory Note, and when, and under what circumstances, his principal only is bound as a party. As to the mode, in which he may acquire his authority, and the nature and extent of his authority, it is not the design of these Commentaries to enter into any inquiry or examination. That properly belongs to a treatise upon the Law of Agency.[1] But, supposing the agent to have full authority to make or indorse a Note for his principal, the mode, in which it is to be exercised in

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general principles adopted in the foreign law, without any very exact consideration of the form, which the contract assumes in the written instrument. So that the question then turns, or at least may turn simply upon this: To whom, taking all the facts, was the credit actually given, and intended to be given? to the agent, or to the principal? See Pothier, De Change, n. 28. Pothier, in his treatise on Obligations, (n. 74, 448,) has pointed out, distinctly, the difference between cases where the agent contracts in his own name, and the cases where he contracts in the name of his principal. Thus, he says, n. 74: "What has been hitherto said as to our only being able to stipulate or promise for ourselves, and not for another, is to be understood as applying to contracts, which we make in our own name; but we may lend our ministry to another person, for whom we may contract, stipulate, or promise; and, in this case, it is not we, properly speaking, who contract, but the other person, who contracts by our ministry." And again he says, n. 448: "In order to raise the accessory obligation of employers, the manager must have contracted in his own name, although he was acting for the employer; but, when he contracts in his quality of agent, he does not enter into any contract himself; it is his employer who contracts by his ministry. Supra, n. 74. In this case, the manager does not oblige himself; it is the employer, alone, who contracts a principal obligation, by the ministry of his manager. When the manager contracts in his own name, the contract, to oblige his employer, must concern the affair to which he is appointed, and the manager must not have exceeded the limits of his commission. Dig. Lib. 1, (*a*,) § 7, & 12, de Exerc. Act." Story on Bills, § 77.

[1] See Story on Agency, § 45-143. See Winter *v.* Hildreth, 13 N. Hamp. R. 104.

order to exempt himself from personal responsibility, and to bind his principal, naturally belongs to the discussion of the present subject. It is the more necessary, because the authorities are not entirely agreed in their conclusions as to particular cases, however well they may agree in an exposition of the general principles, which ought to govern in all. It has been laid down by a learned author, that where a Note is drawn by an agent, executor, or trustee, he should take care, if he means to exempt himself from personal responsibility, to use clear and explicit words to show that intention.[1] But, then, the difficulty is not in ascertaining the value of the admonition, or its true use, as a guide to the diligent and the cautious; but it is to ascertain, when, in a just juridical sense, the intention is upon the face of the instrument clear and explicit, and what is to be the interpretation thereof, where the language is ambiguous, or obscure, or admits of various readings.

§ 68. The true and best mode of an agent's signing, or indorsing, a Promissory Note for his principal, where he means to make the latter, and not himself, personally responsible thereon, is to sign, or indorse, the same, "A. B. (the principal) by his attorney or agent C. D."[2] If the signature be, "C. D. for A. B.," (the principal,) it will be equally available, although not so formally correct.[3] But, in the practice of common life, there are many deviations from this course; and occasionally

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[1] Bayley on Bills, ch. 2, § 7, p. 69 (5th edit.)

[2] Chitty on Bills, ch. 2, p. 37, 38 (8th edit.); Story on Agency, § 153, and note, § 275; Wilks *v.* Back, 2 East, R. 142; Abbott on Shipp. Pt. 3, ch. 1, § 2, note (*c*).

[3] Ibid.

they give rise to great embarrassments, in endeavoring to ascertain, whether, in the actual language used, the agent is personally bound, or the principal alone is bound, or both. Neither is it possible to extract from the authorities any consistent rules, to guide us in this matter of interpretation. Where, indeed, upon the face of the instrument, the agent signs his own name only, without referring to any principal, there he will be held personally bound, although he is known to be, or avowedly acts as agent.[1] But, in many cases, the principal is referred to in the instrument, and it is to such cases, that the preceding observations apply.

§ 69. A liberal construction is ordinarily adopted in the exposition of commercial instruments, for the purpose of encouraging trade, and to meet, as far as possible, the ordinary exigencies of business, which require promptitude of execution, and rarely admit of deliberate examination of the true force of words. In furtherance of this policy, if it can, upon the whole instrument, be collected, that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed.[2] Thus, where an agent,

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[1] Story on Agency, § 269 – 278; Story on Bills, § 76, and note; Chitty on Bills, ch. 2, p. 37, 38 (8th edit. 1833); Id. ch. 5, p. 186; Bayley on Bills, ch. 2, § 7, p. 69, 70 (5th edit.); Ante, § 63. See as to indorsement of Notes by *Agents*, Heinecc. De Camb. cap. 3, § 15, § 7; Id. cap. 2, § 7, § 9.

[2] Ibid.; Pentz *v.* Stanton, 10 Wend. R. 271; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. R. 326; Story on Agency, § 154; Id. § 269, 270, 275, 276, 395 – 400; Townsend *v.* Hubbard, 4 Hill, N. Y. R. 351; Morse *v.* Green, 13 N. Hamps. R. 32. [In the latter case it was held, that if a party authorize another to subscribe his name to a note, the fact that the signature was placed there by an agent need not appear on the note.]

duly authorized, made a Promissory Note thus; "I promise to pay J. S. or order," &c., and signed the Note, "Pro C. D., A. B.;" it was held to be the Note of the principal, and not of the agent, although the words were, "I promise."[1] So, where A. and B. wrote a Note in these words, "*We* jointly and severally promise," and signed it A. and B. for C., it was held to be the note of C., and not of A. and B., the agents.[2] So, where the Note was, "I promise," &c., and it was signed by the agent, "For the Providence Hat Manufacturing Company, A. B." (the agent); it was held to be a Note of the Company, and not of the agent.[3] So, a Promissory Note of a like tenor, signed by the agent in this manner, "A. B., agent for C. D.," has been held to be the Note of the principal, and not of the agent.[4] So, where a Promissory Note was in these words; "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise," &c., and it was signed, "A. B., Treasurer of the Dorchester Turnpike Corporation;" it was held to be the Note of the Corporation, and not of the treasurer.[5] So, where a Note purported to be a promise by "The President and Directors" of a particular corporation, and was signed "A. B., President," it was held to be the Note, not of A. B., but of the

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[1] Long *v.* Colburn, 11 Mass. R. 97; Ex parte Buckley 14 Meeson & Welsby, 469; *In the matter of* Clarke, 1 Gex, Cases in Bankruptcy, 153.

[2] Rice *v.* Gove, 22 Pick. R. 158; Story on Agency, § 154; Id. § 275, 276, 395.

[3] Emerson *v.* Prov. Hat Manuf. Co. 12 Mass. R. 237.

[4] Ballou *v.* Talbot, 16 Mass. R. 461.

[5] Mann *v.* Chandler, 9 Mass. R. 335. See Hills *v.* Bannister, 8 Cowen, R. 31; Story on Agency, § 276; Barker *v.* Mechanics' Fire Ins. Co. 3 Wend. R. 94; Mott *v.* Hicks, 1 Cowen, R. 513; Brockway *v.* Allen, 17 Wend. R. 40; Cole *v.* Sherwood, 20 Vermont R. 42.

corporation.[1] But, if the Note had been, "I, A. B., President of the Corporation (naming it), promise to pay," &c., it would (it seems) have been deemed to be the personal Note of A. B., and not of the corporation.[2] So, where the agent of a corporation drew a Bill of Exchange upon the president of the corporation, styling him such, and the latter accepted the Bill, it was held, that he was not personally liable, if he had authority to

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[1] Mott *v.* Hicks, 1 Cowen, R. 513. See also Bowen *v.* Morris, 2 Taunt. 374; Shelton *v.* Darling, 2 Conn. R. 435; Brockway *v.* Allen, 17 Wend. R. 40; Story on Agency, § 278, and note, § 279.

[2] Barker *v.* Mechanics' Fire Ins. Co. 3 Wend. R. 94. See post, § 70. But see Brockway *v.* Allen, 17 Wend. R. 40; Hills *v.* Bannister, 8 Cowen, R. 31; Story on Agency, § 276; Mann *v.* Chandler, 9 Mass. R. 335. — It is not easy to reconcile all the cases in the books on this subject; although I cannot but think, that the true principle to be deduced from them is that stated in the text. See Paley on Agency, by Lloyd, p. 378–385, and Bayley on Bills, (2d Amer. edit. from 5th London edit.), by Phillips and Sewall, ch. 2, § 7, p. 68–76 (edit. 1836), and notes, ibid.; Bowen *v.* Morris, 2 Taunt. 374; Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Dubois *v.* Del. and Hudson Canal Co. 4 Wend. R. 285. In Pentz *v.* Stanton, 10 Wend. R. 271, where an agent drew a bill for a purchase of goods, on account of his principal, and signed the Bill, "A. B. agent," not stating the name of his principal, it was held, that he, and not his principal, was personally bound by the Bill, as drawer. But the principal was held liable for the goods on a count for goods sold and delivered, as the form of the Bill showed, that exclusive credit was not given to the agent. There is a curious case, cited in the Digest, Lib. 14, tit. 3, l. 20, where the question, whether an agent, who wrote a letter to a creditor, stating himself to be agent of his principal, was personally liable on the contract stated in the letter; and it was held, that he was not, as he wrote confessedly as an agent. Pothier, Pand. Lib. 14, tit. 3, n. 2; 1 Domat, B. 1, tit. 16, § 3, art. 8. In Dubois *v.* Del. and Hudson Canal Co. 4 Wend. R. 285, an agent signed and sealed a contract, "M. W., agent for the Del. and Hudson Canal Co.;" and it was held, that he was not personally liable thereon, as he was authorized to make the contract, although it was not under the seal of the corporation. S. P. Randall *v.* Van Vechten, 19 John. R. 60. But see Hopkins *v.* Mehaffy, 11 Serg. & R. 129. See Story on Agency, § 274–278.

accept the Bill; but the corporation was alone liable.[1] So, where the agents of a corporation, being duly authorized, made a written contract as follows; "We hereby agree to sell," &c., and signed it as agents of the corporation, it was held, that they were not personally bound thereby; but the corporation was.[2] So, where A., an agent duly authorized, wrote on a Note, "By authority from B., I hereby guaranty the payment of this Note," and signed in his own name, A.; it was held to be the guaranty of the principal, and not of the agent.[3] So, where A., an agent, entered into and signed an agreement "as agent for and on behalf of B.," and B. shortly afterwards wrote on it the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was held to be the agreement of B., and that A. was not personally responsible thereon.[4] So, where, on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, in which it was stated, that the sale was made to A. B., the purchaser, and that he and C. D., "mayor of the corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfil, on each of their parts respectively, the conditions of sale," and then came the signature of the purchaser, and of "C. D., mayor;" it was held, that the agreement was that of the corporation, and not that of the mayor

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[1] Lazarus *v.* Shearer, 2 Alabama R. 718, N. S.

[2] Many *v.* Beekman Iron Company, 9 Paige, R. 188; Evans *v.* Wells, 22 Wend. R. 325.

[3] N. E. Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56. See Passmore *v.* Mott, 2 Binn. R. 201; Story on Agency, § 160, *a*, 161, 269, 270, 275, 276, 395–400.

[4] Spittle *v.* Lavender, 2 Brod. & Bing. R. 452.

personally; and that, consequently, the mayor could not sue thereon.[1] So, where in articles of agreement the covenants were in the name of a corporation, without mention of any agent, but the instrument was signed by the president of the corporation by his private name on behalf of the corporation, and sealed with his private seal; it was held, that he was not personally liable thereon.[2]

§ 70. On the other hand, unless some agency is apparent on the face of the instrument, it has been not unfrequently held, that the principal is not bound, although the agent had full authority to make the contract.[3] Thus, where a wife had full authority to sign Notes for her husband, and she made a Note in her own name, not referring to her husband, either in the body of the Note, or in the signature, it was held, that the husband was not bound.[4] So, where A., B., and C. made a Note as follows; "We, the subscribers, jointly and severally, promise to pay D., or order, for the Boston Glass Manufactory, the sum of —," and they signed the Note in their own names, without saying "as agents," it was held, that they were personally bound, and not the corporation.[5] So, where two persons made a Promissory

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1 Bowen *v.* Morris, 2 Taunt. R. 374, 387. See Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Hopkins *v.* Mehaffy, 11 Serg. & R. 129; Meyer *v.* Barker, 6 Binn. 228, 234. See Woodes *v.* Dennett, 9 N. Hamp. R. 55; Story on Agency, § 275, 276.

2 Hopkins *v.* Mehaffy, 11 Serg. & R. 129; Story on Agency, § 154, 273, note.

3 Story on Agency, § 147, note.

4 Minard *v.* Mead, 7 Wend. R. 68.

5 Bradley *v.* The Boston Glass Manufactory, 16 Pick. R. 347. This case seems distinguishable from that of Rice *v.* Gove, 22 Pick. R. 158, principally in the circumstance, that the signatures of A., B., C. did not purport to be as agents. Story on Agency, § 147 and note, § 154, 275, 276.

Note in this form; "We, the subscribers, trustees for the proprietors of the new congregational meeting-house at A., promise to pay B., the sum of," &c., and signed it C., D., E., F.; it was held, that the Note bound them personally, and not the proprietors.[1] So, where the committee of a town made a contract in the following words; "Agreement between A., B., and C., committee of the town of N., of the one part, and D., and E., of the other part; and the said committee agree to pay," &c., signing their own names, A., B., and C.; it was held, that they were personally liable on the contract.[2] So, where a committee of the directors of a turnpike corporation entered into a contract under seal, describing themselves as such committee, on the one part, with the plaintiff on the other part, and signed and sealed the contract in their own names; it was held that they were personally responsible; for it was the deed of the committee, and not of the directors, or of the corporation.[3] So, where certain persons signed a Note, describing themselves as "Trustees of Union Religious Society," it was held, that they were personally liable thereon, although it was proved, that the society was a corporation, and the Note was given for a balance due from the society for a church-bell.[4]

§ 71. Another important inquiry is, how far a person, who signs a Promissory Note in the name of his princi-

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[1] Packard *v.* Nye, 2 Metc. R. 47; Cleveland *v.* Stewart, 3 Kelly, R. 283.

[2] Simonds *v.* Heard, 23 Pick. R. 121.

[3] Tippets *v.* Walker, 4 Mass. R. 595. But see Leach *v.* Blow, 8 Smedes & Marshall, R. 221.

[4] Hills *v.* Bannister, 8 Cowen, R. 31; Story on Agency, § 154; Shelton *v.* Darling, 2 Connect. R. 435; Barker *v.* Mechanics' Fire Insur. Co. 3 Wend. R. 94. But see Mann *v.* Chandler, 9 Mass. R. 335; Mott *v.* Hicks, 1 Cowen, R. 513. See Cooch *v.* Goodman, 2 Adolph. & Ellis, New R. 580, 595, 596; Story on Agency, § 276.

pal, is personally bound thereby, if, in point of fact, his principal is not bound thereby, either because the agent had no authority whatsoever, or had exceeded his authority. That a person, thus acting without authority, or exceeding his authority, would be personally bound therefor to the other contracting party, cannot be doubted. But the question is, whether he may, under such circumstances, be treated as personally liable on the very instrument itself, if there are apt words therein, which may properly charge him. Thus, for example, if an agent should, without due authority, make a Promissory Note, saying in it, "I promise to pay," &c., and sign it "C. D., by A. B., his agent," or "A. B., agent of C. D."; in such a case, may the words, as to the agency, be rejected, and the agent be held personally answerable as the promisee of the Note? Upon this point the authorities do not seem to be entirely agreed.[1]

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[1] In cases, where a person executes an instrument in the name of another without authority, there is some diversity of judicial opinion, as to the form of action, in which the agent is to be made liable for the breach of duty. In England, it is held, that the suit must be by a special action on the case. Polhill *v.* Walter, 3 Barn. & Adolp. 114. The same doctrine has been asserted in Massachusetts. Long *v.* Colburn, 11 Mass. R. 97; Ballou *v.* Talbot, 16 Mass. R. 461; and in Pennsylvania, in Hopkins *v.* Mehaffy, 11 Serg. & R. 129. In New York, it has been held, that an action may, under such circumstances, be maintained upon the instrument, as if it were executed by the agent personally. Thus, if an agent, without authority, should sign a Note in the name of another, it has been held, that he may be sued thereon, as if it were his own Note. Dusenbury *v.* Ellis, 3 John. Cas. 70; Story on Agency, § 251, note. See also White *v.* Skinner, 13 John. R. 307; Meech *v.* Smith, 7 Wend. R. 315; Cunningham *v.* Soules, 7 Wend. R. 106; Stetson *v.* Patten, 2 Greenl. R. 358; Chitty on Contr. 211. See also Woodes *v.* Dennet, 9 N. Hamp. R. 55; Grafton Bank *v.* Flanders, 4 N. Hamp. R. 23; Mayhew *v.* Prince, 11 Mass. R. 54; 2 Kent, Comm. Lect. 41, p. 631, 632 (5th edit.); Clay *v.* Oakley, 17 Martin, R. 138; Perkins *v.* Washington Ins. Co. 4 Cowen, R. 469; Feeter *v.* Heath, 11 Wend. R. 477; White

§ 72. As to partners, the signature of the firm is, in general, indispensable to create a liability of the partnership, as makers, or indorsers, of Promissory Notes;[1] and each partner has complete authority to use it; and, when so used, the Note will be deemed to be made on the partnership account, and bind it accordingly, unless, upon the face of the Note, or upon collateral proof, it is clearly established, that the party, taking it, had full notice, that the Note was drawn, or indorsed, for purposes and objects, not within the partnership business.[2] And this seems equally true in the law of France and of Scotland.[3]

§ 73. There is occasionally some nicety in the application of the general doctrine, as to what are to be deemed partnership Notes. Thus, a Promissory Note beginning with the words, "I promise to pay," but signed in the name of the firm, as, for example, "A., B. & Co.," or "B., for A., B. & Co.," will be a good Note

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v. Skinner, 13 John. R. 307; Harper *v.* Little, 2 Greenl. R. 14; Lazarus *v.* Shearer, 2 Alabama R. 718, N. S. However, if an agent, in purchasing goods, should exceed his authority, he may be properly treated as the purchaser, since no other person would be liable. Hampton *v.* Speckenagle, 9 Serg. & R. 212; Story on Agency, § 264, *a.*

[1] Chitty on Bills, p. 67–69 (8th edit. 1833); Id. p. 186; Story on Partnership, § 102, 128, 134, 136.

[2] Story on Partnership, § 126–132.

[3] Story on Partnership, § 129; Pothier on Oblig. n. 83; Pothier, De Société, n. 101; 2 Bell, Comm. B. 7, p. 616, (5th edit.); Story on Bills of Exchange, § 78; Leroy *v.* Johnson, 2 Peters, R. 186; Furze *v.* Sharwood, 2 Gale & David. 116; Hawken *v.* Bourne, 8 Mees. & Wels. 710; Kirk *v.* Blurton, 9 Mees. & Wels. 284; Faith *v.* Richmond, 11 Adolp. & Ellis, 339; U. States Bank *v.* Binney, 5 Mason, R. 176; Winship *v.* Bank of U. States, 5 Peters, R. 529; Etheridge *v.* Binney, 9 Pick. R. 272; Story on Partnership, § 101, 109, 126, 132; Smith *v.* Lusher, 5 Cowen, R. 688; Drake *v.* Elwyn, 1 Caines, R. 184; Crumpston *v.* McNair, 1 Wend. R. 457; Matheson's Administrator *v.* Grant's Administrator, 2 Howard, Sup. Ct. R. 263, 264, 283.

to bind the partnership.[1] But suppose the partnership business is carried on in the name of one member only of the firm, or his name is the name of the firm also, the question may arise, when, and under what circumstances, a Promissory Note, made or indorsed in the name of such member, will bind the firm, and when it will be deemed the separate Note of that member only. If the note or indorsement is made in the course of the partnership business, or for a partnership transaction, or upon the faith, that it is for account of the partnership business, it will bind the firm; otherwise, it will be treated as the separate Note only of the member, who signs or indorses it.[2] The same rule will apply to a Note, where two trades are carried on in the same place, or in different places by the same persons, in the same firm name;[3] or, by two firms, carrying on business in the same place, or in different places, under the same firm name, where the partners in each firm are partly the same and partly different persons.[4] In each case the Note will bind the firm on whose account, or business, or the faith thereof, the Note has been taken. Of course, this rule will apply only to persons, who receive

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[1] Bayley on Bills, ch. 2, § 6, p. 53, 54, (5th edit.); Mason *v.* Rumsey, 1 Camp. R. 384; Galway *v.* Matthew, 1 Camp. R. 403; S. C. 10 East, R. 264; Wilks *v.* Back, 2 East, R. 242.

[2] Bayley on Bills, ch. 2, § 6, p. 53–56, (5th edit.); South Car. Bank *v.* Case, 8 Barn. & Cressw. 427; Furze *v.* Sharwood, 2 Adolp. & Ellis, New R. 388, 418, 427; Vere *v.* Ashby, 10 Barn. & Cressw. 288; Etheridge *v.* Binney, 9 Pick. R. 272; Ex parte Bolitho, 1 Buck, Bank. R. 100; Thicknesse *v.* Bromilow, 2 Cromp. & Jerv. 425; U. States Bank *v.* Binney, 5 Mason, R. 176; S. C. 5 Peters, R. 529; Manuf. and Mechanics' Bank *v.* Winship, 5 Pick. R. 11.

[3] Bayley on Bills, ch. 2, § 6, p. 55, (5th edit.); Swan *v.* Steele, 7 East, R. 210.

[4] Ibid.

the Note as *bonâ fide* holders, without any knowledge, that there is in the making or indorsing of the Note any fraud, or misconduct, or excess of authority by the partner, who signs or indorses it.[1]

§ 74. As to corporations, according to the old law, they could, generally, (for there always were some admitted exceptions,) contract only under their corporate seal. But the rule has been gradually relaxed, and the exceptions enlarged, until, in our day, it may be taken to be a firmly established rule in America, and admitted, to a great extent, in England, that corporations may contract and bind themselves by contracts not under seal, made through the instrumentality of their agents, and within the proper scope of the objects and purposes of their charter.[2] But the question is more nice, as to to the right of a corporation to become makers, or indorsers, of Promissory Notes, or to become parties to any other negotiable paper. That an express authority is not indispensable to confer such a right, is admitted.[3]

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[1] Bayley on Bills, ch. 2, § 7, p. 55–57, (5th edit.); Galway *v.* Matthew, 10 East, R. 264; Ridley *v.* Taylor, 13 East, R. 175; Shirreff *v.* Wilks, 1 East, R. 48; Green *v.* Deakin, 2 Stark. R. 348; Woodward *v.* Winship, 12 Pick. R. 430; Wintle *v.* Crowther, 1 Cromp. & Jerv. 316; Bank of Rochester *v.* Bowen, 7 Wend. R. 158; Boyd *v.* Plumb, 7 Wend. R. 309.

[2] Bank of Columbia *v.* Patterson's Admin. 7 Cranch, R. 299; Bank of the U. States *v.* Dandridge, 12 Wheat. R. 64, 67–75; Beverley *v.* The Lincoln Gas Light & Coke Company, 6 Adolp. & Ellis, 829; Church *v.* The Imperial Gas Light & Coke Company, 6 Adolp. & Ellis, 846; Story on Agency, § 16, 52, 53; Kyd on Bills, p. 32, (3d edit.); Arnold *v.* The Mayor, &c. of Poole, 4 Mann. & Grang. R. 860; Fishmongers' Company *v.* Robertson, 5 Mann. & Grang. R. 131. Upon this point, it does not seem necessary here to cite the authorities at large. Many of them will be found collected in Story on Agency, § 52, 53; and Bayley on Bills, ch. 2, § 6, p. 53–68, (5th edit. 1830); Chitty on Bills, ch. 2, p. 45–72.

[3] Chitty on Bills, p. 17–21, (8th edit. 1833); Bayley on Bills, ch. 2,

It is sufficient, if it be implied, as a usual and appropriate means to accomplish the objects and purposes of the charter.[1] Corporations are expressly mentioned in the Statute of 3 and 4 Anne, ch. 9, respecting Promissory Notes, as persons, who make and indorse negotiable Notes, and to whom such Notes may be made payable. But where drawing, or indorsing, such Notes is obviously foreign to the purposes of the charter, or repugnant thereto, there the act becomes a nullity, and not binding upon the corporation.[2]

§ 75. Having adverted to these preliminary considerations, applicable to persons who are *sui juris*, and capable of becoming parties to Promissory Notes, let us now briefly inquire as to those persons, who are incompetent or disabled to become such parties, and as to the nature and extent and operation of that incompetency and disability. These may, at least in our law, be re-

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§ 7, p. 69, 70, (5th edit. 1830); Aspinwall *v.* Meyer, 2 Sandford, Superior Ct. N. Y. R. 180.

[1] See Broughton *v.* The Manchester Water Works Company, 3 Barn. & Ald. 1, 7–11; Munn *v.* Commission Company, 15 John. R. 44.

[2] Broughton *v.* Manchester Water Works Company, 3 Barn. & Ald. 1–12; Halstead *v.* Mayor of New York, 5 Barbour, Sup. Ct. R. 218; Attorney General *v.* Life & Fire Ins. Co. 9 Paige, 477; Furniss *v.* Gilchrist, 1 Sandford, Sup. Ct. N. Y. R. 57; Chitty on Bills, p. 17, (8th edit. 1833.) Heineccius, speaking upon the subject of partnerships, (Societates,) probably meant to include what we should call quasi corporations, or joint-stock companies, also. He says: — "Itaque ne societates quidem, tamquam personæ morales, negotiationem collybisticam exercere prohibentur. Immo, illam exercent quotidie, quamvis alicubi legibus cautum sit, ut omnes et singuli socii nomina sua separatim subscribere cogantur." Heinecc. de Camb cap. 5, § 15, p 49, (edit. 1769.) In the foreign law, at least in some countries, partnerships, using the name of the firm, may sue and be sued in that firm name. See Story on Partn. § 221, note (1); Id. § 235, note (5.) See also, 2 Bell, Comm. B. 7, p. 619, 620, (5th edit.), Story on Bills, § 79; Murray *v.* East India Company, 5 Barn. & Ald. 204.

duced to four classes. (1.) First, infants or minors; (2.) Secondly, married women; (3.) Thirdly, alien enemies; (4.) And fourthly, persons insane, imbecile, or *non compotes mentis.*[1]

§ 76. There are, indeed, other persons, who are prohibited, by the local law of particular countries, from engaging in trade or commerce; such as ecclesiastical persons, or clergymen.[2] But then this is understood to be engaging in trade or commerce for a livelihood, or for profit. But the prohibition would not seem to extend to Promissory Notes given by an ecclesiastic in the course of his own pursuits, as, for example, to pay his debts, or to improve his estate; but solely to cases of secular employments of a purely secular character, *animo lucri,* as, for example, by becoming a merchant, or banker, or broker, or making, or discounting, or indorsing Promissory Notes, for purposes of profit.[3] Persons professed in religion, such as monks and friars, are, or at least were, by the Common Law, disabled to contract, for they were deemed dead in the law (*civiliter mortui.*)[4] So, by the laws of some States, persons under guardianship, as spendthrifts or prodigals, or on account of habitual drunkenness, are deemed incapable of contracting.[5] But these and other special disabilities of a

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[1] Many of the doctrines and illustrations applicable to these disabilities, are directly taken from the text of Story on Bills of Exchange, § 81 – 106, as containing a full and correct statement of the law on the subject.

[2] Hall *v.* Franklin, 3 Mees. & Wels. 259.

[3] See Story on Bills, § 82, 83, and the authorities there cited; Pothier, De Change, n. 27; Heinecc. de Camb. ch. 5, § 2, 8, 14, 17; Chitty on Bills, ch. 2, p. 16, (8th edit.); Com. Dig. *Capacity*, B. 1, D. 1.

[4] Com. Dig. *Capacity*, B. 1, D. 1; Hall *v.* Franklin, 3 Mees. & Wels. 259.

[5] See Revised Statutes of Massachusetts, ch. 79, § 13; Story on Bills, § 88; Pothier on Oblig. n. 50 – 52. In Story on Bills, § 88, 89, it is said: "Within the like predicament, as minors, persons fall, who, by the foreign

similar kind may be passed over, as scarcely within the scope of a work like the present, which deals with more general disabilities.

§ 77. In the first place, then, as to minors, or persons under twenty-one years of age, who are by our law significantly called infants. Contracts made by infants are either, first, void, or secondly, voidable, or thirdly, valid.[1] They are void, when they are clearly not for the benefit of the infant, as, for example, a bond made with a penalty by an infant.[2] They are voidable, when,

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or civil law, are interdicted and rendered incapable of contracting by reason of prodigality; for, although such persons know what they do, yet their consent is not deemed valid; and they are treated as persons not *sui juris*, and as having no reasonable discretion. In some of the American States, (as we have seen,) a similar rule prevails, as to persons who are put under guardianship, by reason of their being addicted to habitual drunkenness; and while that guardianship continues, they are incapable of making any valid contract so as absolutely to bind themselves thereby. But although persons who are interdicted by the foreign and civil law from managing their affairs, by reason of prodigality, are thus incapable of binding themselves by a contract; yet they are not, absolutely, incapable of contracting; for they may, like minors, by contracting without the authority of their tutor, curator, or guardian, oblige others to them, although not oblige themselves to others. And this is, accordingly, laid down in the Institutes and Digest. Namque placuit meliorem conditionem licere eis facere, etiam sine tutoris auctoritate. Is, cui bonis interdictum est, stipulando sibi acquirit. The reason is, that the power of tutors, curators, and guardians is established in favor of minors and interdicted persons, and their assistance is necessary only for the interest of the persons under their charge, and from the apprehension of their being deceived; and, consequently, such assistance becomes superfluous, when, in fact, they make their condition better."

1 Story on Bills, § 84; Keane *v.* Boycott, 2 H. Black. 511, 514, 515; Com. Dig. *Enfant*, B. 3, 5, 6, C. 1 to 4; Id. C. 9; Holmes *v.* Blogg, 8 Taunt. 35; Id. 508; Wood *v.* Fenwick, 10 Mees. & Wels. 195; Baker *v.* Lovett, 6 Mass. R. 78, 80; Vent *v.* Osgood, 19 Pick. R. 572; 1 Black. Comm. 463-467; Tucker *v.* Moreland, 10 Peters, R. 58; Fonda *v.* Van Horne, 15 Wend. R. 631.

2 Ibid.; Com. Dig. *Enfant*, C. 1; Oliver *v.* Houdlet, 13 Mass. R. 237; Vent *v.* Osgood, 19 Pick. 572.

they are or may be for his benefit, according to circumstances, as, for example, a lease of his lands rendering rent.[1] They are valid, when they are made for a consideration, and upon an occasion, which the law sanctions and approves; as, for example, for necessaries for himself and his family (if he have one) suitable to his rank and degree.[2]

§ 78. By our law, an infant has not a capacity absolutely to bind himself by a Promissory Note, as maker, or as indorser, in the course of trade; for he is not at liberty to engage in trade.[3] Nor would a Promissory Note given by him for necessaries be absolutely binding upon him, when it is negotiable; or even (as it should seem) if not negotiable, since he cannot bind himself to pay even for necessaries any specific sum.[4] The ground of this doctrine seems to be, that in cases of negotiable Notes, the infant, if bound at all to the indorsee, must be bound for the entire sum stated in the Note; and if the instrument be not negotiable, it is against the policy of the law to bind him to pay any fixed certain sum, where

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[1] Ibid.; Com. Dig. *Enfant*, B. 3 C. 3; Whitney *v.* Dutch, 14 Mass. R. 457, 462; Stone *v.* Dennison, 13 Pick. R. 1; Reed *v.* Batchelder, 1 Metc. R. 559; Wood *v.* Fenwick, 10 Mees. & Wels. 195.

[2] Ibid.; Com. Dig. *Enfant*, C. 5; Burghart *v.* Hall, 4 Mees. & Wels. 727.

[3] Story on Bills, § 84, and authorities there cited; Chitty on Bills, ch. 2, p. 21, 22, (8th edit.); Bayley on Bills, ch. 2, § 2, p. 44, 45, (5th edit.); Warwick *v.* Bruce, 2 Maule & Selw. 205, 209.

[4] Story on Bills, § 84, and authorities there cited; Gibbs *v.* Merrill, 3 Taunt. R. 307; Swasey *v.* Vanderheyden, 10 John. R. 33; Williamson *v.* Watts, 1 Camp. R. 552; Jones *v.* Darch, 4 Price, R. 300; Trueman *v.* Hurst, 1 Term R. 40; Chitty on Bills, ch. 2, p. 21, 22, and note (edit. 1833.) But see Com. Dig. *Enfant*, B. 5; Bayley on Bills, ch. 2, § 1, p. 44, 45, (5th edit.); 2 Kent, Comm. Lect. 31, p. 235, (5th edit.); Everson *v.* Carpenter, 17 Wend. R. 419.

the nature of the contract ought to leave open the whole inquiry as to the sufficiency of the consideration.[1] But, whether a Promissory Note given by an infant, either negotiable or not, is void, or is only voidable, is a matter upon which the authorities present no inconsiderable diversity of opinion.[2] The weight of the modern authorities seems, however, greatly to preponderate in favor of holding Promissory Notes, given or indorsed by an infant, voidable only, and therefore capable of being ratified after the party comes of age.[3]

§ 79. But although an infant cannot bind himself absolutely as the maker of a Promissory Note, there is no doubt, that he may be the payee thereof, since it cannot but be for his benefit, if the consideration therefor does not move from himself, but from some third person; or if it be for a debt justly due to himself, as for labor and

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[1] Chitty on Bills, ch. 2, p. 21, 22, and note, (8th edit.); Swasey *v.* Adm'r of Vanderheyden, 10 John. R. 33; Stone *v.* Dennison, 13 Pick. R. 1. But see Reed *v.* Batchelder, 1 Metc. R. 559; Goodsell *v.* Myers, 3 Wend. R. 479.

[2] See the cases cited in 2 Kent, Comm. Lect. 31, p. 235, note; Story on Bills, § 84. Mr. Chancellor Kent, in summing up the doctrine, says: "It is held, that a negotiable Note, given by an infant, even for necessaries, is void; and his acceptance of a Bill of Exchange is void; and his contract as security for another is absolutely void; and a bond, with a penalty, though given for necessaries, is void. It must be admitted, however, that the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election when they become of age, either to affirm or disallow them. If their contracts were absolutely void, it would follow as a consequence, that the contract could have no effect, and the party contracting with the infant would be equally discharged."

[3] Bayley on Bills, ch. 2, § 2, p. 45, 46, (5th edit.); Chitty on Bills, ch. 2, p. 23, (8th edit.); Story on Bills, § 84; 2 Kent, Comm. Lect. 31, p. 235, 236, (5th edit.); Gibbs *v.* Merrill, 3 Taunt. 307; Hunt *v.* Massey 5 Barn. & Adolp. 902.

services.[1] However, it is quite a different question, whether an infant can personally receive payment of such a Note, made payable to himself or order, or whether it be payable to his guardian only. The latter would seem to be the true rule.[2]

§ 80. Another inquiry naturally arising under this head is, what is the effect of an indorsement made by an infant, who is the payee or indorsee of a Note? It has been already suggested,[3] that he cannot charge himself personally with any liability in virtue of any such indorsement; and it is very clear, that every such indorsement is voidable by him.[4] But a more important point is, whether the person, who takes by the indorsement under him, acquires thereby any title to the Note against any of the antecedent parties thereto; in other words, whether the transfer by the infant is operative in favor of the indorsee, so that the latter may receive or enforce payment thereof from any of the antecedent

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1 Story on Bills, § 85; Chitty on Bills, ch. 2, p. 24, (8th edit.); Kyd on Bills, ch. 2, p. 30, (3d edit.); Bayley on Bills, ch. 2, § 2, p. 46, (5th edit.); Nightingale *v.* Withington, 15 Mass. R. 272; Holliday *v.* Atkinson, 5 Barn. & Cressw. 501.

2 Bayley on Bills, ch. 2, § 2, p. 46, note 7, (5th edit.) Mr. Bayley says: "See Pothier, pl. 166, who observes, that payment to an infant will be no discharge of the debtor, unless it appear that the payment were beneficial to the infant; if the money were applied to his advantage, the payment will be good; if not, as where the infant squanders it, the party paying will not be discharged. So money *lent* to an infant for necessaries if duly applied, may in equity be recovered from him. Marlow *v.* Pitfield, 1 P. Williams, 558. Though it is otherwise at law. 1 Salk. 279, 386. But if an executor pay a legacy to an infant, which the infant's father obtains and dissipates, the executor will be answerable to the infant. Phillips *v.* Paget, 2 Atk. 80. See also Pothier on Obligations, part 3, ch. 1, art. 2, § 1, pl. 504, and § 2."

3 Ante.

4 Bayley on Bills, ch. 2, § 1, 2, p. 44, 45, 46, (5th edit.); Chitty on Bills, ch. 2, p. 22, 23, (8th edit.); Story on Bills, § 85.

parties, and give a good discharge therefor. It seems now well settled, that the indorsee, by such transfer and indorsement, acquires a good and valid title to the Note against every other party thereto, except the infant, since it is not a void, but a voidable, title only.[1] The infant may indeed avoid it, and intercept the payment to the indorsee, or, by giving notice to the antecedent parties of his avoidance, furnish to them a valid defence against the claim of the indorsee. But, until he does so avoid it, the indorsement is to be deemed, in respect to such antecedent parties, as a good and valid transfer.[2]

§ 81. In some respects the foreign law differs from ours, as to the disabilities of persons, who are minors or infants. Minors are not, by the foreign law, positively incapable of making contracts, provided the contracts are beneficial to them. But all contracts, made by them are liable to be rescinded; and the minors are entitled to be reinstated in their original rights, if their contracts are injurious to them.[3] Contracts by way of Bills of Exchange and Promissory Notes, are generally deemed injurious to them. And, hence, it should seem, that minors incur no absolute responsibility, and are incapable of binding themselves, either as makers or indorsers of Promissory Notes, or as drawers, or drawees, or indorsers, of Bills of Exchange. But, in favor of commerce, inasmuch as minors are permitted to engage in it, an exception is made of minors who are mer-

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1 Ibid.

2 Ibid.; Grey *v.* Cooper, 3 Doug. R. 65; Taylor *v.* Croker, 4 Esp. R. 187; Jones *v.* Darch, 4 Price, R. 300; Nightingale *v.* Withington, 15 Mass. R. 272. See Drayton *v.* Dale, 2 Barn. & Cressw. 293, 299; Pitt *v.* Chappelow, 8 Mees. & Wels. 616; Burrill *v.* Smith, 7 Pick. R. 291. See also, Braithwaite *v.* Gardiner, 8 Adolph. & Ellis, N. S. 473.

3 Pothier on Oblig. n. 52.

chants; and they may become parties to, and bind themselves by Bills of Exchange and Promissory Notes, in their business and character as merchants. Thus, Heineccius says: *Contra, non obscurum est, rigori cambiali locum non esse adversus impuberes, et minorennes; illorum enim cambia plane nullius momenti sunt; his vero læsis competit beneficium restitutionis in integrum. Excepti tamen sunt minorennes, qui mercaturam exercent, quippe, qui in rebus ad mercaturam pertinentibus ne jure quidem communi in integrum restituuntur.*[1]

§ 82. The same rule, with similar exceptions, has prevailed in France from a very early period. It is expressly recognized in the Ordinance of 1673, (tit. 1, art. 6;)[2] and it has been since incorporated into the modern Codes of France.[3] The Civil Code declares, that minors are incapable of contracting; but that they cannot, on account of their incapacity, impeach their contracts, except in cases provided for by law; and among these cases are those, where the contract is to their injury.[4] But, under certain limitations, minors are permitted to engage in commerce; and when they are so engaged, their contracts, made in the course of their business, bind them.[5] And, in an especial manner, Promissory Notes and Bills of Exchange drawn, in-

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1 Heinecc. de Camb. cap. 5, § 3, 4, 6; Story on Bills of Exchange, § 86.

2 Jousse, Sur L'Ord. 1673, tit. 1, art. 6, p. 10, (edit. 1802); Pothier, De Change, n. 28; Pothier, on Oblig. n. 49, 52.

3 Code Civil of France, art. 1124, 1125, 1312; Code of Comm. art. 114; Pothier, De Change, n. 28; Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, art. 114, p. 356.

4 Code Civil of France, art. 1124, 1125, 1312; Id. art. 483-487; Pardessus, Droit Comm. Tom. 1, art. 56-62.

5 Code Civil of France, art. 487; Pardessus, Droit Comm. Tom. 1, art. 56-62.

dorsed, or accepted by them, in their commercial negotiations, will be obligatory upon them.[1] But Promissory Notes and Bills of Exchange drawn, indorsed, or accepted by minors, who are not merchants or bankers, are, by the Code of Commerce, declared to be void in respect to them; and, therefore, the remedial justice thereon is not now confined to cases, where the contract, created by the Bill or Note, is injurious to them. There is a positive and absolute prohibition of their binding obligation in all cases.[2] This prohibition, however, does not extend beyond the protection of the minor himself; and, therefore, the Bill or Note will bind all the other parties to it, not only in favor of the minor, but also, in respect to each other.[3]

§ 83. Within the like predicament as minors, persons fall, who, by the foreign or civil law, are interdicted, and rendered incapable of contracting, by reason of prodigality; for, although such persons know what they do, yet their consent is not deemed valid; and they are treated as persons not *sui juris*, and as having no reasonable discretion.[4] In some of the American States (as we have seen) a similar rule prevails, as to persons who are put under guardianship, by reason of their being addicted to habitual drunkenness; and while that guardianship continues, they are incapable of making any valid contract, so as absolutely to bind themselves thereby.[5]

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[1] Ibid.

[2] Code de Comm. art. 112; Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 114, p. 356–360; Pardessus, Droit Comm. Tom. 1, art. 56–62.

[3] Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 112, p. 360; Pothier on Oblig. n. 52; Story on Bills of Exchange, § 87.

[4] Pothier on Oblig. n. 50–52.

[5] Ante, § 76, note; Story on Bills of Exchange, § 88.

§ 84. But, although persons who are interdicted by the foreign and civil law from managing their affairs, by reason of prodigality, are thus incapable of binding themselves by a contract; yet they are not absolutely incapable of contracting; for they may, like minors, by contracting without the authority of their tutor, curator, or guardian, oblige others to them, although not oblige themselves to others. And this is, accordingly, laid down in the Institutes and Digest. *Namque placuit meliorem conditionem licere eis facere, etiam sine tutoris auctoritate.*[1] *Is, cui bonis interdictum est, stipulando sibi acquirit.*[2] The reason is, that the power of tutors, curators, and guardians is established in favor of minors and interdicted persons, and their assistance is necessary only for the interest of the persons under their charge, and from the apprehension of their being deceived, and consequently, such assistance becomes superfluous, when, in fact, they make their condition better.[3]

§ 85. Secondly, as to married women. By the law of England and America a married woman is incapable, in any case, of becoming a party to a Bill of Exchange, so as to charge herself with any obligation whatsoever, ordinarily arising therefrom.[4] This results from her general disability to enter into any contract under the Common Law; for, during the marriage, her very being, or legal existence, as a distinct person, is suspended, or, at least, is incorporated and consolidated into that of

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1 Inst. Lib. 1, tit. 21.

2 Dig. Lib. 45, tit. 1, l. 6; Ante, § 76, note.

3 Ibid.; Pothier on Oblig. n. 52; Story on Bills of Exchange, § 89.

4 Bayley on Bills, ch. 2, § 3, p 47, 48, (5th edit. 1830); Chitty on Bills, ch 2, p. 24, (8th edit. 1833); Id. ch. 6, p. 225; Edwards *v.* Davis, 16 John. R. 281; Com. Dig. *Baron & Feme*, Q.

her husband.[1] There are certain exceptions, recognized by Courts of Equity, and by the custom of London, which it is unnecessary to advert to, since they have no manner of application to the ordinary doctrines respecting Promissory Notes.[2] It will, generally, make no difference, as to this disability of a married woman, at the Common Law, to bind herself by any obligation, as a party to a Promissory Note, that she is, at the time, living separate and apart from her husband;[3] or, that she has a separate maintenance secured to her;[4] or, that she has eloped, and is living notoriously in a state of adultery;[5] or, even that she is separated from her husband by a decree of divorce *a mensâ et thoro;* for nothing but a divorce *a vinculo matrimonii*, will restore her ability.[6]

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1 Black. Comm. 442; 2 Story on Eq. Jurisp. § 1367; Bayley on Bills, ch. 2, § 3, p. 47, 48, (5th edit. 1830); Caudell *v.* Shaw, 4 Term R. 361; Co. Litt. 132 *b*, 133 *a;* Com. Dig. *Baron & Feme*, D. Q.

2 See 2 Story on Eq Jurisp. § 1367 – 1403; Chitty on Bills, ch 2, § 1, p. 24, 25, (8th edit. 1833); Caudell *v.* Shaw, 4 Term R. 361; Beard *v.* Webb, 2 Bos. & Pull. 93; Stewart *v.* Lord Kirkwall, 3 Madd. 387. In equity, a married woman may contract with reference to her own property, secured to her separate use; and, therefore, she may accept a Bill of Exchange; and the same may become payable out of her separate property, although she cannot, otherwise, bind herself, personally, for the debt. — Stewart *v.* Lord Kirkwall, 3 Madd. R. 387; 2 Story on Eq. Jurisp. § 1397; Francis *v.* Wigswell, 1 Madd. R. 258; Aylett *v.* Ashton, 1 Mylne & Craig, 105, 111; Owens *v.* Dickenson, 1 Craig & Phillips, R. 48; Gardner *v.* Gardner, 22 Wend. R. 526.

3 Marshall *v.* Rutton, 8 Term R. 545; Bayley on Bills, ch. 2, § 3, p. 48, (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 24, 25, (8th edit. 1833); Hatchett *v.* Baddely, 2 W. Black. 1079; Lean *v.* Schutz, 2 W. Black. 1195, 1196; Hyde *v.* Price, 3 Ves. jr. 443.

4 Ibid.

5 Ibid.

6 Ibid.; Co. Litt. 133 *a;* Lewis *v.* Lee, 3 Barn. & Cressw. 291; Faithorne *v.* Blaquire, 6 M. & Selw. 73. In Massachusetts, a different rule prevails; for there, under the statutes allowing a divorce, a mensâ et thoro, it has been held, that, although after a decree of such a divorce, the hus-

§ 86. There are, indeed, some exceptions to the general rule, created by the Common Law, which stand upon peculiar grounds, and are quite consistent with its ap-

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band's right to reduce into possession choses in action, which belonged to his wife, during the coverture, and prior to the divorce remains; yet, after such divorce, she is to be treated as a feme sole, in respect to property, subsequently acquired on debts contracted by her. Dean *v.* Richmond, 5 Pick. R. 461. Upon that occasion, it was admitted that the statute did not directly apply to the case. But Mr. Chief Justice Parker, in delivering the opinion of the Court, said: — "But the question, which alone affects the present action, in regard to the capacity of the plaintiff to sue, appears not to have been settled, and that is, the effect of a divorce, a mensâ et thoro. Such a divorce does not dissolve the marriage, though it separates the parties, and establishes separate interests between them. By our statute, the wife, after such a divorce, is not only free from the control of the husband, but all her interest in real estate is restored to her; alimony is allowed her out of the estate of her husband; and she is left to procure her own maintenance by her own labor, where the husband is unable to afford any alimony; which is the case in most instances, of divorce of this nature. In addition to these burdens, she frequently has to support young children, without any means but her own industry. Shall she not maintain an action, even against her husband for alimony, which, though able, he may refuse to pay? May she not sue those who trespass upon her lands, or the tenants who may withhold the rent, or for the earnings of her labor, or the specific articles of property she may have purchased with the savings of her alimony, her rents, or the rewards of her labor? If not, the law, instead of protecting her from the oppression and abuse of power of the husband, has merely released him from an inconvenient connection, reserving to him the right to deprive her of all comfort and support. If she must join him in any action, he may release it; he may receive her rents, and discharge her tenants: he may seize all her necessary articles of furniture and appropriate them to himself; and he may intercept the little fruits of her industry which are absolutely necessary for her support. If the Common Law allows all this, and there is no relief, except by application to a Court of Equity, the Common Law is, indeed, most impotent; and where there is no Court of Equity, as there is not with us to these purposes, the system is most iniquitous. But it is not so. The Common Law only prohibits actions by women, who have husbands alive, whose rights are not impaired by law, but by compact between them, the law recognizes no authority to make such compacts. Where the law itself has separated them and established separate interests and separate property, it acknowledges no such absurdity, as to continue plication to ordinary cases. Thus, for example, if the husband has abjured the realm, or if he is deemed, in contemplation of law, to be civilly (although not naturally) dead, as, if he is, by a judicial sentence, or other-

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the power of the husband over every thing but the person of the wife. No case appears in the English books, and without doubt, because the interests of the wife, so situated, may be taken care of in Chancery. In Bac. Abr. *Baron & Feme*, M., the editor, in the margin, puts the quære, whether a woman, divorced, a mensâ et thoro, may not be sued without her husband; which is enough to show, that, until his time, there had been no decision to the contrary, and I do not find that there has been any since. In a recently published book, which I trust, from the eminence of its author, and the merits of the work, will soon become of common reference in our Courts, (Kent's Commentaries, Vol. II. p. 136,) the learned author, after tracing the English authorities upon the subject of liability of married women, living separate, and having a maintenance, says: — 'I should apprehend, that the wife could sue and be sued, without her husband, when the separation between the husband and wife was, by the act of the law, and that takes place not only in the case of a divorce, a mensâ et thoro, but also in the case of imprisonment of the husband, as a punishment for crimes. Such a separation may, in this respect, be equivalent to transportation for a limited time; and the sentence, which suspended the marital power, suspends the disability of the wife to act for herself, because she cannot have the authority of her husband, and is necessarily deprived of his protection.' So far as this opinion relates to the case of divorce, we fully concur with him, and are satisfied, that, although the marriage is not, to all purposes, dissolved by a divorce, a mensâ et thoro, it is so far suspended, that the wife may maintain her rights by suit, whether for injuries done to her person or property, or in regard to contracts, express or implied, arising after the divorce, and that she shall not be obliged to join her husband in such suit; and, to the same extent, she is liable to be sued alone, she being, to all legal intents, a feme sole, in regard to subjects of this nature. Such, however, is not the law of England, it having been recently decided, that coverture is a good plea, notwithstanding a divorce, a mensâ et thoro. Lewis *v.* Lee, 3 Barn. & Cressw. 291. But the difference in the administration of their law of divorce and ours, and the power of the Court of Chancery there to protect the suffering party, will sufficiently account for the seeming rigor of their Common Law on this subject. If the husband is not liable for the debts of the wife, after a divorce, a mensâ, the chief reason for denying her the right to sue alone fails." 5 Pick. R. 465-467.

wise, banished, or transported for life, or for a term of years, or if he has, by a religious profession, renounced civil life, the disability of the wife is suspended during that period, and her capacity to contract is restored.[1] So, a married woman, resident in any country, whose husband is an alien and never has been in that country, has been held to be restored to the like capacity;[2] and, *a fortiori*, the rule will apply, if he is an alien enemy.[3]

§ 87. With these exceptions, and others, which stand or may stand, upon analogous grounds, the general rule prevails, that married women cannot bind themselves, personally, by contracts, to third persons; and, consequently, they cannot bind themselves, as parties to any Promissory Note, either as makers, or as indorsers. But it by no means follows, that other parties may not be bound to them by, and under, such instruments, and that they may not, *sub modo*, possess or pass a title thereto, which shall be effectual between other persons and parties. They may certainly act as agents of third persons, in drawing and indorsing Promissory Notes;[4] and they may bind their own husbands, as makers, or indorsers, if they act by their express authority, or with their implied consent and approbation. Thus, for example, the wife may draw or indorse a Promissory Note

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[1] Hatchett *v.* Baddeley, 2 W. Black. 1079; Marshall *v.* Rutton, 8 Term R. 545; Bayley on Bills, ch. 2, § 3, p. 47, 48, (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 24, 25, (8th edit. 1833); Bayley on Bills, ch. 2, § 3, p. 47, (5th edit.); Sparrow *v.* Carruthers, cited 1 Term R. 6; Co. Litt. 133 *a*, and Harg. note 3; Story on Partn. § 10; Carrol *v.* Blencow, 4 Esp. R. 27; Newsome *v.* Bowyer, 3 P. Will. 37.

[2] Kay *v.* Duchess de Pienne, 3 Camp. R. 123; Gregory *v.* Paul, 15 Mass. R. 31. See De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 357; Abbott *v.* Bayley, 6 Pick. R. 89.

[3] Derry *v.* Duchess of Mazarine, 1 Ld. Raym. 147.

[4] Story on Agency, § 7, and the authorities there cited.

in the name of her husband, [or even in her own name,[1]] with his express or implied consent.[2] On the other hand, if a Note be made payable, or indorsed, to a married woman, or her order, whose husband is under no civil incapacity, it becomes, immediately, by operation of law, payable to the husband or his order;[3] and he may, at his election, indorse it, or negotiate it, or sue upon it, in his own name;[4] or, he may sue upon it in the joint names of himself and his wife;[5] or he may allow her to indorse, or negotiate it in her own name. And in this last case, it may be declared upon, either, as indorsed by her husband, or in her own name with his consent; and thus a good title may be acquired by the indorsee against the husband, as well as against the other parties to the Note.[6]

§ 88. Promissory Notes, drawn or indorsed by the wife before marriage, are binding upon her after the marriage, and both the husband and wife may be sued therefor by the holder. Promissory Notes, made before

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1 Lindus *v.* Brodwell, 5 Manning, Granger & Scott, 583.

2 Bayley on Bills, ch. 2, § 3, p. 48, 49, (5th edit. 1830); Smith *v.* Pedley, cited ibid.

3 Bayley on Bills, ch. 2, § 3, p. 48, 49, (5th edit. 1830); Arnold *v.* Revoult, 1 Brod. & Bing. R. 443; Philliskirk *v.* Pluckwell, 2 M. & Selw. 393; Draper *v.* Jackson, 16 Mass. R. 480; Commonwealth *v.* Manley, 12 Pick. R. 173; Russell *v.* Brooks, 7 Pick. R. 65; Richards *v.* Richards, 2 Barn. & Adolp. 447.

4 Ibid.; Burrough *v.* Moss, 10 Barn. & Cressw. 558; Mason *v.* Morgan, 2 Adolp. & Ellis, 30.

5 Ibid.; Richards *v.* Richards, 2 Barn. & Adolp. 447.

6 Bailey on Bills, ch. 2, § 3, p. 47, 48, (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 25–27, (8th edit. 1833); Id. ch. 6, p. 225; Barlow *v.* Bishop, 1 East, R. 432; Cotes *v.* Davis, 1 Camp. R. 485; Prestwich *v.* Marshall, 4 Carr. & Payne, 594; S. C. 7 Bing. R. 565; Burrough *v.* Moss, 10 Barn. & Cressw. 558; Mason *v.* Morgan, 2 Adolp. & Ellis, 30.

marriage, [or during marriage,[1]] and payable to the wife or her order, become, like other choses in action, the property of the husband, if he reduces them into possession during the coverture.[2] But, if they are not so reduced into possession, and the wife survives him, she will be entitled to them, in right of her survivorship.[3] On the other hand, if he survives her, and they are not reduced into possession before her death, then her personal representatives will be entitled to sue for them; but the husband will be entitled to the proceeds, when recovered, in right of his survivorship.[4] The same doctrine will apply throughout as to Promissory Notes, and other choses in action, made and given to the wife after the coverture, with this distinction applicable to such notes and other choses in action, after the coverture, that the husband does not, by some overt act, such as bringing an action in his own name, or indorsing or assigning them, which are deemed equivalent to reducing them into possession, elect to hold them exclusively for his own use, and thus disagree to the interest of his wife therein.[5]

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1 Scarpellini *v.* Atcheson, 7 Adolph. & Ellis, N. S. R. 864; Howard *v.* Oakes, 3 Welsby, Hurlstone & Gordon, R. 136.

2 Richards *v.* Richards, 2 Barn. & Adolp. 447; Co. Litt. 351 *b*; Garforth *v.* Bradley, 2 Ves. 675; Betts *v.* Kimpton, 2 Barn. & Adolp. 273; Com. Dig. *Baron & Feme*, E. 3; McNeilage *v.* Holloway, 1 Barn. & Ald. 218; Legg *v.* Legg, 8 Mass. R. 99; Howes *v.* Bigelow, 13 Mass. R. 384; Dean *v.* Richmond, 5 Pick. R. 461; Chitty on Bills, ch. 6, p. 225, (8th edit. 1833); Id. ch. 2, § 1, p. 26, 27.

3 Ibid.; Com. Dig. *Baron & Feme*, F. 1, 2; Draper *v.* Jackson, 16 Mass. R. 480; Stanwood *v.* Stanwood, 17 Mass. R. 57.

4 Betts *v.* Kimpton, 2 Barn. & Adolp. 273; Co. Litt. 351 *a*, and Mr. Butler's note; Cart *v.* Rees, cited 1 P. Will. R. 381.

5 Richards *v.* Richards, 2 Barn. & Adolp. 273; Garforth *v.* Bradley, 2 Ves. 675; Dean *v.* Richmond, 5 Pick. R. 461; Gaters *v.* Madeley, 6 Mees. & Wels. 423; Chitty on Bills, ch. 6, p. 225, (8th edit. 1833);

§ 89. We have already had occasion to state, that women are, generally, by the French Law, disabled from

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Id. ch. 2, § 1, p. 26, 27. In McNeilage *v.* Holloway, 1 Barn. & Ald. 218, it was held, that where a Bill of Exchange was made payable to a feme sole, or her order, before marriage, and she intermarried before the Note became due, her husband might sue thereon in his own name, without joining his wife, although the latter had not indorsed the Bill. Upon that occasion, Mr. Justice Bayley said: — "This being a negotiable security, the right of action shifts with the possession. Chattels personal vest absolutely in the husband by marriage. Choses in action do not; for, in order to reduce them into possession, it is necessary to join the wife. The case of a negotiable security is a middle case; whoever has the instrument in his possession, and the legal right to it, may sue upon it in his own name. It differs, in this respect, from a bond, and other securities not negotiable. By assigning a bond, a right of suing only in the name of the obligee is conferred. The Bill is payable to the wife, and the effect of the marriage is not to destroy the negotiability of the instrument. In whom, then, will the power of indorsing vest? Certainly not in the wife, for her power to do so is superseded by the marriage; then it must be in the husband. It may be said that he could not indorse to himself; perhaps not; because, in that case, there would be no transfer; but that must be on the ground of his having the entire interest in the Bill without indorsement. We break in upon no principle, therefore, by saying, that this is a species of property, in the possession of the wife, at the time of the marriage, which, by the act of marriage itself, vested in the husband." But this decision is open to much observation; and, indeed, it is plain, from the subsequent case of Richards *v.* Richards, 2 Barn. & Adolp. 447, 453, that the Court were not entirely satisfied with that case as an authority. It may, indeed, as to the point, that a Bill is a personal chattel, and not a chose in action, be deemed entirely overruled by the late case of Gaters *v.* Madeley, 6 Mees. & Wels. R. 423, where Mr. Baron Parke said: — 'A Promissory Note is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has, indeed, been made by statute, assignable, and transferable, according to the custom of merchants, like a Bill of Exchange; yet, still, it is a chose in action, and nothing more. When a chose in action, such as a bond or Note, is given to a feme covert, the husband may elect to let his wife have the benefit of it, or, if he thinks proper, he may take it himself; and if, in this case, the husband had, in his lifetime, brought an action upon this Note, in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part, to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and, in that case, the remedy on it survives to the wife, or he may, according to the decision in Philliskirk *v.*

binding themselves to absolute obligations, as makers or indorsers of Promissory Notes, or as drawers, indorsers, or acceptors, of Bills of Exchange, unless they are regular merchants, and carry on trade as such.[1] And this disability equally applies, whether they are married or unmarried, whether they are maidens or widows. A married woman, therefore, who is not a regular merchant, is equally within the interdiction, whether she is authorized by her husband to do the act or not;[2] for this interdiction is designed for her protection and safety against the ordinary and summary remedies against the person, and the property, which Bills of Exchange or Promissory Notes generally carry with them under the French Law.[3]

Pluckwell, adopt another course, and join her name with his own; and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the Note, as the judgment would survive to her. The only doubt in this case arose from the observation of Lord Ellenborough, in McNeilage *v.* Holloway, that a Promissory Note may be treated as a personal chattel in possession. Now, in that respect, I think there was a mistake, and an incorrect expression used; but it was unnecessary for his Lordship to lay down such a doctrine, in order to decide the case then before him. In fact, the decision in the subsequent case of Richards *v.* Richards, has qualified that position. In that case, the Court of King's Bench said, that a Promissory Note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule that choses in action, given to the wife, survive to her after the death of her husband, unless he has reduced them into possession. The case of Nash *v.* Nash, is also an authority in favor of the position, that it survives to the wife; and, although that case was decided before McNeilage *v.* Holloway it does not appear to have been cited in the latter case. I am of opinion that the Note must be considered as having survived to the wife, and her executor was, therefore, the proper person to sue.'" See also, Com. Dig. *Baron & Feme*, V. W. X.; Morse *v.* Earl, 13 Wend. R. 271.

1 Ante, § 60; Story on Bills, § 73; Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 351–355; Code de Comm. art. 113.

2 Ibid.

3 Ibid. But see Pothier, De Change, n. 28; Sautayra, Code de Comm. art. 113, p. 78, 79.

§ 90. We are not, however, to understand (as has been already suggested) from this statement, that, if an unmarried woman, or a married woman, with the authority and consent of her husband, not being a merchant, should sign, or indorse, or accept, a Bill of Exchange or Promissory Note, it would, by the French Law, be an absolute nullity. But we are only to understand, that it will be reduced to the case of a simple promise on her part, which, in that law, imports, or may import, very different rights, remedies, and obligations.[1] For unmarried women, and married women, with the consent of their husbands, may enter, under ordinary circumstances, into a valid contract. The interdiction only applies to prevent women, whether married or unmarried, from incurring the ordinary responsibilities of drawers, indorsers, or acceptors, and from being subjected to the ordinary remedies, to enforce the rights of the holder, against persons in that predicament. But this interdiction does not render a married woman incompetent to make Promissory Notes, or to draw, indorse, or accept Bills of Exchange, in the name of her husband, with his authority and consent; for, then, she is not personally bound, as such a Bill, or Note, is treated as his personal contract, through the instrumentality of his agent.[2]

§ 91. But married women, who, with the consent of their husbands, carry on trade separately, as regular merchants, may bind themselves as parties to Promissory Notes and Bills of Exchange, in the course of their business; but, as they cannot so engage in business

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[1] Story on Bills, § 73, note.

[2] Locré Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 354; Pothier, De Change, n. 28.

without such consent, it follows, that they cannot contract any valid engagements, even as merchants, where the consent of the husband is withheld, or he interdicts the engagement in trade.[1] But, although a Bill of Exchange, or Promissory Note, drawn under the circumstances above stated, may not be binding personally upon the woman herself, either as a drawer, or indorser, or acceptor; yet, as between the other parties to it, it may be of full force and obligation. Thus, if a Bill be drawn or indorsed by a woman, under circumstances of interdiction, still, if accepted, it may be binding between the indorsee, or other holder, and the acceptor.[2] And, in like manner, a Promissory Note drawn or indorsed by a woman under interdiction, will be binding between the other parties thereto.

§ 92. There seems to be another difference between our law and that of France, in respect to married women; and that is, that as married women, by the French law, are incapable of contracting with other persons, without the consent and authority of their husbands, they cannot oblige other persons thereby to them, any more than they can oblige themselves to other persons; for they cannot, without the authority and consent of their husbands, contract in any manner, whether the contract be for their detriment, or for their benefit.[3] And, therefore, a Bill of Exchange, or Promissory Note, made payable to them, would not be obligatory in their favor; in which respect, the case differs from that of

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1 Pardessus, Droit Comm. Tom. 1, art. 63, p. 311, 312; Code de Comm. art. 45; Code Civil of France, art. 220; Merlin, Répert. *Lettre et Billet de Change*, § 3, art. 6, p. 194, 195, (edit. 1827.)

2 Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 355.

3 Pothier on Obligations, n. 52.

minors and prodigals under the French Law.[1] But, in our law, such a Bill or Note would clearly be good in favor of the husband, who might adopt the act, and sue upon the Bill or Note in his own name.[2]

§ 93. Heineccius informs us, that in the territories of Brunswick, women are not allowed to deal in Bills of Exchange; and in the other German provinces they are bound only when they exercise the business of merchandise.[3] But if authority is granted to women to carry on the business of money-brokerage, regularly, they are not at liberty to engage in exchange, unless under the guidance of a curator, or other administrator. And there is no doubt whatsoever, that, if a woman enters into a contract of exchange for other persons, the contract is invalid.[4] Even when a woman is a merchant, she is not bound as a party, except to Bills of Exchange, drawn in the course of her business, as such; which, however, will be presumed, unless the contrary is shown.[5] The same rule would apply to Promissory Notes made or indorsed by women, under the like circumstances.[6]

§ 94. Thirdly, as to alien enemies. The doctrine is now very clearly established, that a state of war between two countries interposes an absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing, between the subjects or citizens of the two countries.[7] It would be utterly incompatible

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1 Ibid.

2 Story on Bills of Exchange, § 86-89.

3 Heinnec. de Jure Camb. cap. 5, § 5-7.

4 Ibid. 5 Ibid.

6 Story on Bills of Exchange, § 90-98.

7 1 Kent, Comm. Lect. 3, p. 66-69, (5th edit.); Potts *v.* Bell, 8 Term R. 548; Willison *v.* Patteson, 7 Taunt. R. 439; The Indian Chief, 3 Rob. R. 22; The Jonge Pieter, 4 Rob. R. 79; The Franklin, 6 Rob. R. 127;

with all the known rights and duties of the parties, to suffer individuals to carry on friendly and commercial intercourse with each other, while the governments to which they respectively belonged, were in open hostility with other; or, in other other words, that the subjects or citizens should be at peace, while the nations were at war.[1] Upon this ground, the rule is now generally, if not universally recognized, that all contracts made between the subjects or citizens of different countries, which are at war with each other, are utterly void.; or, as the rule is often briefly expressed, contracts made with an enemy are void.[2] They are not merely voidable; but they are, *ab origine*, void and incapable of being enforced or confirmed.[3] In this respect, they differ essentially from contracts made between the subjects of different countries in a time of peace; for a subsequent war between the countries does not avoid or extinguish those contracts; but only suspends the right to enforce them in the belligerent countries, by reason of the personal disability of alien enemies to sue or be sued. As soon, however, as peace is restored, the right revives, and these contracts retain or re-acquire all their original obligation, and may be enforced in the judicial tribunals

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The Venus, 4 Rob. R. 355; The Carolina, 6 Rob. R. 336; Griswold *v.* Waddington, 15 John. R. 57; S. C. 16 John. R. 438; The Rapid, 8 Cranch, R. 155; The Julia, 8 Cranch, R. 181; Scholefield *v.* Eichelberger, 7 Peters, R. 580; Ex parte Boussmaker, 13 Ves. 71; Antoine *v.* Morshead, 6 Taunt. R. 237. The masterly judgment of Mr. Chancellor Kent, in the Court of Errors, in the case of Griswold *v.* Waddington, 16 John. R. 438, examines, and exhausts the whole learning upon the subject. There cannot, perhaps, be found, in the judicial annals of our country, any case, in which the resources of a great mind, acting upon the most comprehensive researches, have been more eminently or successfully displayed.

[1] Ibid. [2] Ibid. [3] Ibid.

of either country, as the parties then possess, what is technically called a *persona standi in judicio*.[1]

§ 95. Hence, an alien enemy cannot, *flagrante bello*, draw a Bill upon a subject, belonging to the adverse country, or indorse a Bill to such a subject, or accept a Bill drawn by such a subject; for, in each case, as between the alien enemies, the contract is treated as utterly void, and founded in illegal communication, intercourse, or trade.[2] The same rule applies to the purchase of Bills drawn on the enemy's country, and the remittance or deposit of funds there, and the buying or selling of Exchange there.[3] The same rule also applies to Promissory Notes made or indorsed to, or by, an alien enemy.

§ 96. But certain exceptions have been allowed, either as compatible with the principles, or as resulting from the very necessities and accidents of war itself. Thus, a Bill of Exchange, or Promissory Note, drawn or negotiated in favor of any person, competent to sue, would, doubtless, be upheld, if it was given for the ransom of a captured ship; for such a ransom is upheld by the Law of Nations, as a sacred and inviolable contract, and, if not prohibited by some statute, would be deemed in a Court of Admiralty, acting under the Law of Nations, as entitled to be enforced.[4] So, if a person, who is a

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[1] 1 Kent, Comm. Lect. 3, p. 67–69, (5th edit.); Griswold *v.* Waddington, 15 John. R. 57; S. C. 16 John. R. 438; Potts *v.* Bell, 8 Term R. 548; Willison *v.* Patteson, 7 Taunt. R. 439; Scholefield *v.* Eichelberger, 7 Peters, R. 580; Antoine *v.* Morshead, 6 Taunt. R. 237; Flindt *v.* Waters, 15 East, R. 266; Ex parte Boussmaker, 13 Ves. 71.

[2] Ibid. [3] Ibid.

[4] See Cornu *v.* Blackburne, 2 Doug. R. 641; Anthon *v.* Fisher, 2 Doug. R. 649, note; Yates *v.* Hall, 1 Term R. 73; Maisonnaire *v.* Keating, 2 Gallis. R. 325; Ricord *v.* Bettenham, 3 Burr. R. 1734; Brandon *v.*

prisoner of war should draw or indorse a Bill, drawn upon a fellow-subject, resident in his own country, or should make or indorse a Promissory Note, that Bill or Note, whether made payable to an alien enemy, or indorsed to him, will be held valid, if it be made or indorsed to the alien enemy, for the purpose of obtaining necessaries and subsistence for the prisoner.[1] The ground of this exception must be, that it is in furtherance of the ordinary duty of every nation, not to suffer its own subjects to be deprived of the means of support and maintenance, by the strict application of principles, intended to guard against other public mischiefs; and that the allowance of such Bills or Notes for such objects can have no tendency to promote the interests of the enemy, or to foster any illegal or injurious commerce with the enemy.

§ 97. Another exception may fairly be deemed to exist in cases of cartel ships, where Bills or Notes are drawn and negotiated in the enemy's country, for purposes connected with the objects of the voyage; such as for necessary repairs, provisions, and other supplies. This class of laws may be presumed to stand upon the general ground of an implied license from both governments; and it does not differ in its principles, from another class of cases, where there is an express license for the trade with the enemy, which exempts the party and the transactions from the taint of illegality, at least so far as concerns his own country, where the contract is to be enforced.[2]

Nesbitt, 6 Term R. 23; Puffendorf, De Jure Nat. et Gent. Lib. 8, cap. 7, § 14, and Barbeyrac's note; Vattel, B. 3, ch. 16, § 264.

[1] See Antoine *v.* Morshead, 6 Taunt. R. 237; Daubuz *v.* Morshead, 6 Taunt. R. 332. See also, Duhammel *v.* Pickering, 2 Stark. R. 90; Bayley on Bills, ch. 2, § 9, p. 75, 76, (5th edit. 1830.)

[2] Potts *v.* Bell, 8 Term R. 548.

§ 98. But there is no necessary incompatibility of duties, or obligations, arising from a state of war, to prevent a subject of a neutral country, being in the enemy's country, from making or indorsing a Promissory Note, or from there drawing, or indorsing, or accepting, a Bill of Exchange, in favor of one of his fellow-subjects, or of another neutral; for in such a case, if the transaction is *bonâ fide*, and for neutral or legal objects, there is no principle upon which it ought to be held invalid.[1] A state of war does not suspend the rights of commerce between neutrals, or the general obligations of contracts between persons, who are, in no just sense whatever, parties to the war, or acting in violation of the duties growing out of it.

§ 99. And here, again, the principle would seem to apply, that, although a Promissory Note or a Bill of Exchange, drawn, indorsed, or accepted, in favor of an alien enemy, may not be valid between them; yet, as between other parties to the Bill or Note, it may have complete force and obligation; at least if they are not parties to any original intended illegal use of it, or have not participated in such illegal use. Thus, for example, if a Bill be drawn by an alien enemy upon the subject or citizen of the adverse country, in favor of a neutral, it will, subject to the limitation above stated, be good, in favor of the neutral, against the drawer, and also against the drawee, if he becomes the acceptor. The same doctrine will apply to an indorsement of such a Bill by an alien enemy, in favor of a neutral, although it might be invalid between the original parties, or be-

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[1] Houriet *v.* Morris, 3 Camp. R. 303; The Hoffnung, 2 Rob. R. 162; The Cosmopolite, 4 Rob. R. 8; The Clio, 6 Rob. R. 67.

tween them and the acceptor; for there is nothing in the character of the neutral, which prevents him from receiving such a Bill, in the course of his own negotiations, or which deprives him of his ordinary character, or of his *persona standi in judicio*, to enforce the obligations created thereby, between him and the other persons, with whom he is dealing. Similar considerations will apply to cases of Promissory Notes, *mutatis mutandis*.

§ 100. It need scarcely be added, that the disability of alien enemies to contract with each other during the war, is not a doctrine founded in the peculiar municipal jurisprudence of England and America; but that it has its origin and confirmation in the Laws of Nations, and is approved by the most eminent Publicists, such as Grotius, and Puffendorf, and Vattel, and Bynkershoek.[1] The same exceptions of cases of positive moral necessity, such as cases of ransom, are also recognized, as belonging to the general doctrine, upon the ground stated by Vattel, that, when, by the accidents of war, a subject is placed in the hands of his enemy, so that he can neither receive his own sovereign's orders, nor enjoy his protection, he resumes his natural rights, and is to provide for his own safety by any just and honorable means. And hence, he adds, if that subject has promised a sum for his ransom, the sovereign, so far from having a power to discharge him from his promise, should oblige him to perform it.[2]

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[1] Grotius, De Jure Bell. et Pac. Lib. 3, ch. 23, § 5; Puffendorf, De Jure Nat. et Gent. Lib. 8, ch. 7, § 14; Vattel, B. 3, ch. 16, § 264; Bynk. Ques. Pub. Jur. B. 1, ch. 3; Heinnec. Exerc. 30, De Jur. Princ. circa Commerc. § 12, Tom. 2, Pars 2, p. 98, (edit. Genev. 1766.)

[2] Vattel, B. 3, ch. 16, § 264; Griswold *v.* Waddington, 16 John. R. 451; Story on Bills of Exchange, § 99-105.

§ 101. Fourthly, as to persons insane or imbecile in mind. A few words will suffice upon the disability of all persons, in this predicament, to bind themselves as makers, or indorsers, of Promissory Notes.[1] This disability flows from the most obvious principles of natural justice. Every contract presupposes, that it is founded in the free and voluntary consent of each of the parties, upon a valuable consideration, and after a deliberate knowledge of its character and obligation. Neither of these predicaments can properly belong to a lunatic, an idiot, or other person *non compos mentis*, from age, or imbecility or personal infirmity. Hence, it is a rule, not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void.[2] The Roman Law, in expressive terms, adopted this doctrine. *Furiosus nullum negotium gerere potest, quia non intelligit, quod agit.*[3]

§ 102. We may conclude this part of our subject by remarking, that, as by the bankruptcy of a party all his property, including Bills of Exchange, Promissory Notes, and other negotiable instruments and choses in action belonging to him, is, under the Bankrupt Law, vested in

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[1] See Baxter *v.* Lord Portsmouth, 5 Barn. & Cressw. 170; 2 Black. Comm. 291, 292; Pitt *v.* Smith, 3 Camp. R. 33, 34; Chitty on Bills, ch. 2, § 1, p. 21, (8th edit. 1833); Brown *v.* Jodrell, 3 Carr. & Payne, 30; Sentance *v.* Poole, 3 Carr. & Payne, 1; Peaslee *v.* Robbins, 3 Metc. R. 164.

[2] Puffendorf, Law of Nat. and Nat. B. 3, ch. 6, § 3, and Barbeyrac's note; Grotius, De Jure Bell. et Pac. Lib. 2, ch. 11, § 4, 5; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (*a*); Id. § 3; 1 Story on Eq. Jurisp. § 222; Ersk. Inst. B. 3, tit. 1, § 16; Bell, Comm. B. 2, Pt. 2, ch. 8, p. 132; Id. B. 3, Pt. 1, ch. 1, p. 294, 295, (5th edit.); Peaslee *v.* Robbins, 3 Metc. R. 164.

[3] Inst. Lib. 3, tit. 20, § 8; Dig. Lib. 50, tit. 17, l. 5, 40, 124; Story on Bills of Exchange, § 106.

his assignees, he is no longer able to sue on the same, or to convey any perfect title thereto by indorsement or otherwise. Still, however, if he should indorse the same to any *bonâ fide* holder without notice, he would convey a good title to such holder against all the other parties to the instrument, which may be enforced against such parties, unless the assignees chose to interfere and oppose the claim;[1] as, indeed, the bankrupt himself might, with the consent of the assignees, also enforce the same in his own name.[2]

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[1] Bayley on Bills, ch. 2, § 4, p. 49, (5th edit.); Drayton *v.* Dale, 2 Barn. & Cressw. 293; Kitchen *v.* Bartsch, 7 East, R. 53.

[2] Ibid.

CHAPTER III.

RIGHTS, DUTIES, AND OBLIGATIONS OF PARTIES TO PROMISSORY NOTES.

§ 103. Let us next pass to the consideration of the rights, duties, and obligations of the respective parties to Promissory Notes. These respect either the Maker, the Payee, the Transferrer, the Indorser, or the Holder. We shall postpone to a future page the examination of the question, what consideration is necessary or sufficient to support a Promissory Note, and between what parties and under what circumstances it is either necessary, or available, or important. At present it will be assumed, that the Promissory Note is not open to any question of this sort, but that a sufficient consideration exists, and is fully established.

§ 104. In the first place, then, as to the rights, duties, and obligations of the maker of a Promissory Note. The rights of the maker are few, and may be briefly stated. If the Note was originally given for a preëxisting debt, or for a present consideration, if it was received as an absolute payment thereof, the original consideration is extinguished, and no longer is due from the maker.[1] If it was received as conditional payment only, then, if duly paid or discharged, the original consideration is equally extinguished. If it is not so duly

[1] Bayley on Bills, ch. 9, p. 363 - 369, (5th edit.)

paid or discharged, then the original debt or consideration revives, although suspended in the intermediate period; and it may be enforced by an action against the maker, if he is ready to return the Promissory Note, and it is not outstanding in the possession of a third person, or a suit may, at the election of the holder, be brought against him on the Promissory Note itself.[1] In general, by our law, unless otherwise specially agreed, the taking of a Promissory Note for a preëxisting debt, or a contemporaneous consideration, is treated *prima facie* as a conditional payment only, that is, as payment only if it is duly paid at maturity.[2] But, in some of the American States, a different rule is applied, and, unless it is otherwise agreed, the taking of a Promissory Note is deemed *prima facie* an absolute payment of the preexisting debt or other consideration.[3] But in each case, the rule is founded upon a mere presumption of the supposed intention of the parties, and is open to expla-

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[1] Bayley on Bills, ch. 9, p. 363-369, (5th edit.); Kearslake *v.* Morgan, 5 Term R. 513; Dangerfield *v.* Wilby, 4 Esp. R. 159; Tobey *v.* Barber, 5 John. R. 68; New York State Bank *v.* Fletcher, 5 Wend. R. 85; Burdick *v.* Green, 15 John. R. 247; Sheehy *v.* Mandeville, 6 Cranch, R. 253, 264.

[2] Bayley on Bills, ch. 9, p. 363-369, (5th edit.); Puckford *v.* Maxwell, 6 Term R. 52; Owenson *v.* Morse, 7 Term R. 64; Bridges *v.* Berry, 3 Taunt. R. 130; Sheehy *v.* Mandeville, 6 Cranch, R. 253, 264; Murray *v.* Gouverneur, 2 John. Cas. 438; Elliot *v.* Sleeper, 2 N. Hamp. R. 525; Holmes *v.* De Camp, 1 John. R. 34; Putnam *v.* Lewis, 8 John. R. 389; Bill *v.* Porter, 9 Conn. R. 23; Van Cleef *v.* Therasson, 3 Pick. R. 12; Muldon *v.* Whitlock, 1 Cowen, R. 290; Post, § 404, 438.

[3] Bayley on Bills, by Phillips & Sewall, note (*y*,) p. 337-404, (edit. 1836); Hutchins *v.* Olcutt, 4 Verm. R. 549; Hunt *v.* Boyd, 2 Miller, Louis. R. 109; Thatcher *v.* Dinsmore, 5 Mass. R. 299; Chapman *v.* Durant, 10 Mass. R. 47; Wiseman *v.* Lyman, 11 Mass. R. 369; Maneely *v.* McGee, 6 Mass. R. 143; Whitcomb *v.* Williams, 4 Pick. R. 228; Varner *v.* Nobleborough, 2 Greenl. R. 121; Descadillas *v.* Harris, 8 Greenl. R. 298; Wallace *v.* Agry, 4 Mason, R. 336; Post, § 438.

nation and rebutter by establishing, by proper proofs, what the real intention of the parties was; and this may be established not only by express words, but by reasonable implication from the attendant circumstances.[1]

§ 105. It is curious to observe the coincidences of our law with the Roman Law upon this subject. It shows, that common sense, in its application to the every-day transactions of human life, speaks the same language, and is regulated by the same motives of convenience, and policy, and justice, in all civilized countries, however wide their distance, or remote their ages from each other. Thus, we are told in the Institutes, that the ancient lawyers at Rome held, that a novation (the substitution of a new debt for an old one, thereby extinguishing the former,[2]) arose when a second contract was intended to dissolve a former. But that it was always difficult to know with what intent the second obligation was made, and for want of such positive proof, opinions were founded upon presumptions arising from the circumstances of each case. This uncertainty gave rise to a positive Constitution in the Roman Law, whereby it was declared, that a novation of a former contract should only take place, when the contracting parties had expressly agreed, that they contracted with the intent to create a novation of the former contract; and that otherwise the first contract should continue valid, and the second should be deemed as an accession to it, so that the obligation of both contracts might re-

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[1] Wallace *v.* Agry, 4 Mason, R. 336; Maneely *v.* McGee, 6 Mass. R. 143; Watkins *v.* Hill, 8 Pick. R. 522; Curtis *v.* Ingham, 2 Verm. R. 287; Hutchins *v.* Olcutt, 4 Verm. R. 549; Torrey *v.* Baxter, 13 Verm. R. 452.

[2] Pothier on Oblig. by Evans, n. 546; Dig. Lib. 46, tit. 2, l. 1.

main. *Sed cum hoc quidem inter veteres constabat, tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat; per hoc autem dubium erat, quando novandi animo videretur hoc fieri; et quasdam de hoc præsumptiones alii in aliis casibus introducebant: ideo nostra processit Constitutio, quæ apertissime definivit, tunc solum novationem prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt alioqui manere et pristinam obligationem, et secundam ei accedere, ut maneat ex utraque causa obligatio secundum nostræ Constitutionis definitionem, quam licet ex ipsius lectione apertius cognoscere.*[1] So the Digest says: *Omnes res transire in novationem possunt, quodcunque enim sive verbis contractum est, sive non verbis: novari potest, et transire in verborum obligationem ex quacunque obligatione; dummodo sciamus novationem ita demum fieri, si hoc agatur, ut novetur obligatio: cæterum, si non hoc agatur, duæ erunt obligationes.*[2]

§ 106. Another right, in a practical view quite as important to be understood, is, whether the maker of a Note has a right to insist, when he is called upon to pay a Promissory Note at its maturity, that the Note itself should be produced and be delivered up to him.[3] When the Note is not negotiable, or, if originally negotiable, it is not indorsed, so as to be negotiated, it may not, strictly speaking, be deemed a matter of much consequence; since, whoever claims the Note, must claim it not only under, but in the name of the payee, or his personal representative; and hence it may be supposed that the defence of payment would always be a valid

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[1] Just. Inst. Lib. 3, tit. 30, § 3; Cod. Lib. 8, tit. 42, l. 8.

[2] Dig. Lib. 46, tit. 2, l. 2.

[3] Chitty on Bills, ch. 9, p. 391, (8th edit.)

and competent defence. But we are to consider, that the proofs of the payment may disappear by lapse of time, or by accident, or by the death of witnesses; and yet, if the Note be outstanding, it will, *prima facie*, unless barred by the statute of limitations, import a present subsisting debt or liability.[1] It is far, therefore, from being even here, in many cases, a matter of indifference; and there would be no hardship in a rule of law, which should require, even when the Note is not negotiable, that it should either be given up, or a formal written receipt given of its being paid, or security given as an indemnity against a second payment to be required from the maker.[2] Such, however, is not understood to

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[1] See Story on Bills of Exchange, § 447–449; Post, § 244, 245, 290, 445–450.

[2] 2 Story on Eq. Jurisp. § 705; Ex parte Greenway, 6 Ves. R. 812.—Mr. Chitty (Chitty on Bills, ch. 8, p. 456, 8th edit.) says, that on payment of a Bill or Note, it has been considered as doubtful, whether a person paying can insist upon a receipt being given for the payment; but he adds, that it should seem that the party is entitled upon payment to demand a receipt. For this last position, he relies on the Statute of 43 Geo. 3, ch. 126, § 5. Where the Bill or Note is paid by an indorser, it might be important to him, to have a receipt to verify the fact of payment. Ibid.; Mendez *v.* Carreroon, 1 Ld. Raym. 742. But where payment is made by the maker, it would seem to be sufficient that the Note is in his possession, to establish the presumption, that he has paid it. But this presumption, however, has not been admitted in the case of the acceptor of a Bill of Exchange, from his mere possession of it without further proof. Ibid.; Pfiel *v.* Van Batenberg, 2 Camp. R. 439; Egg *v.* Barnett, 3 Esp. R. 196; Aubert *v.* Walsh, 4 Taunt. R. 293. In Pfiel *v.* Van Bantenberg, 2 Camp. R. 439, Lord Ellenborough said:—"Show, that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible, that when they were left for acceptance, he refused to deliver them back, and having detained them ever since, now produces them as evidence of a loan of money. Nor do I think the receipts carry the matter a bit

be the positive requirement of our law, when the payment of non-negotiable paper is demanded; although, if an action of law were brought to recover upon the Note, it must be produced, or its absence or loss be satisfactorily accounted for.[1]

§ 107. But where the Promissory Note is negotiable, and is payable to bearer, or, being payable to order, is indorsed in blank, and then it is not produced or offered to be delivered up to the maker upon payment thereof, there a different rule prevails, although (as we shall presently see) the American authorities are not all agreed on the point;[2] and the holder is not entitled to demand payment, without delivering up the Note. It is not sufficient, in such a case, to show that the Note has been lost or even destroyed, or that it has become overdue; for the maker has a right to it as his voucher of payment, and as his security against any future claim or demand thereof. As far as regards his voucher and

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further, unless you show them to be in the handwriting of the defendant, or some other person authorized to receive payment of the bills. A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; and it is possible, that though the bills are unsatisfied, these receipts may have been fraudulently indorsed without the plaintiff's privity. The fact of payment still hangs *in dubio*, and you must do something more to turn the balance. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment. If you do not, the plaintiff must be called." Post, § 452.

[1] Bayley on Bills, ch. 9, p. 369–371, (5th.edit); Chitty on Bills, ch. 9, p. 391, 456–458, 8th edit.); Wain *v.* Bailey, 10 Adolp. & Ellis, 616; Pierson *v.* Hutchinson, 2 Camp. R. 211; Long *v.* Bailie, 2 Camp. R. 214; Champion *v.* Terry, 3 Brod. & Bing. R. 295; Rolt *v.* Watson, 4 Bing. R. 273; Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Rowley *v.* Ball, 3 Cowen, R. 303; Pintard *v.* Tackington, 10 John. R. 104; Renner *v.* Bank of Columbia, 9 Wheat. R. 581, 596, 597; McNair *v.* Gilbert, 3 Wend. R. 344; Hough *v.* Boston, 20 Vermont R. 455.

[2] Post, § 111, 448.

discharge towards the holder, it will be the same thing, whether the instrument be destroyed or mislaid. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or of the destruction of the Note? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And if the Note should afterwards appear, and a suit should be brought against him by another holder, (a fact not improbable in case of a lost Bill,) is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his negligence or misfortune, to cast this burden upon the maker, even as a punishment for not discharging the Note on the day when it became due?[1]

§ 108. These considerations, although put in a mere interrogatory form, present the full stress of the argument against any right of the holder to require payment, or any duty on the part of the maker to make payment, of such a negotiable Note, alleged to be lost or destroyed, which may pass title by mere delivery. They have been thought sufficient in England, notwithstanding some conflict of opinion, to support the doctrine that no remedy under such circumstances lies at law upon such a Note, whether, at the time of the supposed loss or destruction, the Note was overdue or not; and

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[1] Hansard *v.* Robinson, 7 Barn. & Cressw. R. 90. This case arose on a Bill of Exchange, and the reasoning of Lord Tenterden, in delivering the judgment of the Court, is addressed to that case. But it is equally applicable to the case of a Promissory Note; and is so laid down in Bayley on Bills, ch. 9, p. 369-373, (5th edit.); Story on Bills of Exchange, § 447-449.

that the true and only remedy is in a Court of Equity, which, in granting relief, can at the same time compel the holder to give to the maker a suitable and adequate indemnity.[1] Of course, as we shall hereafter see, every consideration herein urged applies still more forcibly to the case, where payment is demanded of an indorser; for he is entitled to his recourse over against the maker.[2]

§ 109. The case of a Promissory Note, payable to bearer, affords a very clear illustration of the principle thus established; for any person who becomes the lawful possessor of such a Note, after it has been lost, for value and without any notice of a defect in his title, is certainly, upon principles of policy and public convenience, entitled to the fullest protection.[3] Under such circumstances, the maker ought not to be exposed to the risk of being liable to a double payment thereof to different holders, which he may, upon any other rule, be compelled to incur; and against which, from the want of evidence on his own part, and from the varying

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[1] Bayley on Bills, ch. 9, p. 369-373, (5th edit.); Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Ex parte Greenway, 6 Ves. 812; Davis *v.* Dodd, 4 Taunt. R. 602; Davis *v.* Dodd, 1 Wilson, Exch. R. 110. By Statute of 9 and 10 Will. 3, ch. 17, § 3, if an inland Bill be lost or miscarried within the time limited for payment, the drawee shall give another of the same tenor to the holder, who, if required, shall give security to indemnify him in case the Bill shall be found. A provision like this existed under the French Ordinance of 1673, art. 19.

[2] Bayley on Bills, ch. 9, p. 371-373, (5th edit.); Chitty on Bills, ch. 10, p. 532, (8th edit.); Story on Bills of Exchange, § 449; Post, 445.

[3] Bayley on Bills, ch. 12, p. 529-531 (5th edit.); Chitty on Bills, ch. 6, § 3, p. 277-284 (8th edit.); Story on Bills, § 193, 194, 415; Goodman *v.* Harvey, 4 Adolp. & Ellis, 870; Uther *v.* Rich, 10 Adolp. & Ellis, 784; Arbouin *v.* Anderson, 1 Adolp. & Ellis, New R. 498, 504; Knight *v.* Pugh, 4 Watts & Serg. R. 445.

evidences in each of the cases, tending to charge him, he may be unable to protect himself.

§ 110. The French Law proceeds upon a similar distinction and principle. By the old law, as well as by the modern Code of Commerce, the acceptor of a Bill (and the like rule applies to the maker of a Promissory Note) is not required, when it is alleged to be mislaid, or lost, or destroyed, to pay the Bill, if it be payable to bearer, or to order, unless upon an indemnity being first given to the acceptor, under the sanction of the proper court.[1] And by the old law, silently dropped in the modern Code, it was also provided, that if the Bill be payable to a particular person only, then, notwithstanding the mislaying, or loss, or destruction, of the Bill, payment of the Bill may be required of the acceptor without any tender of indemnity.[2]

§ 111. In America, there has been (as has been already hinted) some diversity of judicial opinion, as to

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1 Post, § 111.

2 Ordin. of 1673, art. 18, 19; Jousse, Sur L'Ord. 1673, art 18, 19; Code de Comm. art. 151, 152; Pardessus, Droit Comm. Tom. 2, art. 408, 410, 411. Jousse, in his Commentary upon the Ordin. of 1673, art. 18, p. 111, gives the reason for the distinction. "*Sans donner caution.* Parce qu'une Lettre de Change, qui n'est point payable à ordre, ou au porteur, mais seulement à un particulier, n'a point de suite, et que nulle autre personne entre les mains de qui cette lettre viendrait à tomber, ne peut s'en servir qu'en vertu d'un transport que lui en aurait fait celui au profit de qui elle est tirée. Ainsi il n'est pas nécessaire dans ce cas de donner caution pour recevoir la somme en vertu d'une seconde lettre, parce que si après l'acquittement de cette seconde lettre il venait une personne avec la première Lettre de Change, même avec un transport de celui à qui elle appartenait, elle n'en serait pas plus avancée, ce transport ne lui donnant pas plus de droit qu'en avait son cédant, suivant cette maxime de Droit, que *Nemo plus juris potest ad alium transferre quam ipse habet.* (Dig. Lib. 54. *ff. de Regulis Juris.*) C'est pourquoi celui, que aurait payé sur la seconde lettre, serait déchargé de payer la première, en rapportant cette seconde lettre quittancée de celui à qui elle était payable." Post, § 447.

the right of the holder, at law, to compel payment of a Promissory Note from the maker, without a delivery or production thereof. In some of the States, the affirmative has been maintained;[1] in others, the English doctrine prevails;[2] and, again, in others, the holder is entitled to recover at law, if he executes a suitable instrument of indemnity.[3] Upon another point, also, german to this matter, the authorities are at variance with each other. In England, it has been held, that if a Promissory Note, payable to bearer, (as for example, a bank note,) be cut in halves, and one half be lost, the holder cannot recover upon the other half at law; because the entire instrument must be produced, or, at least, sufficient proof given, that the part which is wanting has been destroyed, for the half which is missing may have got into the hands of a *bonâ fide* holder for value, and he would have as good a right to recover upon that, as the other holder upon the other half.[4] A different doc-

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[1] Anderson *v.* Robson, 2 Bay, R. 495; Swift *v.* Stevens, 8 Connect. R. 431; Murray *v.* Carrett, 3 Call, R. 373; Renner *v.* Bank of Columbia, 9 Wheat. R. 581; Peabody *v.* Denton, 2 Gallis. R. 351; Story on Bills, § 448. See Freeman *v.* Boynton, 7 Mass. R. 483, 486; Whitwell *v.* Johnson, 17 Mass. R. 449, 452; Gilbert *v.* Dennis, 3 Metc. R. 495, 496, 497; Fales *v.* Russell, 16 Pick. R. 315, 316; Baker *v.* Wheaton, 5 Mass. R. 509, 512; Jones *v.* Fales, 5 Mass. R. 101; Clark *v.* Reed, 12 Smedes & Marshall, R. 554.

[2] Rowley *v.* Ball, 3 Cowen, R. 303; Smith *v.* Rockwell, 2 Hill, N. Y. R. 482; Morgan *v.* Reintzel, 7 Cranch, R. 275. See Pintard *v.* Tackington, 10 John. R. 104; McNair *v.* Gilbert, 3 Wend. R. 344.

[3] Meeker *v.* Jackson, 3 Yeates, R. 442; Brent *v.* Ervin, 15 Martin, Louis. R. 303; Lewis *v.* Petavin, 16 Martin, Louis. R. 4; Miller *v.* Webb, 8 Miller, Louis. R. 516; Fales *v.* Russell, 16 Pick. R. 315, 316; Smith *v.* Rockwell, 2 Hill, N. Y. R. 482; Post, § 445.

[4] Mayor *v.* Johnson, 3 Campb. R. 326. Upon this occasion, Lord Ellenborough said; — "I am of opinion, that this action cannot be maintained. It is usual and proper to pay upon an indemnity; but payment cannot be enforced at law only by the production of an entire Note, or by proof that

trine has been maintained in some of the American States.[1]

§ 112. The law of France does not, (as we have seen,) upon the subject of the loss or destruction of a Bill of Exchange, or Promissory Note, differ in substance from that of England.[2] The Code of Commerce positively declares, that, in such a case, the payment thereof cannot be required except upon the order of the proper judge, and upon giving security.[3] This order may be obtained from the proper judge, upon application of the holder; and if the payment should be refused on a demand made after such order, and security offered, the holder is entitled to, and preserves all his ordinary rights by a regular protest.[4]

§ 113. In the next place, as to the duties and obligations of the maker of a Promissory Note. They may be summed up in a very few words. He undertakes to pay the money stated in the Note at the time, when it becomes due, or, as the common phrase is, at its maturity, to the payee, or other person, entitled to receive

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the instrument, or the part of it, which is wanting, has been actually destroyed. The half of this Note taken from the Leeds mail may have immediately got into the hands of a *bonâ fide* holder for value, and he would have as good a right of suit upon that, as the plaintiffs upon the other half, which afterwards reached them. But the maker of a Promissory Note cannot be liable in respect of it to two parties at the same time." Bayley on Bills, ch. 9, p. 374 (5th edit.) But see, contrà, Mossop *v.* Eadon, 16 Ves. 430.

1 Bullett *v.* Bank of Pennsylvania, 2 Wash. Cir. R. 172; Patton *v.* State Bank, 2 Nott & McCord, S. Car. R. 464; Hinsdale *v.* Bank of Crange, 6 Wend. 378.

2 Ante, § 110.

3 Code de Comm. art. 151–153, 187; Locré, Esprit du Code de Comm. Tom. 1, p. 478–486, art. 150–152; Pardessus, Droit Comm. Tom. 2, art. 408–411; Ante, § 110.

4 Ibid.

the same, according to the tenor thereof. He is not bound to pay the Note until its maturity; and if he pays it before, and it is not surrendered up, he will be liable to any subsequent *bonâ fide* holder for value without notice, before it became due.[1] The maker, in case of the Note being payable to bearer, or indorsed in blank, may discharge himself by payment to any person, who is in possession of it, with an apparent lawful right of ownership.[2] Mere suspicion, that he may not be the lawful holder, will not exonerate the maker from payment; but there must be circumstances, amounting to clear proof, that he is a fraudulent holder.[3] If the Note is payable to order, and is indorsed, the maker, before he can safely pay it, is bound to ascertain, if the indorsement is genuine, and, if the indorsement be to a particular person, that the person producing it is the identical person, otherwise he may be liable to pay it again to the real and true owner.[4]

§ 114. The same rule, as to the liability of the maker of a Promissory Note, is recognized in the foreign law; for the maker incurs personally the same obligations, and stands in the same position as the acceptor of a Bill of Exchange; and by that law the acceptor, by his

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[1] Bayley on Bills, ch. 8, p. 326 (5th edit.); Chitty on Bills, ch. 8, p. 429, 430 (8th edit.); Story on Bills, § 417.

[2] Bayley on Bills, ch. 5, § 2, p. 129-131 (5th edit.); Miller *v.* Race, 1 Burr. R., 452; Grant *v.* Vaughan, 3 Burr. 1516; Story on Bills, § 450.

[3] Goodman *v.* Harvey, 4 Adolp. & Ellis, 879; Uther *v.* Rich, 10 Adolp. & Ellis, 784; Arbouin *v.* Anderson, 1 Adolp. & Ellis, New R. 498, 504; Chitty on Bills, ch. 9, p. 429, 430 (8th edit.); Story on Bills, § 450, 451.

[4] Bayley on Bills, ch. 5, § 2, p. 129-131, 134 (5th edit.); Chitty on Bills, ch. 9 p. 230, (8th edit.); Id. p. 459-463; Story on Bills, § 450, 451.

acceptance engages to pay to the holder the full amount of the Bill at maturity; and if he does not, the holder has a right of action against him, as well as against the drawer. Heineccius says; "*Trassati obligatio ex acceptatione demum nascitur, et tunc dubium non est, illum tum a præsentante, tum ab indossatario conveniri posse. Et quamvis in utriusque arbitrio sit, adversus trassatum agere malit, an adversus trassantem; posterius tamen vel ideo plerumque fieri solet, quia denegata cambii acceptati solutio argumentum plerumque evidentissimum est, trassatum foro cessurum, et jam tum non amplius solvendo esse.*"[1] Similar obligations exist by the French Law between the acceptor of a Bill, and the payee, and his indorsee, and every subsequent holder thereof; and by his acceptance the acceptor (and the maker of a Promissory Note is in the same predicament) contracts an obligation with them respectively, to pay the amount of the Bill at its maturity, according to the tenor thereof; and this obligation he incurs conjointly, and *in solido*, with the antecedent parties thereto.[2]

§ 115. In the next place, as to the rights, duties, and obligations of the payee. Of course, he has a right to receive payment at the maturity of the Promissory Note, or when it becomes legally due, and at the same time, (as we have just seen,) he ought to be ready to produce and deliver up the Note. He is also entitled to have it paid in the very money or currency, in which it is made payable, at its value at the time of payment; and he is not bound to accept payment in any other manner.[3] Thus, for example, he is entitled ordinarily

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[1] Heinecc. de Camb. cap. 6, § 5; Story on Bills, § 115,

[2] Pothier, De Change, 115-117; Code de Comm. art. 118, 121, 140, 187; Pardessus, Droit Comm. Tom. 5, art. 356, 376.

[3] Story on Bills, § 418, 419; Post, § 389-400.

to demand payment in gold or silver, at its current value, or the standard value in the country, where it is paid, or payable; and he is not bound to receive it in bank notes, or in any other paper currency.[1] The Note is also to be paid at the place, where it is made payable; and although there is some conflict of the authorities upon the point, it would seem upon principle not to be payable elsewhere, at least, not until a demand has first been made thereof, at the proper place for payment.[2] But upon this more will be said hereafter in another connection.[3] When the payee indorses the Bill, other rights, duties, and obligations intervene, which we shall proceed immediately to consider.

§ 115 *a.* It may be well in this connection to state, that it is no part of the duty of the holder of a Note,

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[1] Story on Bills, § 419; Chitty on Bills, ch. 9, p. 433 (8th edit.); Post, § 389 - 400.

[2] Story on Bills, § 353 - 357, and the authorities there cited.

[3] Mr. Bayley says (Bayley on Bills, ch. 7, § 1, p. 217); "The receipt of a Bill or Note implies an undertaking from the receiver, to every party to the Bill or Note, who would be entitled to bring an action on paying it, to present, in proper time, the one, where necessary, for acceptance, and each for payment; to allow no extra time for payment; and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a default in any of these respects will discharge such person from all responsibility on account of a non-acceptance or non-payment, and will, unless the Bill or Note were on an improper stamp, make it operate as a satisfaction of any debt or demand for which it was given." There is some confusion in this passage, arising from the fact, that Bills and Notes are both mixed up in the statement. And, in truth, all that is said is solely applicable to the drawers and indorsers of Bills, and the indorsers of Notes, for, although the maker of a Note, or the acceptor of a Bill, is an accommodation maker or acceptor for some other party thereon, and "would be entitled to bring an action on paying it," yet neither of them is within the scope of the rule, and the holder may, as to them, delay the demand of payment, as long as he chooses, without injury to his rights.

which has been dishonored, and due notice thereof given to the indorsers, to sue the maker, if the indorsers, or any of them, request him so to do. He has his choice in this respect to sue whom he pleases, and all are in default to him. On the contrary, it is the duty of any indorser, who desires to recover or secure the amount against any of the antecedent parties, to pay the Note himself, and thus to entitle himself to bring a suit against such parties.[1]

[§ 115 *b*. Though by the common law, where a contract in writing, not under seal, is made in another name than that of the real principal, the latter can sue and be sued, yet in the case of a Bill of Exchange or a Promissory Note, none but the parties named in the instrument, can sue or be sued upon it. Therefore, where the Bank of the United States sought to recover upon a Promissory Note, executed by the defendants and made payable to "Samuel Jaudon, Esq. Cashier, or order," and it appeared that the note was given for a debt due to the plaintiffs, and that Jaudon was their Cashier, acting merely as their agent in taking the note, and having no personal interest in it whatever, and, that the note had not been indorsed by Jaudon, it was held that the plaintiffs could not sustain an action upon it, nor give it in evidence under a count for money had and received to their use, or an account stated with them.[2]]

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[1] Beebe *v.* West Branch Bank, 7 Watts & Serg. 375; Post, § 419.
[2] Bank of United States *v.* Lyman, 20 Vermont R. 667. But see Furniss *v.* Gilchrist, 1 Sandford, Superior Ct. N. Y. R. 53.

CHAPTER IV.

RIGHTS, DUTIES, AND OBLIGATIONS OF PARTIES, ON TRANSFERS.

§ 116. Let us now proceed to the consideration of the rights, duties, and obligations of the transferrer, or indorser, of a Promissory Note. A note may be transferred by mere delivery, as, for example, when it is payable to bearer, or it is indorsed in blank, and the holder is not the indorser; or it may be transferred by indorsement.[1] The rights, duties, and obligations in each of these cases are not the same, and therefore require a separate and distinct consideration.

§ 117. And first, as to a transfer by delivery. When a Promissory Note is payable to the bearer, and it is transferred by mere delivery, without any indorsement, the person making the transfer ceases to be a party to the Note.[2] Under such circumstances, he does not incur the obligations or responsibilities ordinarily belonging to an indorser.[3] In other words, where a Promis-

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[1] Bayley on Bills, ch. 5, § 1, p. 121 (5th edit.)

[2] Bayley on Bills, ch. 5, § 1, p. 121 (5th edit.); Id. p. 368; Story on Bills, § 111, 200, 225, note; Chitty on Bills, ch. 6, p. 271 (8th edit.); Id. ch. 6, p. 245 - 247 (9th edit.); Thomson on Bills, ch. 3, p. 555 (2d edit.)

[3] Story on Bills, § 109, and note; Bayley on Bills, ch. 5, § 3, p. 169, 170 (5th edit.); Chitty on Bills, ch. 6, p. 268, 269 (8th edit.) Mr. Chitty, in the 8th edition of his work on Bills of Exchange, (ch. 6, p. 219,) has

sory Note is payable to the bearer, or, being payable to the payee or order, it is indorsed in blank, and afterwards is transferred by the holder by mere delivery thereof, without any indorsement, such holder is not responsible thereon to the immediate party, to whom he delivers the same, or to any subsequent holder, upon the dishonor thereof; for no person, whose name is not on the Note, as a party thereto, is liable on the Note, and he cannot be deemed to undertake any of the ordinary obligations of an indorser.[1] By not indorsing it, he is generally understood to mean, that he will not be responsible upon it.[2] If, indeed, he undertakes to guaranty the payment of the Note, upon such a delivery or transfer, he may be liable upon such special contract;[3] but that is collateral to the obligations created by the Note, and is ordinarily limited to the immediate parties thereto.[4] In like manner, if the Note, in such a case, is received by the party, to whom it is delivered, as con-

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the following passage; — "And in all cases, though no words authorizing a transfer be inserted in a Bill or Note, yet it will always have the same operation against the party making the transfer, as if he had power to assign; for the act of indorsing a Bill is equivalent to that of a new drawing; and a transfer by mere delivery, unless where it is otherwise agreed or understood from the nature of the transaction, imposes on the person making it, an obligation to his immediate assignee, similar to that created by indorsement." The latter part of this passage is incorrect in point of law. In the 9th edition (1840) of the same work, edited by Chitty and Hulme, Pt. 1, ch. 6, p. 196, 197, the whole passage is silently dropped, and thereby its inaccuracy impliedly admitted.

1 See Bayley on Bills, ch. 9, p. 368, 369 (5th edit. 1830); Chitty on Bills, ch. 5, p. 197, 200, 201 (8th edit. 1833); Id. ch. 6, p. 262, 269-273.

2 Fenn *v.* Harrison, 3 Term R. 757.

3 Chitty on Bills, ch. 16, p. 269, 270, 272 (8th edit. 1833); Morris *v.* Stacey, Holt, N. P. R. 153.

4 Chitty on Bills, ch. 6, p. 268-271 (8th edit.) 1833); In the matter of Barrington and Burton, 2 Sch. & Lefr. 112; Story on Bills, § 215, 457.

ditional payment of a precedent debt due to him, or as a conditional satisfaction for any other valuable consideration, then paid by him, the holder, who delivered it, will, if the Note be duly presented and dishonored, and due notice thereof be given to him, be responsible to pay back the full amount of the precedent debt, or valuable consideration, although he is not directly suable as a party to the Note.[1] On the other hand, the party, receiving the same, is bound, under such circumstances, to make due presentment of the Note, and to give due notice of the dishonor; otherwise, by his laches, he makes the Note his own, and discharges the party from whom he received it, from all liability for any loss sustained thereby.[2] But this we shall presently have occasion to state in more general terms.[3]

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[1] Chitty on Bills, ch. 5, p. 200 – 202 (8th edit. 1833); Id. p. 268 – 271; Bayley on Bills, ch. 9, p. 363 – 368 (5th edit. 1830); Ex parte Blackburne, 10 Ves. 204; Owenson *v.* Morse, 7 Term R. 64; Brown *v.* Kewley, 2 Bos. & Pull. 518; Ward *v.* Evans, 2 Ld. Raym. 928; Puckford *v.* Maxwell, 6 Term R. 52; Tapley *v.* Martens, 8 Term R. 451; Robinson *v.* Read, 9 Barn. & Cressw. 449; Emly *v.* Lye, 15 East, R. 13; Ex parte Dickson, cited 6 Term R. 142; Ante, § 104, 105; Post, § 404, 438.

[2] Ibid. In Bayley on Bills, ch. 5, § 3, p. 169 (5th edit. 1830), it is said; "And a transfer, by delivery only, if made on account of an antecedent debt, implies a similar undertaking, from the party making it, to the person, in whose favor it is made;" that is, an undertaking similar to that of an indorser, or drawer, of a Bill. But this is manifestly incorrect. Mr. Chitty, in his 8th edition, (1833,) p. 268, quite as inaccurately stated the same position; but afterwards immediately corrected it in his text; and stated, what is now the well considered and established doctrine. In his 9th edition, (1840,) p. 244, he says; "It has been said, that a transfer by mere delivery, without any indorsement, when made on account of a preëxisting debt, or for a valuable consideration, passing to the assignor, at the time of the assignment, (and not merely by way of sale or exchange of paper,) as where goods are sold to him, imposes an obligation on the person making it to the immediate person, in whose favor it is

[3] Story on Bills, § 109.

§ 118. Still, however, unless it be expressly otherwise agreed, the holder so transferring the Note is not exempt from all obligations or responsibilities; but he incurs some, although they are of a limited nature. In the first place, he warrants by implication, unless otherwise agreed, that he is a lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery; for this is implied as an obligation of good faith.[1] In the next place, he warrants, in the like manner, that the instrument is genuine, and not forged or fictitious;[2] [unless where the note is sold, as

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made, equivalent to that of a transfer by formal indorsement. But this expression seems incorrect; for the party, transferring only by delivery, can never be sued upon the instrument, either as if he were an indorser, or as having guaranteed its payment, unless he expressly did so. The expression should be, 'that, if the instrument should be dishonored, the transferrer, in such case, is liable to pay the debt, in respect of which he transferred it, provided it has been presented for payment in due time, and that due notice be given to him of the dishonor.' A distinction was once taken between the transfer of a bill, or check, for a precedent debt, and for a debt, arising at the time of the transfer; and it was held, that, if A. bought goods of B., and, at the same time, gave him a draft on a banker, which B. took, without any objection, it would amount to payment by A., and B. could not resort to him, in the event of a failure of the banker. But it is now settled, that, in such case, unless it was expressly agreed, at the time of the transfer, that the assignee should take the instrument assigned as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee, maintain an action against the assignor, on the consideration of the transfer. And, where a debtor, in payment of goods, gives an order to pay the bearer the amount in Bills on London, and the party takes Bills for the amount, he will not, unless guilty of laches, discharge the original debtor." Chitty on Bills, ch. 6, p. 268, 269 (8th edit. 1833); Id. Pt. 1, ch. 6, p. 244 (9th edit.); Camidge *v.* Allenby, 6 Barn. & Cressw. 373.

1 Story on Bills, § 109–111. See Burrill *v.* Smith, 7 Pick. 291.

2 Bayley on Bills, ch. 5, § 3, p. 179, (5th edit.); Id. p. 364, 366; Chitty on Bills, ch. 6, p. 269–271, (8th edit.); Id. ch. 6, p. 244–247, (9th edit.); Story on Bills, § 111, 225, 419; Ellis *v.* Wild, 6 Mass. R. 321; Young *v.* Adams, 6 Mass. R. 182; Markle *v.* Hatfield, 2 John. R.

other goods and effects, by delivery merely without indorsement, in which case it has been decided that the law respecting the sale of goods is applicable, and that there is no implied warranty.[1]] In the next place, he warrants, that he has no knowledge of any facts, which prove the instrument, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; for any concealment of this nature would be a manifest fraud.[2] Thus, for example, if the instrument

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455; Eagle Bank of New Haven *v.* Smith, 5 Conn. R. 71; Jones *v.* Ryde, 5 Taunt. R. 488; Bruce *v.* Bruce, 1 Marsh. (Eng.) R. 165.

[1] Baxter *v.* Duren, 16 Shepley, R. 434; Ellis *v.* Wild, 6 Mass. R. 321; Fenn *v.* Harrison, 3 T. R. 757; Bank of England *v.* Newman, 1 Ld. Raym. 442; Chitty on Bills, ch. 6, p. 245, 246.

[2] Chitty on Bills, ch. 6, p. 271, (8th edit.); Id. ch. 6, p. 244–249, (9th edit.); Bayley on Bills, ch. 9, p. 365, 366, (5th edit.); Story on Bills, § 111, note, § 225, and note; Fenn *v.* Harrison, 3 Term R. 757; Camidge *v.* Allenby, 6 Barn. & Cressw. 373, 382; Young *v.* Adams, 6 Mass. R. 182, 185. The following quotation from the 9th edition (1840) of Mr. Chitty on Bills, p. 244–247, edited by Mr. Chitty and Mr. Hulme, shows the state of the law according to the learned author's latest opinion. It occurs immediately after the passage cited in the preceding section, n. (2.) "And where a person obtains money or goods on a bank note, navy bill, or other Bill or Note, on getting it discounted, although without indorsing it, and it turns out to be forged, he is liable to refund the money to the party from whom he received it, on the ground that there is in general an implied warranty, that the instrument is genuine; although there is no guaranty implied by law in the party passing a Note payable on demand to bearer, that the maker of the Note is solvent at the time when it is so passed. And though a party do not indorse a Bill or Note, yet he may, by a collateral guaranty or undertaking, become personally liable. But as on a transfer by mere delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, becoming such after the assignment by himself, and consequently no person but his immediate assignee can maintain an action against him, and that only on the original consideration, and not on the Bill itself. And if only one of several partners indorse his name on a Bill, and get it discounted with a banker, the latter cannot sue the firm, though the proceeds of the Bill were carried to the partnership account. When a transfer by

be a bank note, and at the time of the transfer by delivery the party knows the bank to have become insolvent, and conceals it from the other party, it will be deemed a fraud, and the consideration for the transfer may be recovered back.[1]

§ 119. But another question may arise upon this subject, which involves more doubt, and has given rise to some diversity of opinion. Suppose the instrument to be a bank note, and both parties are equally innocent, and equally ignorant, that the bank at that time has actually failed, and become insolvent. Under such circumstances, which party is to bear the loss? The transferrer or the transferee? The authorities on this subject are in conflict with each other, some maintaining, that the transferrer in such case must bear the loss, and others that it must be borne by the transferee. The weight of reasoning, and the weight of authority, seems to be in favor of the former; for, as Mr. Chitty has well remarked, it must be implied in the absence of any other express agreement or understanding, that, at

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mere delivery, without indorsement, is made merely by way of sale of the Bill or Note, as sometimes occurs; or by exchange of it for other Bills; or by way of discount, and not as a security for money lent; or where the assignee expressly agrees to take it in payment, and to run all risks; he has in general no right of action whatever against the assignor, in case the Bill turns out to be of no value. But there can be no doubt that if a man assign a Bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received. And it should seem that if, on discounting a Bill or Note, the Promissory Note of country bankers be delivered after they have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounter, because it must be implied, that at the time of the transfer the Notes were capable of being received, if duly presented for payment."

[1] Ibid.

the time of the transfer, the bank note would be paid, if duly presented for payment at the bank.[1]

§ 120. In the next place, as to transfers by indorsement. If a Promissory Note is originally payable to a person or his order, there it is properly transferable by indorsement. We say properly transferable, because in no other way will the transfer convey the legal title to the holder, so that he can, at law, hold the other parties liable to him *ex directo*, whatever may be his remedy in equity.[2] If there be an assignment thereof without an indorsement, the holder will thereby acquire the same rights only, as he would acquire upon an assignment of a Note not negotiable.[3] If by mistake, or accident, or

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[1] Chitty on Bills, ch. 6, p. 271, (8th edit.); Id. ch. 6, p. 247, (9th edit.) and note supra; Id. ch. 9, p. 384, 385, (9th edit.); Story on Bills, § 111, and note, § 225, 419. See Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Owen *v.* Morse, 7 Term R. 64; Ex parte Blackburne, 10 Ves. 204; Emly *v.* Lye, 15 East, 7, 13. By Bayley J. In Bayard *v.* Shunk, 1 Watts & Serg. R. 92, in Pennsylvania, it was held, that payment in bank bills, after the bank has failed, but the fact is unknown both to payer and receiver, is a good payment, and the loss is to be borne by the receiver. The like doctrine seems to have been held in Young *v.* Adams, 6 Mass. R. 182, 185, in Scruggs *v.* Gass, 8 Yerger, Tenn. R. 175, and in Lowry *v.* Murrell, 2 Porter, Alab. R. 282. The opposite doctrine has been maintained in New York, in Lightbody *v.* The Ontario Bank, 11 Wend. R. 1, affirmed on error in 13 Wend. R. 107, and in Harley *v.* Thornton, 2 Hill, So. Car. R. 509. The same doctrine has been supported in New Hampshire, in Fogg *v.* Sawyer, 9 New Hamp. R. 365; Story on Bills, § 225, and note; Post, § 389.

[2] Bayley on Bills, ch. 5, § 1, p. 120, 121, (5th edit. 1830); Chitty on Bills, ch. 6, p. 251, (8th edit. 1833); Id. p. 265; Gibson *v.* Minet, 1 H. Black. 605; Story on Bills, § 60; Clark *v.* Sigourney, 17 Conn. R. 511.

[3] In general, in such a case, the holder, as against the prior parties, will, upon the transfer, have the same rights in equity, as the payee or assignor has; that is, he may, at law, sue the other parties thereto, in the name of the payee or assignor, or perhaps he may maintain a suit in equity in his own name, ex directo, against them. See Story on Bills, § 199; 2 Story on Eq. Jurisp. § 1036, 1037, 1044, 1047.

fraud, a Note 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 becomes bankrupt, that will not vary his right or duty to make it; and, if he should die, his executor or administrator will be compellable, in like manner, to make it.[1] The assignees of a bankrupt, under the like circumstances, may be compelled to make an indorsement of a Note, tranferred before his bankruptcy.[2] But, in the case of an executor, or administrator, or assignee of a bankrupt, the doctrine is to be understood with this limitation, that the indorsement cannot be insisted upon, except with the qualification, that it shall not create any personal liability of the executor, or administrator, or assignee, to pay the Note.[3]

[§ 120 *a.* A Note may be indorsed to a party in two ways, either by special indorsement, making it payable to that party, or by a blank indorsement, and delivery to that party. In the latter way, if not in the former, the note must be delivered to the party as indorsee, in order to constitute an indorsement to him. Accordingly where a party having written his name on a Promissory Note, deceased, and his executrix without indorsing it, simply delivered it to the plaintiffs, it was held that these acts did not constitute an indorsement

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1 Chitty on Bills, ch. 6, p. 228, 229, (8th edit. 1833); Id. p. 263; Bayley on Bills, ch. 5, § 1, p. 123, (5th edit. 1830); Id. § 2, p. 136, 137; Watkins *v.* Maule, 2 Jac. & Walk. 237, 242; Smith *v.* Pickering, Peake, R. 50.

2 Bayley on Bills, ch. 5, § 2, p. 138, (5th edit. 1830); Ex parte Mowbray, 1 Jac. & Walk. 428.

3 Ibid.; Story on Bills, § 195, 201.

of the Note, and that the plaintiffs had no title to sue on it.[1]]

§ 121. In the next place, as to the form of an indorsement. In cases, where an indorsement is necessary, as it is upon all Promissory Notes payable to order, no particular form of words is indispensable to be used. It is generally sufficient, if there be the signature of the indorser affixed, without any other words being used. And if any other words are placed over, or precede the signature, it is sufficient, if they import a present intent to transfer the same thereby.[2] It has even been held, that the initials of the holder of a check, indorsed on the check, are sufficient to charge him as indorser.[3] So, if the party intending to become the indorser, make any marks or write any figures (as 1, 2, 8,) on the back of the Note, he will be chargeable as indorser.[4] The word indorsement, in its strict sense, seems to import a writing on the back of the Note; but it is well settled, that this is not essential.[5] On the contrary, it will be a good indorsement, if it be made on the face of the Note, or on another paper annexed thereto, (called, in France, *Allonge*,) which is some-

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1 Browage *v.* Lloyd, 1 Welsby, Hurlstone & Gordon, 32; Marston *v.* Allen, 8 Mees. & Welsb. 494; Bell *v.* Ingestre, 12 Adolph. & Ellis, N. S. 317; Clark *v.* Sigourney, 17 Conn. R. 511; Nelson *v.* Nelson, 6 Iredell, Equity, N. C. R. 409.

2 Chitty on Bills, ch. 6, p. 253, (8th edit. 1833); Bayley on Bills, ch. 5, § 1, p. 122, (5th edit. 1830); Chaworth *v.* Beech, 4 Ves. 555; Partridge *v.* Davis, 20 Vermont, R. 499.

3 Merchants' Bank *v.* Spicer, 6 Wend. R. 443.

4 Brown *v.* Butchers' & Drovers' Bank, 6 Hill, N. Y. R. 443; George *v.* Surrey, 1 Mood. & Malk. 516.

5 Heineccius says: "Id, quod vocant indossamentum (das Indossement,) quia dorso inscribi solet." Heinecc. de Camb. cap. 2, § 7. See also, Pothier De Change, n. 22; Gibson *v.* Powell, 6 Howard, Mississippi, R. 60.

times necessary, when there are many successive indorsements to be made.[1] The signature ought, in all cases, to be written with ink, in order to prevent its defacement. But even this has been recently held not to be indispensable, and that an indorsement in pencil is sufficient.[2] The mode of making the indorsement, when it is by an agent, or a partner, or a feme covert, or any other person, acting officially, is precisely the same, as the signature should be in drawing a Note.[3] In whatever way an indorsement may be made, by the general principles of law, unless varied by the contract of the parties, the indorser is deemed to stand in the relation of a new drawer of a Bill of Exchange, and, of course, he is affected with all the liabilities of a drawer.[4]

§ 122. Indorsements are sometimes made upon Promissory Notes containing blanks, to be afterwards filled up, and sometimes upon blank paper, which is intended to be filled up, so as to make the party an indorser. In all such cases, as against him, the Note is to be treated exactly as if it had been filled up before he indorsed it, and he will be bound accordingly.[5] And it will make

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[1] Chitty on Bills, ch. 5, p. 147, (8th edit. 1833); Id. ch. 6, p. 253, 262; Pardessus, Droit Comm. Tom. 2, art. 343; Folger *v.* Chase, 18 Pick. R. 63; Post, § 151.

[2] Chitty on Bills, ch. 6, p. 252, (8th edit. 1833); Geary *v.* Physic, 5 Barn. & Cressw. 234; Partridge *v.* Davis, 20 Vermont, R. 499; Ante, § 11.

[3] Ante, § 68–73, 87.

[4] Chitty on Bills, ch. 6, p. 265–267, (8th edit. 1833); Hodges *v.* Steward, 1 Salk. R. 125; Heylin *v.* Adamson, 2 Burr. 674; Ballingalls *v.* Gloster, 3 East, R. 481; Bayley on Bills, ch. 9, p. 332, (5th edit. 1830); Pothier, De Change, n. 38; Story on Bills, § 204.

[5] Chitty on Bills, ch. 6, p. 240, 241, (8th edit. 1823); Snaith *v.* Mingay, 1 Maule & Selw. 87; Cruchley *v.* Clarance, 2 Maule & Selw. 90; Bay-

no difference in the rights of the holder, that he knows the facts; unless, indeed, there should be a known fraud upon the indorser, or a known misappropriation of the Note to other purposes, than those which were intended.[1]

§ 123. As to the rights, duties, and obligations arising from an indorsement. We have already had occasion to consider, who are competent to become parties to Promissory Notes, as makers, or payees, or indorsers, or indorsees, and it is not, therefore, necessary to enlarge upon that topic in this place.[2] Still, however, as the subject is of great practical importance, it may be well to suggest a few remarks; first, as to the persons, by whom a transfer may be made; and, secondly, as to the persons, to whom it may be made. In case of the bankruptcy of the payee, or other holder of a Promissory Note, all his rights of transfer of the same become vested in his assignees, who may, by law, transfer the same in their own names.[3] In case of the death of the payee, or other holder, the like right exists in the executors and administrators of the deceased; and they may, in their own names, transfer the Note in the like manner.[4] In each of these cases, the transfer will be

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ley on Bills, ch. 1, § 10, p. 36, (8th edit. 1830); Id. ch. 5, § 3, p. 167, 168; Russell *v.* Langstaffe, Doug. R. 514; Usher *v.* Dauncey, 4 Camp. R. 97; Pasmore *v.* North, 13 East, R. 517; Putnam *v.* Sullivan, 4 Mass. R. 45; Mitchell *v.* Culver, 7 Cowen, R. 336; Violett *v.* Patton, 5 Cranch, R. 142; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 390, (5th edit.) But see Abrahams *v.* Skinner, 12 Skinner, 12 Adolph. & Ellis, R. 763.

[1] Ibid.; Story on Bills, § 222.

[2] Ante, § 58 – 104.

[3] Chitty on Bills, ch. 6, p. 227 – 238, (8th edit. 1833); Bayley on Bills, ch. 2, § 4, p. 49, 50, (5th edit. 1830); Id. ch. 5, § 2, p. 136 – 156.

[4] Chitty on Bills, ch. 6, p. 225, 226, (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 136, (5th edit. 1830); Id. ch. 5, § 2, p. 136, 137; Rawlin-

available, as assets, for the benefit of the estate of the bankrupt, or of the deceased testator or intestate, if the Note was held by him *bonâ fide* on his own account; and if held, either positively or constructively, in trust for the benefit of third persons, the transfer will be for their sole use.[1]

§ 124. In case of the marriage of a female, who is payee or indorsee of a Note, the property thereof vests in her husband, and he becomes solely entitled to negotiate it, as holder, and to indorse it in his own name.[2] The same rule applies in the case of a Note made payable to a married woman after her marriage. The husband may transfer it in his own name.[3] In case of an infant payee or indorsee of a Note, the infant may, by his indorsement, (which is a voidable act only, and not absolutely void,) transfer the interest to any subsequent holder, against all the parties to the Note except himself; but the indorsement will not bind him personally, or bind his interest in the Note.[4]

§ 125. In case of a Note, payable or indorsed to a

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son *v.* Stone, 3 Wils. 1; S. C. 2 Str. R. 126; Watkins *v.* Maule, 2 Jac. & Walk. 237.

1 Ibid.; Story on Bills, § 195.

2 Ante, § 88; Chitty on Bills, ch. 2, p. 26, (8th edit. 1833); Id. ch. 6, p. 225, 226; Bayley on Bills, ch. 2, § 3, p. 47 - 49, (5th edit. 1830); Id. ch. 5, § 2, p. 135, 136; Miles *v.* Williams, 10 Mod. R. 243, 245; McNeilage *v.* Holloway, 1 Barn. & Ald. 218; Arnold *v.* Revoult, 1 Brod. & Bing. 445; Philliskirk *v.* Pluckwell, 2 Maule & Selw. 393; Connor *v.* Martin, 1 Str. R. 516; Burrough *v.* Moss, 10 Barn. & Cressw. 558; Barlow *v.* Bishop, 1 East, R. 432; Miller *v.* Delamater, 12 Wend. R. 433.

3 Ibid.

4 Chitty on Bills, ch. 2, § 1, p. 21 - 24, (8th edit. 1833); Id. ch. 6, p. 224; Bayley on Bills, ch. 2, § 12, p. 44 - 46, (5th edit. 1830); Id. ch. 5, § 2, p. 136; Story on Bills, § 196.

trustee, for the use of a third person, (such as a Note, payable or indorsed to A., for the use of B.,) the trustee alone is competent to convey the legal title to the Note, by a transfer or indorsement.[1] In the case of a partnership, a Note, payable or indorsed to the firm, may be transferred by any one of the partners in the name of the firm,[2] at any time during the continuance of the partnership. But where the partnership is dissolved during the lifetime of the partners, neither partner can afterwards indorse a Note, payable to the firm, in the name of the firm.[3] But where the dissolution is by the death of one partner, there the survivor may indorse a Note, payable to the firm, in his own name.[4] The reason of the distinction is, that, in the former case, the implied authority for one partner to act for all is gone; whereas, in the latter case, the Note, or chose in action, vests exclusively in the partner by survivorship, although he must account therefor, as a part of the assets of the partnership.[5] If a Note be made payable or indorsed to several persons not partners, (as to A., B. and C.,) there the transfer can only be by a joint indorsement of all of them.[6]

§ 126. Thus far in respect to the persons, by whom the transfer of Promissory Notes may be made. Let

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[1] Chitty on Bills, ch. 6, p. 226, (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 134, (5th edit. 1830); Evans *v.* Cramlington, Carth. R. 5; S. C. 2 Vent. 307; Skinn. R. 264.

[2] Chitty on Bills, ch. 2, p. 67, (8th edit. 1833); Id. ch. 6, p. 226; Bayley on Bills, ch. 2, § 6, p. 53, 54, (5th edit. 1830.)

[3] Sanford *v.* Mickles, 4 John. R. 224; Story on Partn. § 323; Bayley on Bills, ch. 2, § 6, p. 59, (5th edit. 1830.)

[4] Jones *v.* Thorn, 1 Martin, R. (N. S.) 463.

[5] Crawshay *v.* Collins, 15 Ves. 218, 226.

[6] Ibid.; Carvick *v.* Vickery, 2 Doug. R. 653, note; Story on Bills, § 197; Sayre *v.* Frick, 7 Watts & Serg. 383.

us, for a moment consider, to whom the transfer may be made. The transfer may, of course, be made to any person of full age, who is not otherwise incompetent. It may also be transferred to an infant, and thereby the interest will vest in him; or to a feme covert, and then the interest will vest in her husband, who thereby becomes the legal owner thereof, and may treat it, as payable to himself; or he may, at his election, treat it, as payable to himself and his wife;[1] and then, if she survives her husband, he not having reduced the same into possession, she may hold and sue upon the indorsement in her own name, for her own use. If the transfer be to a person, who is an idiot, or a *non compos*, or a lunatic, there does not seem to be any legal incapacity in holding it to be valid in their favor, if it be clearly and unequivocally for their benefit, as if it be a mere bounty to them. If the transfer be to an executor or administrator, or to any person, as trustee for another, it will operate, as a transfer to them personally, although the trust may attach upon the proceeds in their hands.[2] If the transfer be to an agent, by an indorsement of his principal in blank, he may treat the Note, as between himself and all the other parties, except his principal, as his own, and fill it up in his own name; or he may hold it for his principal, and act in his name.[3] If the in-

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[1] Bayley on Bills, ch. 2, § 3, p. 47–49, (5th edit. 1830); Chitty on Bills, ch. 2, p. 26, (8th edit. 1833); Id. ch. 6, p. 225, 238; Id. Pt. 2, ch. 1, p. 556; Philliskirk *v.* Pluckwell, 2 Maule & Selw. 393; Richards *v.* Richards, 2 Barn. & Adolp. 447; Burrough *v.* Moss, 10 Barn. & Cressw. 558.

[2] Richards *v.* Richards, 2 Barn. & Adolp. 447.

[3] Bayley on Bills, ch. 5, § 2, p. 132–134, (5th edit. 1830; Story on Bills of Exchange, § 207, 224; Clerk *v.* Pigot, 12 Mod. R. 192, 193; 1 Salk. 126; 3 Kent, Comm. Lect. 44, p. 78–81, 89, 90, (4th edit.);

dorsement be filled up to the agent by the principal, then he is invested with the legal title, as to all persons, but his principal. But the principal may, at any time, revoke his authority and reclaim his rights.[1]

§ 127. In cases of Promissory Notes held by banks, the question often arises, whether an indorsement thereof by the cashier of the bank, in his official character, as, for example, indorsed by him, "A. B., cashier," is sufficient to pass the title of the bank thereto. It is held to be sufficient, supposing him to possess authority to pass the title, as he is deemed to possess it *ex officio*, unless prohibited by the by-laws of the corporation.[2] The same rule will apply to any indorsements to the cashier of a bank in the same mode, and the Note will be deemed to be transferred to the bank.[3] And in cases of an indorsement to a cashier of a bank, as cashier, as, for example, "to A. B., cashier," it is competent for the bank to maintain a suit thereon, as upon an indorsement to the corporation or for the cashier to maintain a suit thereon, in his own name.[4] In like manner, an

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Chitty on Bills, ch. 6, p. 255, 256, (8th edit. 1833); Bank of Utica *v.* Smith, 18 John. R. 230; Guernsey *v.* Burns, 25 Wend. R. 411; Little *v.* O'Brien, 9 Mass. R. 423; Sterling *v.* Marietta & Susq. Trad. Co. 11 Serg. & Rawle, 179; Mauran *v.* Lamb, 7 Cowen, R. 174; Banks *v.* Eastin. 3 Martin, R. (N. S.) 291; Brigham *v.* Marean, 7 Pick. R. 40; Lovell *v.* Evertson, 11 John. R. 52; Bragg *v.* Greenleaf, 14 Maine, R. 396 (Shepley, R.); Lowney *v.* Perham, 2 Appleton, R. 235. But see contrà, Thatcher *v.* Winslow, 5 Mass. R. 58; Sherwood *v.* Roys, 14 Pick. R. 172; Wilson *v.* Holmes, 5 Mass. R. 543, 545, per Parsons, Chief Justice.

1 Ibid.; Story on Bills, § 198.

2 Fleckner *v.* Bank of U. States, 8 Wheat. 360, 361; Wild *v.* Passamaquoddy Bank, 3 Mason, R. 505. See also Minor *v.* Mechanics' Bank of Alexandria, 1 Peters, R. 46, 70; Folger *v.* Chase, 18 Pick. R. 63; Story on Agency, § 114; Hartford Bank *v.* Barry, 17 Mass. R. 94.

3 See Bank of Manchester *v.* Slason, 13 Verm. R. 334.

4 Fairfield *v.* Adams, 16 Pick. R. 381. It seems also, that in such a

indorsement to the treasurer of the United States, in his official character, will be deemed a transfer to the government, and may be sued on by the government in its own name.[1] [But an attorney, to whom a Promissory Note is committed for the purpose of collection by the payee, derives no authority, from the mere fact of the employment, to indorse and transfer the Note, in behalf of his client, to a third person, so as to enable him to maintain an action for the benefit of the payee.[2]]

§ 128. Promissory Notes may be non-negotiable, and payable to a particular person only, or they may be payable to bearer, or they may be payable to order. And each of these cases, so far as the transfer by indorsement is concerned, may require a distinct consideration. Where a Promissory Note is not negotiable, if it is indorsed by the payee, it will be binding upon him, and may, as between him and his immediate indorsee, possess certain rights, liabilities, and obligations, capable of being enforced against him.[3] But as between him and subsequent holders, either no liabilities and obligations at all may exist at law, or very different rights, or qualified rights, and liabilities, and obligations only.[4] In respect to the immediate indorsee of the payee of a non-negotiable Note, the indorsement will ordinarily

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case the party, who is cashier, may personally sue on the same indorsement in his own name. McHenry *v.* Ridgeley, 2 Scamm. R. 309; S. P. Porter *v.* Nekervis, 4 Rand. R. 359. See also, McConnell *v.* Thomas, 2 Scamm. R. 313.

1 Dugan *v.* U. States, 3 Wheat. R. 172.

2 White *v.* Hildreth, 13 N. Hamp. R. 104.

3 Story on Bills, § 60, 199, 202; Chitty on Bills, ch. 6, p. 265, 266, (8th edit.); Bayley on Bills, ch. 5, § 1, p. 120, 121, (5th edit.); Hill *v.* Lewis, 1 Salk. 132; White *v.* Low, 7 Barbour, Sup. Ct. R. 204.

4 Plimley *v.* Westley, 2 Bing. N. Cas. 249, 251; Penny *v.* Innes, 1 Cromp. Mees. & Rosc. 439.

create the same liabilities and obligations, on the part of the payee, as the indorsement of a negotiable Note.[1]

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[1] Story on Bills, § 119, 199, 202; Bayley on Bills, ch. 5, § 1, p. 120, 121, (5th edit.); Chitty on Bills, ch. 6, § 1, p. 219, (8th edit.); Hill *v.* Lewis, 1 Salk. 132; Josselyn *v.* Ames, 3 Mass. R. 274; Jones *v.* Fales, 4 Mass. R. 245; Sanger *v.* Stimpson, 8 Mass. R. 260; Jones *v.* Witter, 13 Mass. R. 305; 3 Kent, Comm. Lect. 44, p. 77, (5th edit.) and note; Gadcomb *v.* Johnson, 1 Verm. R. 136; Upham *v.* Prince, 12 Mass. R. 14; Commercial Bank *v.* Wood, 7 Watts & Serg. 89; Sweetser *v.* French, 2 Cushing, R. 310. But see Smallwood *v.* Vernon, 1 Str. R. 478; Plimley *v.* Westley, 2 Bing. N. Cas. 249, 251; Penny *v.* Innes, 1 Cromp. Mees. & Rosc. 439; Parker *v.* Riddle, 11 Stanton, Ohio, R. 102. In the case of Seymour *v.* Van Slyck, 8 Wend. R. 403, 421, the Supreme Court of New York held, that an indorsement by the payee of a negotiable Note was equivalent to the making of a new Note; and that is a guaranty that the Note will be paid, and a direct and positive undertaking on the part of the indorser to pay the Note to the indorsee, and not a conditional one to pay the Note, if the maker does not upon demand and notice. It does not appear to me that the authorities cited by the Court upon that occasion, support the doctrine. The nearest is the case of Smallwood *v.* Vernon, 1 Str. R. 478; and that is, upon its own circumstances, clearly distinguishable. The preceding authorities, above cited, are certainly the other way. The case of Josselyn *v.* Ames, 3 Mass. R. 275, is difficult to understand, from the imperfect manner in which it is stated in the report. In Plimley *v.* Westley, 2 Bing. N. Cas. 249, the Court seemed to think that the payee of a non-negotiable Note had no authority to indorse it; and the holder could neither sue the indorsee, nor the indorsee the maker. Probably the Court meant, (for the report is obscure,) that the last holder could not sue the immediate indorsee of the payee, he not being his own immediate indorser, nor the first indorsee the maker. This seems regularly correct. But the Court added, that, if there had been a second stamp on the Note, the indorsement of the immediate indorser to the holder might, as between them, make such indorser liable as the maker of a new Note. But in Gwinnell *v.* Herbert, 5 Adolp. & Ellis, R. 436, held, that the indorser of a negotiable Note does not stand in the situation of a maker of a Note, even where he is not the payee thereof, and it is not indorsed to him, and where, consequently, his indorsee cannot sue the original maker. According to our law in such a case, he might, if there was a sufficient consideration, be treated as a guarantor to his immediate indorsee. See Post, § 133, and the authorities there cited. Mr. Chitty, in the 9th edition of his work on Bills, Pt. 1, ch. 12, p. 528, 529, says: "There is, however, one important distinction between Bills and Notes, as regards

In respect to every subsequent holder, no privity or connection is, at law, created between the payee and such holder, unless the payee, by his indorsement, makes it expressly payable to his indorsee or order, or he expressly promises to pay the Note to the holder in consideration of the indorsement; and, therefore, such holder cannot, except under such circumstances, bring any suit at law in his own name against the payee, upon the dishonor of the Note.[1] Still, however, in such a case, such holder is not without his remedy

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the liability arising from an indorsement; with respect to Bills of Exchange, we have seen, that every indorser is in the nature of a new drawer, but the indorser of a Promissory Note does not stand in the situation of maker relatively to his indorsee; nor can the indorsee of a Note declare against his indorser as maker, even where the latter has indorsed a Note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker. The distinction between the two cases is obvious; in allowing the indorser of a Bill to be treated as a new drawer, the indorser's liability is not altered; it still remains secondary or collateral only; but to suffer the indorser of a Note to be charged as maker, would be at once to render the indorser's liability primary and immediate, and to place him in the situation of the acceptor of a Bill." For this, the author relies on the language of the learned Courts in Gwinnell *v.* Herbert, 5 Adolp. & Ellis, R. 441, where, indeed, the Court seem to have relied upon a supposed distinction between the indorser of a Note, and the drawer or indorser of a Bill. I agree, that the indorser of a Note cannot properly be treated as the maker thereof, whether he be the payee or indorsee thereof, or a third person. But I am unable to perceive, why he does not stand in the same situation as the drawer or indorser of a Bill. In each case, the indorsement creates a collateral liability only. The maker of a Note, and the acceptor of a Bill, are the primary parties to pay the same. Every indorsement upon an accepted Bill, is precisely, in effect, the same as an indorsement of a Note; and each imports the same liability to the holder. It is a request to the maker or acceptor, to pay the amount to the holder, and an agreement, upon its dishonor, at maturity, and due notice of the dishonor, to pay the same to the holder. Why, then, is not the indorser of a Note in the very predicament of the drawer or indorser of a Bill, as to his liability upon such dishonor?

[1] Ibid.

against the payee, and also against the maker. He may ordinarily use the name of the payee against the maker in an action at law, and that of the immediate indorsee of the payee against the latter, in an action at law to recover the debt.[1] And, in Equity, he may, without question, maintain a suit in his own name against the maker, and against the payee, and, indeed, against every intermediate indorser between his immediate indorser and the antecedent indorsers.[2]

§ 129. The reason for this doctrine is, that every indorsement operates in legal contemplation between the parties thereto, as the drawing of a Bill of Exchange by the indorser, in favor of the immediate indorsee. It is, in fact, a request of the indorser, that the maker (who stands in this respect very much in the situation of an acceptor) would pay the amount to the indorsee, or to any other holder, if the indorsement is not restrictive.[3] Indeed, it may be treated, with strict propriety, as an authority given to the indorsee to receive the money due on the Note, and also as an undertaking, that it shall be paid to him upon due presentment; and, therefore, as involving, in case of dishonor, and due notice

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[1] Story on Bills, § 60, 199; Bayley on Bills, ch. 5, § 1, p. 120, (5th edit.); Jones *v.* Witter, 13 Mass. R. 305; Grover *v.* Grover, 24 Pick. R. 261; Story on Eq. Jurisp. § 1056 – 1057, *a*. But see Hammond *v.* Messenger, 9 Sim. R. 327; Rose *v.* Clarke, 1 Younge & Coll. New R. 539, 545; Kimball *v.* Huntingdon, 10 Wend. R. 675.

[2] Ibid.

[3] Bayley on Bills, ch. 5, § 1, p. 120, 121 (5th edit.); Chitty on Bills, ch. 6, p. 219 (8th edit.); Id. 226; Ballingalls *v.* Gloster, 3 East, R. 481; Slacum *v.* Pomeroy, 6 Cranch, 221. See Smallwood *v.* Vernon, 1 Str. R. 478; Van Staphorst *v.* Pearce, 4 Mass. R. 258; Field *v.* Nickerson, 13 Mass. R. 131, 136; Story on Bills, § 107, 118, 119; Penny *v.* Innes, 1 Cromp. Mees. & Rosc. 439. But see Gwinnell *v.* Herbert, 5 Adolp. & Ellis, 436; Plimley *v.* Westley, 2 Bing. N. Cas. 249; Ante, § 128, note.

thereof, the ordinary responsibility of an indorser of negotiable paper.[1] But the same considerations do not apply to a subsequent indorsee under the immediate indorsee of the payee of a non-negotiable Note; for the like privity does not necessarily exist between them.

§ 130. There is, indeed, one exception to the general rule above stated, and that is, where an assignment is made by, or to, the sovereign or government, of a non-negotiable instrument, or other debt or chose in action; for, in such a case, the indorsement or assignment by, or to, the sovereign or government, creates the same liabilities, as if the instrument were originally assignable. The reason is, that the principle of the Common Law, which prohibits the assignment of choses in action, is, that it shall not be the means of stirring up and multiplying litigation between debtors and third persons, or to enable the rich and powerful to oppress those, who are in the unfortunate state of dependent and embarrassed debtors. Such a reason is inapplicable to the sovereign or government, who can never be presumed to be the abettor, or minister, of any injustice to the subjects, or citizens, and can have no interest, but to act for the public benefit.[2]

§ 131. In the Civil Law, and in the jurisprudence of the modern commercial nations of Continental Europe, there does not seem to have been any foundation for such an objection to the assignment of debts; for all

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[1] Ibid.

[2] Chitty on Bills, ch. 6, p. 219 (8th edit.); Id. p. 252; Lambert *v.* Taylor, 4 Barn. & Cressw. 138, 150, 151; 2 Story on Eq. Jurisp. § 1039, 1040; Co. Litt. 232 *b*, Butler's note (1); Prosser *v.* Edmonds, 1 Younge & Coll. 499; Scafford *v.* Bulkley, 2 Ves. 170, 181; Miles *v.* Williams, 1 P. Will. 252; U. States *v.* Buford, 3 Peters, R. 30; U. States *v.* White, 2 Hill, N. Y. R. 59.

debts were, from an early period, allowed to be assigned, if not formally, at least in legal effect; and for the most part, if not in all cases, they may be sued for in the name of the assignee.[1] The Code of Justinian says;

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[1] Pothier has stated the old French Law upon this subject (which does not in substance probably differ from that of the other modern states of Continental Europe) in very explicit terms, in his Treatise on the Contract of Sale, of which an excellent Translation has been made by L. S. Cushing, Esq. The doctrines therein stated are in many respects so nearly coincident with those maintained by our Courts of Equity, that I have ventured to transcribe the following passages from Mr. Cushing's work. "A credit being a personal right of the creditor, a right inherent in his person, it cannot, considered only according to the subtlety of the law, be transferred to another person, nor consequently be sold. It may well pass to the heir of the creditor, because the heir is the successor of the person and of all the personal rights of the deceased. But, in strictness of law, it cannot pass to a third person; for the debtor, being obliged towards a certain person, cannot, by a transfer of the credit, which is not an act of his, become obliged towards another. The jurisconsults have, nevertheless, invented a mode of transferring credits, without either the consent or the intervention of the debtor. As the creditor may exercise against his debtor, by a mandatary, as well as by himself, the action, which results from his credit. When he wishes to transfer his credit to a third person, he makes such person his mandatary, to exercise his right of action against the debtor; and it is agreed between them, that the action shall be exercised by the mandatary, in the name indeed of the mandator, but at the risk and on the account of the mandatary, who shall retain for himself all, that may be exacted of the debtor in consequence of the mandate, without rendering any account thereof to the mandator. Such a mandatary is called, by the jurisconsults, Procurator in rem suam, because he exercises the mandate, not on account of the mandator, but on his own. A mandate, made in this manner, is, as to its effect, a real transfer, which the creditor makes of his credit; and if he receives nothing from the mandatary, for his consent, that the latter shall retain to his own use what he may exact of the debtor, it is a donation; if, for this authority, he receives a sum of money of the mandatary, it is a sale of the credit. From which it is established in practice, that credits may be transferred, and may be given, sold, or disposed of by any other title; and it is not even necessary that the act which contains the transfer, should express the mandate, in which, as has been explained, the transfer consists. The transfer of an annuity or other credit, before notice of it is given to the

Nominis autem venditio (distinguishing between the sale of a debt, and the delegation or substitution of one

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debtor, is what the sale of a corporeal thing is, before the delivery; in the same manner, that the seller of a corporeal thing, until a delivery, remains the possessor and proprietor of it, as has been established in another place. So, until the assignee notifies the debtor of the assignment made to him, the assignor is not devested of the credit which he assigns. This is the provision of art. 108 of the Custom of Paris: — 'A simple transfer does not devest, and it is necessary to notify the party of the transfer, and to furnish him with a copy of it.' From which, it follows, first, that, before notice, the debtor may legally pay to the assignor his creditor; and the assignee has no action, in such case, except against the assignor, namely, the action ex empto, ut præstet ipsi habere licere; and, consequently, that he should remit to him the sum, which he is no longer able to exact of the debtor, who has legally paid the debt to the assignor. Second, that before notice, the creditors of the assignor may seize and arrest that, which is due from the debtor, whose debt is assigned; and they are preferred to the assignee, who has not, before such seizure and arrest, given notice of the assignment to him; the assignee, in this case, is only entitled to his action against the assignor, namely, the action ex empto, in order that the latter præstet ipsi habere licere; and, consequently, that he should report to him a removal of the seizures and arrests, or pay him the sum, which, by reason thereof, he is prevented from obtaining of the debtor. Third, that if the assignor, after having transferred a credit to a first assignee, has the bad faith to make a transfer of it to a second, who is more diligent than the first, to give notice of his assignment to the debtor, the second assignee will be preferred to the first, saving to the first his recourse against the assignor. Though the assignee notifies to the debtor the assignment to him, the assignor, in strictness of law, remains the creditor, notwithstanding the transer and notice; and the credit continues to be in him. This results from the principles established in the preceding article. But quoad juris effectus, the assignor is considered, by the notice of the transfer given to the debtor, to be devested of the credit, which he assigns; and is no longer regarded as the owner of it; the assignee is considered to be so; and, therefore, the debtor cannot afterwards legally pay the assignor; and creditors of the assignor cannot, from that time, seize and arrest the credit, because it is no longer considered to belong to their debtor. Nevertheless, as the assignee, even after notice of the transfer, is only the mandatary, though in rem suam, of the assignor, in whose person, the credit, in truth, resides; the debtor may oppose to the assignee a compensation of what the assignor was indebted to him, before the notice of the assignment; which, however, does not prevent him from opposing also a compensation debtor for another for the same debt) *et ignorante, vel invito eo, adversus quem actiones mandantur, contrahi solet.*[1] And Heineccius, after remarking, that Bills of Exchange are for the most part drawn, payable to a person or his order, says, that although this form be omitted, yet an indorsement thereof may have full effect, if the laws of the particular country respecting exchange do not specially prohibit it; because an assignment thereof may be made without the knowledge, and against the will, of the debtor; and he refers to the passage in the Code in proof of it.[2] But he adds, (which is certainly not our law,) that if the bill be drawn payable to the order of Titius, it is not to be paid to Titius, but to his indorsee. *Tunc enim Titio solvi non potest, sed ejus indossatario.*[3] The same general doctrine as to the assignability of Bills of Exchange, payable to a party, but not

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of what the assignee himself owes him; the assignee being himself, non quidem ex juris subtilitate, sed juris effectu, creditor." Pothier on Sales, by Cushing, n. 550, 555-559. The modern French Law has gotten rid of the subtlety as to the suit being brought in the name of the assignor upon contracts generally; for it may now (whatever might have been the case formerly) be brought in the name of the assignee, directly against the debtor. See Troplong, Des Privil. et Hypoth. Tom. 1, n. 340-343; Code Civ. of France, art. 2112; Id. 1689-1692; Troplong, De la Vente, n. 879-882, n. 906, 913.

1 Cod. Lib. 8, tit. 42, l. 1; 1 Domat, B. 4, tit. 4, § 3, 4.

2 Heinecc. de Camb. cap. 2, § 8; Id. cap. 3, § 21-25. Heineccius, in a note, says, that in Franconia and Leipsic, no assignment is of any validity, if the formula of its being payable to order is omitted. The present law of France is the same, so far as the general negotiability of Bills is concerned, and to give them circulation, unaffected by any equities between the payee and the debtor, as will be seen in the sequel. Pardessus, Droit Comm. Tom. 2, art. 339, p. 360; Delvincourt, Instit. Droit Comm. Tom. 1, Liv. 1, tit. 7, Pt. 2, p. 114, 115. Delvincourt says, that the right of a simple Bill (not payable to order,) is transferable only by an act of transfer made known to the debtor. See also, Merlin, Répert. *Lettre et Billet de Change*, § 4, 8, p. 196, 252, (edit. 1827.)

3 Heinecc. de Camb. cap. 2, § 8.

to his order, is affirmed in the Ordinance of France of 1673 (art. 12), as soon as the transfer is made known to the drawee or debtor.[1] Indeed, the like doctrine prevails now in France, not only in cases of Bills of

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[1] Jousse, Sur L'Ordin. 1673, art. 30, p. 123. The article, and Jousse's commentary, are as follows: Art. 30, "Les Billets de Change, payables à un particulier y nommé, ne seront réputez appartenir à autre, encore qu'il y eust un transport signifié, s'ils ne sont payables au porteur, ou à ordre. *Les Billets De Change.* La disposition contenue en cet article ne doit pas s'étendre aux autres billets, parce que suivant le droit commun on peut disposer des billets et promesses par obligation et transport, et que le transport, signifié saisit celui au profit de qui il est fait, suivant la disposition de l'article 108 de la Coûtume de Paris. La raison pour laquelle l'Ordonnance déroge ici au droit commun, à l'égard des billets de change, payables à un particulier y nommé, et afin d'abolir l'usage des transports et significations en cette matière, qui est proprement de négoce, et où tout doit être sommaire. Néanmoins en examinant plus particulièrement le sens de cet article, il paraît, que l'esprit de l'Ordon. n'est pas d'abolir l'usage des transports des billets de change, qui ne sont point payables au porteur, ou à ordre: car il semble qu'on ne peut empêcher un particulier propriétaire d'un billet de cette espèce de transférer la propriété de ce billet à celui au profit de qui le transport aurait été consenti. En effet, si l'on fait attention, que l'esprit de l'Ordonnance est de conserver au débiteur, qui a consenti des billets payables à un particulier, les mêmes exceptions contre les cessionnaires de ces billets, que celles que le débiteur lui-même aurait pu opposer au créancier, qui en était originairement propriétaire, sans distinguer, si la cession ou transport a été signifiée ou non, il sera aisé de se convaincre, que l'Ordonnance n'a jamais eu intention d'abolir l'usage des cessions et transports en maitère de billets de change, qui ne sont point payables au porteur ou à ordre, mais qu'elle a seulement entendu marquer en cet article la différence, qu'il y a entre les billets payables à un particulier y nommé, et les billets payables au porteur ou à ordre. Dans les billets payables au porteur ou à ordre, celui, qui en est le porteur, n'a pas à craindre, que le débiteur puisse lui opposer aucune exception du chef de son cédant, le porteur, quel qu'il soit, en étant le véritable propriétaire, ainsi que s'il avait été originairement consenti en sa faveur. Mais dans les billets payables à un particulier y nommé, le cessionnaire ne peut jamais avoir plus de droit que ce particulier, et ne peut éviter par conséquent que toutes les exceptions, qui auront pu être opposées à ce particulier, ou cédant, ne puissent lui être opposées à lui-même. C'est dans ce

Exchange, but of contracts generally; so that the assignee may now sue therefor in his own name after the assignment, subject, however, to all the equities, subsisting between the parties before and at the time, when the debtor has notice of the assignment.[1] In Scotland, it has been long settled, that the words "or order" are not necessary to make a Promissory Note negotiable by

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même sens que les articles 18 et 19 de ce titre distinguent au sujet du paiement d'une lettre adhirée, si cette lettre est payable à un particuliere y nommé, ou si elle est payable au porteur ou à ordre: le paiement dans le premier cas pouvant être fait sans aucune précaution, en vertu d'une seconde lettre; au lieu que dans le second cas le paiement ne peut être fait que par Ordonnance du Juge, et en donnant caution."

[1] Pardessus, Droit Comm. Tom. 2, art. 313; Troplong de Priv. et Hypoth. Tom. 1; Troplong, De la Vente, n. 879-913; Code Civil of France, art. 1689-1693; Id. art. 2112; Id. art. 1295; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, p. 342; Pothier, De Vente, n. 551-560; Story on Bills, § 19; 2 Story on Eq. Jurisp. § 1040, *a*. Mr. Chitty (on Bills, ch. 6, p. 218, 8th edit.; Id. Pt. 1, ch. 6, p. 196, 9th edit. 1840,) says: "In France it is absolutely essential, that Bills be drawn expressly payable to order, and they must not be payable to bearer; and it appears, that the Bills were not transferable in France by the Law Merchant; but by a particular ordinance." Mr. Chitty here probably alludes to the ordinance of 1673, art. 30. Now, it is manifest from Jousse's commentary on this very article, (Jousse, Sur L'Ordin. 1673, p. 123,) that the article is not only an exception to the general law; but that it does not restrain the assignability of such instruments, but only leaves it open to all the equities between the original parties. The contrary of which is true as to Bills of Exchange payable to order, which are not open to the like equities. Pothier (De Change, n. 221, 222,) does not inculcate a different doctrine; but only suggests as one of the differences between Bills of Exchange and Promissory Notes payable to order, that even the latter are not entitled to the peculiar privileges of Bills, but are treated as mere simple Notes, (simples billets,) when the maker is not a merchant or banker, or state financier. Pardessus (Droit Comm. Tom. 2, art. 313) is to the same effect. See also, Troplong, De la Vente, n. 879-913; Code Civil of France, art. 1689-1693; Id. art. 2112; Id. art. 1295; Locré, Esprit du Code De Comm. Tom. 1, Liv. 1, tit. 8, p. 342; Pothier, De Vente, n. 551-560. The modern Code of Commerce of France, (art. 110, 188,) seems to require that all Bills of Exchange and Promissory Notes, to have the privileges appropriate to each, should be payable to order.

indorsement, and that a Note may be effectually indorsed without them by the payee.[1]

§ 132. Although a Note payable to bearer is, as we have seen, transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder. In such a case, the indorser incurs the same liabilities and obligations as the indorser of a negotiable Note, payable to order, from many of which, in the case of a mere transfer by delivery, he is exempt.[2] Where a Note is originally payable to bearer, and is indorsed, it would seem, upon principle, that the holder might, as against the maker, declare upon it as a bearer, or as indorsee, at his election; and this seems to be the weight of authority, although the decisions are not, perhaps, entirely reconcilable.[3] Where a Note is payable to a fictitious person or order, (which is sometimes, although rarely done,) and it is indorsed in the name of such fictitious person, it will be deemed a Note payable to bearer, as to all *boná fide* holders, without notice of the fiction, and entitle them, as against the maker, and all prior real indorsers, to the like remedy, as if the Bill were payable to bearer.[4] It would be otherwise, if

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[1] Thomson on Bills, ch. 1, § 2, p. 85, (2d edit.); Id. ch. 3, p. 256; 3 Kent, Comm. Lect. 44, p. 77, note, (5th edit.)

[2] Story on Bills, § 200; Bayley on Bills, ch. 5, § 1, p. 120, 121, (5th edit.); Chitty on Bills, ch. 6, p. 219, 220, (8th edit.); Waynam *v.* Bend, 1 Camp. R. 175; Brush *v.* Reeves, 3 John. R. 439; Eccles. *v.* Ballard, 2 McCord, So. Car. R. 388; Wilbour *v.* Turner, 5 Pick. R. 526; Dole *v.* Weeks, 4 Mass. R. 451; Gilbert *v.* Nantucket Bank, 5 Mass. R. 97; Truesdell *v.* Thompson, 12 Metcalf, R. 565; Tillman *v.* Ailles, 5 Smedes & Marshall, R. 373.

[3] See Bayley on Bills, ch. 11, p. 466, 467, (5th edit.); Chitty on Bills, ch. 6, § 1, p. 220, (8th edit.); 3 Kent. Comm. Lect. 44, p. 78, (5th edit.); Waynam *v.* Bend, 1 Camp. R. 175; Wilbour *v.* Turner, 5 Pick. R. 526.

[4] Chitty on Bills, ch. 5, p. 178, 179, (8th edit.); Id. ch. 6, p. 252;

the holders had notice of the fiction, when the Bill was received.[1]

§ 133. In some cases it is a matter of considerable nicety, to decide in what character a party stands upon a Promissory Note, in virtue of his indorsement thereof. It is plain, that if he is the payee of the Note, whether negotiable or not, he is (as has been already stated[2]) to be deemed regularly liable as an indorser. But, suppose he is not the payee of the Note, but he indorses it, what is the nature and effect of such an indorsement? If he signs it at the time when the Note is made, then he will ordinarily be deemed a guarantor of the Note upon the footing of the original consideration;[3] and if he indorses it subsequently, not being a regular indorsee from or under any of the antecedent parties, he will in like manner, still be deemed a guarantor, if there be a sufficient consideration for his indorsement; but not otherwise.[4]

Bayley on Bills, ch. 1, § 10, p. 31, 32, (5th edit.); Id. ch. 9, p. 383; 3 Kent, Comm. Lect. 44, p. 78, (5th edit,); Plets *v.* Johnson, 3 Hill, N. Y. R. 112; Story on Bills, § 200.

[1] Benet *v.* Farnell, 1 Camp. R. 130; Id. p. 133, note; Id. 180, *b*, *c*, § 9 of Addenda; Hunter *v.* Jeffrey, Peake, Add'l Cas. 146; Cooper *v.* Meyer, 10 Barn. & Cressw. 469.

[2] Ante, § 128.

[3] Ante, § 59, and note; Post, § 463-473; 3 Kent, Comm. Lect. 44, p. 122, (5th edit.); Leonard *v.* Vredenburgh, 8 John. R. 29. See Bailey *v.* Freeman, 11 John. R. 221; Nelson *v.* Dubois, 13 John. R. 175; De Wolf *v.* Rabaud, 1 Peters, R. 476; Hunt *v.* Adams, 5 Mass. R. 358; Oxford Bank *v.* Haynes, 8 Pick. R. 423.

[4] Chitty on Bills, ch. 6, p. 266, (8th edit.); Morley *v.* Boothby, 3 Bing. R. 107. See also, Herrick *v.* Carman, 12 John. R. 159; Tillman *v.* Wheeler, 17 John. R. 326; Aldridge *v.* Turner, 1 Gill & John. R. 427; Lamourieux *v.* Hewit, 5 Wend. R. 307; Longley *v.* Griggs, 10 Pick. R. 121; Watson *v.* McLaren, 19 Wend. R. 557; Tenney *v.* Prince, 4 Pick. R. 385; Oxford Bank *v.* Haynes, 8 Pick. R. 423; Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Hall

§ 134. Where a person makes an indorsement in blank on a Bill, it will not be construed to be a guaranty, unless where such a construction is indispensable to give some effect to the indorsement, and to prevent an entire failure of the express, or presumed contract. Thus, if a Bill be negotiable, and the payee should indorse it in blank, the indorsement will not inure as a guaranty, but simply as the contract of an indorser. The like rule will prevail if the indorsement is made by any other person than the payee; for he may be well deemed as intending to stand in the character of a second indorser after the payee, although he was privy to the original consideration between the drawer and the payee, and indorsed it for the accommodation of the drawer.[1] But it would have been otherwise, if the Bill had not been negotiable; for, then, the indorsement would be utterly unavailable, unless as a guaranty.[2]

§ 135. Passing from these considerations, which apply to peculiar cases, let us now consider the general rights, duties, and obligations arising from the indorsement of Promissory Notes, payable to a person, or his order. Indorsements may be in blank or in full, restrictive or general, qualified or conditional; but of these we shall speak hereafter.[3] At present, what will be here said is applicable to all indorsements, which are either in blank or full, and are, of course, payable to the in-

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v. Newcomb, 3 Hill, N. Y. R. 232; Sylvester *v.* Downes, 20 Vermont, R. 355. See Post, § 458 to 461.

[1] Seabury *v.* Hungerford, 2 Hill, N. Y. R. 84; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; Ellis *v.* Brown, 6 Barbour, Sup. Ct. R. 282; Taylor *v.* M'Cune, 1 Jones, Penn. R. 461; Crozer *v.* Chambers, 1 Spencer, N. Jersey, R. 256; Fear *v.* Dunlap, 1 Greene, Iowa, R. 334.

[2] Ibid.; Story on Bills, § 215.

[3] Post, § 138.

dorsee or order generally. The indorsement of a Note, in contemplation of law, amounts to a contract on the part of the indorser with and in favor of the indorsee and every subsequent holder, to whom the Note is transferred; (1.) That the instrument itself and the antecedent signatures thereon are genuine;[1] (2.) That he, the indorser, has a good title to the instrument; (3.) That he is competent to bind himself by the indorsement, as indorser; (4.) That the maker is competent to bind himself to the payment, and will, upon due presentment of the Note, pay it at maturity, or when it is due; (5.) That if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder.[2] The French

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[1] Post, § 380, 387.

[2] Story on Bills, § 108-111, 119, 127, 225, 262, and the authorities there cited; Chitty on Bills, ch. 6, p. 269, 270, (8th edit.); Id. Pt. 2, ch. 5, p. 635, 636; Jones *v.* Ryde, 5 Taunt. 488; Free *v.* Hawkins, Holt, N. P. R. 550; Bruce *v.* Bruce, 1 Marshall, (Eng.) R. 165; Murray *v.* Judah, 6 Cowen, R. 484; Burrill *v.* Smith, 7 Pick. R. 291, 294, 295. These I conceive to be the true implications of contracts resulting from the act of indorsement of a Promissory Note. Mr. Bayley has not expressed himself with his usual clearness and precision on this subject. In Bayley on Bills, ch. 1, § 15, p. 43, (5th edit.) it is said:—"The act of drawing a Bill implies an undertaking from the drawer to the payee, and to every other person to whom the Bill may afterwards be transferred, that the drawee is a person capable of making himself responsible for its payment; that he shall, if applied to for that purpose, express in writing upon the Bill an undertaking to pay it when it shall become payable, and that he shall then pay it; and subjects the drawer, on a failure in any of these particulars, to an action at the suit of the payee or holder. The making of a Note is an express engagement of the payee or person to whom it shall be transferred, to pay the money mentioned therein, according to its tenor." And again, in ch. 5, § 3, p. 169, (5th edit.):—"The indorsement of a Bill or Note implies an undertaking from the indorser to the person in whose favor it is made, and to every other person to whom the Bill or Note may afterwards be transferred, exactly similar to that which is implied by drawing a Bill; except that in the case of a Note, the stipu-

Law, with some not very important distinctions, imports similar obligations on the part of the payee, and every

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lations with respect to the drawer's responsibility and undertaking do not apply; and a transfer by delivery only, if made on account of an antecedent debt, implies a similar undertaking from the person making it, to the person in whose favor it is made. And a transfer by delivery, where the Bill or Note is sold, may imply that it is a genuine Bill. An indorsement is no warranty, that the prior indorsements are genuine. At least it is not, in the case of a person who has the same means of judging as the indorser and who uses those means and judges for himself." Is not there a mistake in this last passage of ' drawer's," and should it not be drawee's?" Mr. Chitty seems to think otherwise; but I think, that the authorities cited by him do not support him. His language is: —" It has been contended, that an indorsement is equivalent to a warranty, that the prior indorsements were made by persons having competent authority. But the Court seemed to deny that doctrine; and, though an indorsement admits all prior indorsements to have been, in fact, duly made, yet an indorser, by his indorsement, merely engages, that the drawee will pay, or, that he, the indorser, will, on his default, and due notice thereof, pay the same, and which is the extent and limit of his implied contract." Chitty on Bills, ch. 6, p. 266, (8th edit. 1833.) He cites East India Company *v.* Tritton, 3 Barn. & Cressw. 280, and the opinion of Chambre, J. in Smith *v.* Mercer, 6 Taunt. R. 83. The former case was decided upon an independent ground, that the party accepted the Bill, with a knowledge of what the agent's authority was, and mistook its legal effect. The latter turned upon the point, that the Bill was paid by the plaintiff, as agent of the supposed acceptor, whose acceptance was forged; and both parties were equally innocent; and the plaintiff's name was not on the Bill. In Bayley on Bills, ch. 5, p. 170, (5th edit. 1833,) it is laid down, that " An indorsement is no warranty, that the prior indorsements are genuine." But for this position, the sole reliance is on the case of the East India Company *v.* Tritton. In the case of Jones *v.* Ryde, 5 Taunt. R. 488, there was a forgery, by altering the Bill from £800 to £1800. The Court held, that the plaintiff, who had sold the Bill as one for £1800, and who had paid the amount of the difference to his vendee, (1000,) was entitled to recover, from his own vendor, the like amount. In Lambert *v.* Pack, 1 Salk. 127; Critchlow *v.* Parry, 2 Camp. 182; Free *v.* Hawkins, Holt, N. P. R. 550, it was decided, that an indorsement admitted the signatures of the drawer and other indorsers. If so, does it not necessarily admit the genuineness thereof? See Chitty on Bills, Pt. 2, ch. 5, p. 635, 636, (8th edit. 1833.) In the French Law, Pardessus says, that the indorser warrants, with the other persons whose names are on the Bill, the genuineness of the Bill, (la vérité de la Lettre.) Pardessus, Droit Comm. Tom. 2, art. 347. Mr. Chief Justice Marshall, in his opinion in the great case of Ogden *v.* Saunders, subsequent indorsee, to the holder; and, indeed, it declares all the parties thereto, whether makers or indorsers, jointly and severally bound (*in solido*) as guarantors or sureties to the holder for the due payment of the Note.[1]

(12 Wheat, R. 213, 341,) has expounded, in a masterly manner, the true foundation of the implications resulting by law from the drawing and indorsing of negotiable instruments. He says: "The liability of the drawer of a Bill of Exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the Bill is drawn, and promises, that it shall be returned by the drawee. If the drawee fail to pay the Bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise, that the Bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing; and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C. for value received. The Bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect that his promise will be performed. He has also a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his Bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it. A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed every thing that is to be done by either."

[1] Code de Comm. art. 141, 187; Pardessus, Droit Comm. Tom. 2, art. 347; Pothier, De Change, n. 61–63.

§ 136. Similar obligations exist, by the foreign law, between the indorser and every subsequent holder of a Promissory Note, as exist between the drawer and the payee of a Bill of Exchange. Thus, Heineccius says: *Is, qui cambium alicui ita cessit, ut valutam a cessionario receperit, huic omnino semper obligatus est, adeoque cessionarius vel indossatarius actionem habet adversus indossantem ad recuperandam sortem, proxeneticum, damna, et impensas, modo protestationem rite interposuerit.*[1]

§ 137. One consequence of the doctrine, that by a blank indorsement the Note will pass from and by mere delivery, is, that, if the Note is transmitted to an agent for the purpose of collection or negotiation, he may either fill up the blank, and make it payable to himself or he may fill it up as agent of his principal, in the name of a third person. In the former case, he may sue, as owner, upon the Note, or transfer it to a third person. In the latter, the indorsee will take it without any reponsibility whatever of the agent.[2] Another consequence of this doctrine is, that, if the Note should, after such blank indorsement, be lost, or stolen, or fraudulently misapplied, any person, who should subsequently become the holder of it, *bona fide*, for a valuable consideration, without notice, would be entitled to recover the amount thereof, and hold the same against the rights of the owner at the time of the loss or theft.[3]

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1 Heinecc. de Camb. cap. 6, § 7; Story on Bills, § 116.

2 Clark *v.* Pigot, 1 Salk. R. 126; 12 Mod. 192; Story on Bills, § 198, 224.

3 Ibid.; Marston *v.* Allen, 8 Mees. & Wels. 494, 504; Bayley on Bills, ch. 5, § 2, p. 129-131, (5th edit. 1830); Anon. 1 Ld. Raym. 738, 1 Salk. R. 126; 3 Salk. R. 7; Miller *v.* Race, 1 Burr. R. 452; Grant Vaughan, 3 Burr. R. 1516; Chitty on Bills, ch. 6, p. 277, (8th edit. 1833); Id. ch. 9, p. 429; Story on Bills, § 207.

§ 138. Having thus seen what are the rights, duties, and obligations of indorsers, in cases of general indorsements, let us now proceed to the consideration of the different sorts of indorsements, and the different modes in which transfers may be made of Promissory Notes. Indorsements may be in blank, or full, general, or restrictive, qualified, conditional, or absolute.[1] An indorsement is said to be in blank, when the name of the indorser is simply written on the back of the Note, leaving a blank over it for the insertion of the name of

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[1] Mr. Chitty has placed in his text, (Chitty on Bills, ch. 6, p. 250, 251, 8th edit.) certain forms of indorsements applicable to various cases, which I here insert, as illustrative of my own text. "James Atkins," in all these forms, is supposed to be, solely, or with his partners, payee and first indorser.

MODES OR FORMS OF INDORSEMENTS AND TRANSFERS.

1. *First indorsement by drawer or payee in blank.*

"James Atkins."

2. *The like by a partner.*

"Atkins & Co."

or,

"For self and Thompson,
"James Atkins."

3. *The like by an agent.*

"Per procuration James Atkins,
"John Adams."

or,

"As agent for James Atkins,
"John Adams."

4. *Qualified indorsement to avoid personal liability,*

"James Atkins,
"*sans recours.*"

or,

"James Atkins, with intent only to transfer my interest, and not to be subject to any liability in case of non-acceptance or non-payment."

5. *Indorsement in full, or special.*

"Pay John Holloway, or order,
"James Atkins."

6. *Restrictive indorsement in favor of indorser.*

"Pay John Holloway for my use,
"James Atkins."

or,

"Pay John Holloway for my account,
"James Atkins."

7. *Restrictive indorsement in favor of indorsee, or a particular person only.*

"Pay to I. S. only,
"James Atkins."

or,

"The within must be credited to A. B.,
"James Atkins."

8. *Indorsement of a foreign Bill, dated, stating name of indorsee, and value, and* au besoin, *and* sans protêt.

"Payee La Fayette frères, ou ordre, valeur recue en argent, (*or* 'en marchandises,' *or* 'en compte,')
"James Atkins.

"A Londre,
"18th Juin, A. D. 1831.
"Au besoin chez Messrs. ——,
"Rue ——, Paris.
"Retour sans Protêt."

the indorsee, or of any subsequent holder.[1] In such a case, while the indorsement continues blank, the Note may be passed by mere delivery, exactly as if it were payable to bearer, and the indorsee, or other holder, is understood to have full authority personally to demand payment of it, or to make it payable, at his pleasure, to himself, or to any other person, or his order.[2] But he is not at liberty to write over the blank indorsement any words, which shall change the liability, created by law, upon the indorser, or at least none, which shall not be in exact conformity to the agreement under which the indorsement was made by the indorser to the indorsee.[3]

§ 139. An indorsement is said to be a full indorsement, when it mentions the name of the person, in whose favor it is made.[4] The ordinary form of a full indorsement is, "pay to A. B. or order"; but, if it be, "pay to A. B." it is deemed a general indorsement, and payable to him or his order, and the latter words may be added.[5] In order to make it restrictive, other words

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[1] Story on Bills, § 206; Bayley on Bills, ch. 5, § 1, p. 123, 124, (5th edit.)

[2] Bayley on Bills, ch. 5, § 1, p. 123, 124, (5th edit.); Story on Bills, § 207; Chitty on Bills, ch 6, p. 253, 255-257, (8th edit.); Peacock *v.* Rhodes, Doug. R. 633, 636; Marston *v.* Allen, 8 Mees. & Wels. 494, 504; 3 Kent, Comm. Lect. 44, p. 89, (5th edit.); Evans *v.* Gee, 11 Peters, R. 80; Lovell *v.* Evertson, 11 John. R. 52; Seabury *v.* Hungerford, 2 Hill, N. Y. R. 86; Hall *v.* Newcomb, 3 Hall, N. Y. R. 232; Little *v.* O'Brien, 9 Mass. R. 423; 3 Kent. Comm. Lect. 44, p. 77, (5th edit.); Cruchley *v.* Clarance, 2 Maule & Selw. 90; Atwood *v.* Griffin, Ryan & Mood. R. 423; Edie *v.* East India Co. 2 Burr. 1216.

[3] Tenney *v.* Prince, 4 Pick. 385; Central Bank *v.* Davis, 19 Pick. R. 373, 376; Nevins *v.* De Grand, 15 Mass. R. 436; Blakely *v.* Grant, 6 Mass. R. 386.

[4] Bayley on Bills, ch. 5, § 1, p. 123, (5th edit.); Chitty on Bills, ch. 6, p. 253, 257, (8th edit.)

[5] Bayley on Bills, ch. 5, § 1, p. 128, (5th edit.); Chitty on Bills, ch. 6, p. 257, 258, (8th edit.); More *v.* Manning, Com. R. 311; Story on Bills,

must be added, as, for example, (as we shall presently see,) "pay to A. B. only." When an indorsement is made in full, the indorsee can transfer his interest in it only by his own indorsement in writing thereon.[1] But, while the first indorsement remains blank, the Note, as against the maker and the first indorser, is transferable by mere delivery, notwithstanding it may have subsequent full indorsements, if not restrictive thereof.[2] But, even if the first indorsement be full, and not restrictive, and it is afterwards indorsed by the indorsee, or by any subsequent regular holder, in blank, any subsequent holder may take the same by mere delivery, and make himself the immediate indorser upon the blank indorsement, by filling up the blank in his own name.[3] It is not desirable, however, where there are successive indorsements in blank on the Note, that the holder should fill up any of the early indorsements in his own name, as he may thereby discharge the subsequent indorsers from all responsibility on the Note, unless, indeed, he should be unable, when a suit is to be brought upon the dishonor of the Note, to prove the signatures of the intermediate indorsers.[4]

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§ 206, 210; Acheson *v.* Fountain, 1 Str. R. 557; Bull. Nisi Prius, 275; Edie *v.* East India Co. 1 W. Black. R. 295; 2 Burr. 1216; Hodges *v.* Adams, 19 Vermont, R. 74.

[1] Chitty on Bills, ch. 6, p. 253, (8th edit.); Story on Bills, § 208.

[2] Bayley on Bills, ch. 5, § 1, p. 124, 125, (5th edit.); Chitty on Bills, ch. 6, p. 253, 255–257, (8th edit.); Story on Bills, § 207. See Smith *v.* Clarke, Peake, R. 225; 1 Esp. R. 180; Walker *v.* McDonald, 2 Welsby, Hurlstone & Gordon, 527.

[3] Chitty on Bills, ch. 6, p. 255, 256 (8th edit.) See Thompson *v.* Robertson, 4 John. R. 27; Story on Bills, § 207, 208.

[4] Story on Bills, § 207, § 208. — There are some advantages and some disadvantages, which practically may occur in either way. A good pleader would undoubtedly put into the declaration different counts, deducing title in different ways, according to the facts, and his means of proving them.

§ 140. By the Law of France, in order to pass a valid title to a Promissory Note, to the indorsee, or holder, it is essential, that the indorsement should be subscribed by the indorser; that it should be dated truly (and not antedated); that it should be expressed to be for value received; and that the name of the person, to whose order it is payable, should be mentioned.[1] When an indorsement contains all these particulars, it is called a regular indorsement, and the title will thereby pass to the indorsee.[2] If the indorsement be not attended with these formalities, it is called an irregular indorsement, and will only operate as a simple procuration to the indorsee, giving him authority to receive the contents.[3] A blank indorsement, therefore, is treated as an irregular indorsement, and will not transfer the property to the indorsee or holder, unless, indeed, the imperfection is cured by the indorser, before it has become the subject

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Thus, if he could prove only the signature of the first indorser, he would rely on a count stating the plaintiff to be his immediate indorsee. If he could prove all the signatures of all the indorsers, he ought to have a count in his declaration founded upon all of them. For, if the plaintiff should elect to recover upon an early blank indorsement, he might thereby discharge all the subsequent indorsers, or waive any remedy against them. This might be a serious inconvenience to him, if there should be any doubt of the insolvency of such early indorser. Great care and consideration are, therefore, necessary to be observed in all complicated cases of this sort, if the holder means to rely upon the responsibility of all the indorsers. See Bayley on Bills, ch. 11, p. 464, 467, (5th edit. 1830). See Chitty on Bills, Pt. 2, ch. 5, p. 628-631 (8th edit. 1833); Id. p. 636; Cocks *v.* Borradaile, cited Chitty on Bills, 631, note (*f*); Chaters *v.* Bell, 4 Esp. R. 210. See, also, Story on Bills, § 190.

1 Code de Comm. art. 136-139; Pothier, De Change, n. 38-40; Jousse, Sur L'Ord. 1673, tit. 5, art. 23.

2 Pardessus, Droit Comm. Tom. 2, art. 343-350; Ante, § 131.

3 Code de Comm. art. 138; Pardessus, Droit Comm. art. 343, 353-355; Chitty on Bills, ch. 6, p. 251, (8th edit. 1833); Pothier, De Change, n. 38, 39.

of some notarial or public act, or before the indorser has become incapable.[1] Still, a blank indorsement is not without effect in France; for, if the Note has been indorsed in blank, and it is then lost or stolen, and the blank is filled up in a false or forged name, and the maker should, without notice of the fact, pay the Note to the holder, he would be protected in so doing.[2] Blank indorsements seem also prohibited in many other of the continental nations of Europe. Heineccius on this subject, says: "*Nec minus notari meretur, leges cambiales tantum non omnes ob innumeras fraudes prohibere cessiones, quæ solo subscripto nomine fiunt, ac proinde vocantur* INDOSSAMENTA IN BIANCO. *Ex his ne actio quidem datur, nisi ante præsentationem nomen indossatarii ab indossante inscriptum sit.*"[3]

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1 Pardessus, Droit Comm. Tom. 2, art. 353, 354; Pothier, De Change, n. 41; Trimbey *v.* Vignier, 1 Bing. N. Cas. 151; Ante, § 2, 42.

2 Pardessus, Droit Comm. Tom. 2, art. 446, 455; Ante, § 2, 42.

3 Heinecc. de Camb. cap. 2, § 11; Id. § 10; Story on Bills, § 205. — The remarks of Mr. Professor Mittermeier on this subject are equally philosophical and striking. "L'endossement en blanc mérite une attention particulière. Un fait digne de remarque, c'est que, nonobstant les dispositions des articles 137 et 138, il se fait en France un grand nombre d'endossements en blanc, dont les auteurs ont cependant l'intention de transférer la propriété de la Lettre de Change. En Angleterre et aux Etats Unis, les commerçants n'ont jamais élevé aucun doute sur la validité d'un endossement en blanc, et les lois des Pays-Bas et du Danemark le reconnaissent formellement comme valable. Aux termes de la nouvelle loi hongroise, un endossement complet ne peut être attaqué sous le prétexte qu'il a été donné en blanc et rempli ensuite. La loi du royaume de Saxe, en date du 18 Juillet, 1840, reconnaît également la validité de l'endossement en blanc. D'après le projet préparé pour le royaume de Wurtemberg, l'endossement en blanc peut être donné par la simple signature de l'endosseur, et cet endossement transmet la propriété de la Lettre de Change. Le projet autrichien admet de même la validité de cet endossement. Le projet prussien de 1838 déclare, à la vérité, que l'endossement en blanc ne vaut que comme procuration; mais les rédacteurs des motifs annexés à ce projet ajoutent que plusieurs corporations de commerçants ont fait remarquer que les endossements en blanc sont indispensables au

§ 141. An indorsement is said to be general, or absolute, when it is in blank, or filled up payable to the

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commerce; que souvent ils sont employés pour mettre en gage une Lettre de Change avant l'échéance; et qu'on peut admettre comme règle que le signataire de l'endossement en blanc entend donner au porteur le droit de le remplier. Lors de la réception du Code de Commerce français dans le grand-duché de Bade, le législateur a fait une addition à l'article 138, portant défense au porteur d'un endossement en blanc, de le remplir. Cet exposé comparatif des diverses législations en matière d'endossements en blanc, porte à conclure qu'il y a toujours imprudence ou légèreté de la part du législateur, lorsqu'il néglige d'appeler à son aide l'expérience des hommes pratiques et qui ont pu, dans l'usage quotidien, apprécier le mérite et les inconvénients d'une disposition. On ne saurait douter que déjà à une époque reculée, et aussitôt que l'institution des endossements eut pris quelques développements, les endossements en blanc n'aient été d'un usage général dans les grandes villes de commerce, parce que cette forme d'endossement était conforme à la véritable nature de la Lettre de Change, qui est de former un titre susceptible d'une circulation rapide et analogue à celle du papier-monnaie. La proscription des endossements en blanc, ou la disposition qu'ils ne vaudront que comme procuration, est le résultat, d'une part, de l'application, à la Lettre de Change, des principes relatifs à la cession et à la nécessité de justifier de la propriété du titre; d'autre part de la crainte des abus et dangers auxquels les endossements en blanc peuvent donner lieu. Le législateur oublia que l'intérêt des relations commerciales exige l'application d'endossements en blanc, et que ces endossements font accroître le crédit de la Lettre de Change; en effet, par ce moyen, celle-ci obtient une circulation plus rapide, puisque les personnes par les mains desquelles elle passe par l'effet d'endossements en blanc ne se soumettent pas à l'obligation de garantie et sont, par suite, plus disposées à entrer dans les opérations de change. Celui qui fait escompter en blanc une Lettre de Change en conserve la propriété, et les périls sont à ses risques; tandis que si l'endossement était rempli, les périls éventuels seraient aux risques de l'escompteur. Ainsi s'explique pourquoi les auteurs qui se sont pénétrés des véritables besoins du droit de change, par exemple M. Einert, insistent sur la nécessité de maintenir l'endossement en blanc. En France, nonobstant les dispositions qui considèrent cet endossement comme une simple procuration, en lui refusant l'effet d'opérer le transport de la propriété, il est d'un usage général, d'après le témoignage de tous les auteurs, et sans qu'on l'emploie dans un but de fraude; des jurisconsultes estimables, par exemple M. Horson, reconnaissent que l'usage du commerce a dérogé à la loi. La jurisprudence des tribunaux français s'est déclarée en faveur de l'usage; car elle admet que l'endossement en blanc produit les effets d'un endossement parfait, lorsque le porteur justifie qu'il indorsee or his order, without any restrictive or qualifying or conditional words. An indorsement is restrict-

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en a fourni la valeur, et que le porteur d'un endossement en blanc peut transférer valablement à un tiers la propriété de la Lettre de Change. En examinant, sous le rapport législatif, s'il y a lieu ou non d'admettre l'endossement en blanc, on a ordinairement confondu deux questions distinctes; celle de savoir si le porteur peut être contrait de se contenter de cet endossement, et celle de savior si la loi doit sanctionner la convention des contractants qui sont d'accord d'employer cette espèce d'endossement? Il faut répondre négativement à la première question, et affirmativement à la seconde. A la vérité, le préjudice dont le détenteur d'un endossement en blanc est menacé, peut déterminer un négociant à refuser de s'en charger; mais la possibilité de ce préjudice possible ne saurait engager le législateur à interdire un usage qui, depuis des siècles, a offert des advantages aux commerçants; il doit s'abstenir d'autant plus de prononcer une prohibition, qu'elle peut être plus facilement éludée. En effet, souvent le détenteur d'un endossement en blanc le remplit avant d'en faire usage, et on ne saurait lui défendre d'operer ce complement. A Leipzig, où la loi avait généralement interdit l'endossement en blanc, l'usage s'en conserva cependant, et une jurisprudence bien entendue reconnut au porteur le droit de remplir cet endossement. Nous ajouterons une dernière considération. Si le législateur veut être conséquent, il ne doit point s'arrêter à moitié chemin; il ne doit point se borner à reconnaître la validité de l'endossement en blanc dans le cas où il aurait été rempli plus tard; il doit également statuer sur la question de savoir à qui appartient le droit de remplir l'endossement. En effet, si l'on exige que ce complément ne puisse être effectué que par l'endosseur lui-même, auteur de l'endossement en blanc, il sera souvent impossible de satisfaire à cette prescription. Ainsi, lorsqu'un négociant de Paris reçoit, le 15 août, de son correspondant de New-York une Lettre de Change payable à Lyon le 1er Septembre, il y impossibilité de renvoyer l'effet aux Etats-Unis pour remplir l'endossement. Si l'on se borne à exiger d'une manière absolue que l'endossement soit rempli, on accorde par là même au porteur le droit de le remplir; mais dès que ce droit existe, la prescription de la loi ne produira aucun effet, et on ouvrira la porte à des faits illicites. Dans cet état de choses, le législateur devra tout simplement abandonner au libre arbitre du commerçant la faculté d'employer l'endossement en blanc, et de l'accepter comme valable, s'l lui est présenté." Fœlix, Revue Etrang. et Franç. Tom. 8, (1841,) p. 116-121. See also, Nouguier, Des Lettres de Change, Tom. 1 p. 273, 274, cited Ante, § 42, note; Id. Tom. 1, p. 279-285. The same learned author says, that indorsements in blank were first introduced into France at the commencement of the 18th century. Nouguier, Tom. p. 296.

ive, when it is either expressly restrained to the payment of the Note to a particular person only, or for a particular purpose, or is made in favor of a person who cannot make a transfer thereof to another.[1]

§ 142. The payee, or indorsee, having the absolute property in the Bill, and the right of disposing of it, has the power of limiting the payment to whom he pleases, and also the purpose, to which the payment shall be applied; and thus to restrict its negotiability.[2]

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[1] Bayley on Bills, ch. 5, § 1, p. 125, (5th edit.); Chitty on Bills, ch. 6, p. 258, 259, (8th edit.); Nicholson *v.* Chapman, 1 Robinson, Louis. R. 222; Story on Bills, § 206.

[2] Mr. Chitty has remarked on this subject: "It was once thought, that although the indorser might make a restrictive indorsement, when he intended only to give a bare authority to his agent to receive payment, yet, that he could not, when the indorsement was intended to transfer the interest in the Bill to the indorsee, by any act, preclude him from assigning it over to another person, because, as it was said, the assignee purchases it for a valuable consideration, and, therefore, takes it with all its privileges, qualities, and advantages, the chief of which is its negotiability. (Edie *v.* East India Company, 2 Burr. 1226.) In a case (Bland *v.* Ryan, Peake, Addit. Cas. 39) before Lord Kenyon, he doubted, whether a Bill, indorsed in blank by A. to B., can be restrained in its negotiability by B.'s writing over A.'s indorsement, 'Pay the contents to C. or order.' In a note, the reporter has collected the cases, showing, that, in general, a restrictive indorsement may be made by a subsequent holder, after an indorsement in blank; but observes, that the recent cases do not establish the right of an indorsee in blank to write over the indorser's name, but only, that a restrictive indorsement may be made below an indorsement. But the case of Clarke *v.* Pigot (1 Salk. 126, 12 Mod. 192) seems to be an authority to prove that this may be done. It has long been settled, on the above principle, that an indorser may restrain the negotiability of a Bill, by using express words to that effect, as by indorsing it, 'Payable to J. S. only;' or by indorsing it, 'The within must be credited to J. S.' (Ancher *v.* Bank of England, Doug. R. 637; Chitty on Bills, ch. 6, p. 258, note, 8th edit. 1833,) or by any other words clearly demonstrating his intention to make a restricted and limited indorsement. But a mere omission, in the indorsement, of the words, 'or order,' will not, in any case, prevent a Bill from being negotiable, ad infinitum." Chitty on Bills, ch. 6, p. 260, 261, (8th edit. 1833). [See Soares *v.* Glyn, 8 Adolph. & Ellis, N. S. 24.]

In respect to restrictive indorsements, it is proper to observe, that, where the Bill is originally negotiable, or payable to order, an indorsement, directing payment to a particular person by name, without adding the words, "or his order," will not make it an indorsement payable to him only, and restrain the negotiation thereof; for, in all cases of indorsement, the restriction must arise by express words or necessary implication, to produce such an effect.[1] The reason is, that the direction to pay to a particular person does not necessarily import, that it shall not be paid to any other person, to whom he may indorse it; but only that it shall not pass without his indorsement.[2] So, if a Bill is indorsed, "Pay to the order of A. B.," he may not only indorse it, but he may, in his own name, sue and recover upon the same, without averring, that he has made no order.[3]

§ 143. It is not, perhaps, easy, in all cases, to assert what language will amount to a restrictive indorsement, or, in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purposes, to which the indorsement might otherwise entitle the indorsee to apply it. Where the indorsement is, "Pay to A. B.

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1 Chitty on Bills, ch. 6, p. 257, 258, (8th edit. 1833); Bayley on Bills, ch. 5, § 1, p. 128, (5th edit. 1830); More *v.* Manning, Com. R. 311; Acheson *v.* Fountain, 1 Str. R. 557; Edie *v.* East India Company, 1 Wm. Black. R. 295, 2 Burr. 1216; Story on Bills, § 210.

2 Ibid.

3 Ibid.; Fisher *v.* Pomfrett, Carth. R. 403; Smith *v.* McClure, 5 East, R. 476; Story on Bills, § 19, 56. Heineccius informs us, that the law is different in Germany; for, in the like case, A. B. has no right to receive payment, but can only indorse it. "Quin aliquando et invitus alii cambium cedere tenetur, si illi inest clausula, der Herr zahle an Titii Ordre. Tunc enim Titio solvi non protest, sed ejus indossatario." Heinecc. de Camb. cap. 2, § 8; Story on Bills, § 19, 56, 206, note.

only," there the word "only" makes it clearly restrictive, and does not authorize a payment or indorsement to any other party.[1] So, if a Bill should be indorsed, "The within to be credited to A. B.,"[2] or "Pay the within to A. B. for my use,"[3] or, "Pay the within to A. B. for the use of C. D.,"[4] it would be deemed a restrictive indorsement, so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the Bill may be negotiated by the indorsee, yet every subsequent holder must receive the money, subject to the original designated appropriation thereof; and, if he voluntarily assents to, or aids in, any other appropriation, it will be a wrongful conversion thereof, for which he will be responsible.[5]

§ 144. The French Law, in like manner, recognizes the right of the indorser to make a restrictive indorsement. This is usually done by a direction, "Pay on my account to such a one" (*Pour moi paierez à un tel*); in which case, the payment can be made only to the person designated.[6] If it is intended to clothe the party with authority to procure payment through any

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1 Chitty on Bills, ch. 6, p. 258-261, 263, 264, (8th edit. 1833); Ancher *v.* Bank of England, Doug. R. 637, 638; Bayley on Bills, ch. 5, § 1, p. 125, 126 (5th edit. 1830); Edie *v.* East India Company, 2 Burr. 1216, 1227; Power *v.* Finnie, 4 Call. R. 411; 1 Bell, Comm. B. 3, § 4, p. 401, 402, (5th edit.)

2 Ibid.; Ancher *v.* Bank of England, Doug. R. 615, 637.

3 Ibid.; Sigourney *v.* Lloyd, 8 Barn. & Cressw. 622, 5 Bing. R. 525, 3 Younge & Jerv. 299; Wilson *v.* Holmes, 5 Mass. R. 543; Savage *v.* Merle, 5 Pick. R. 85.

4 Ibid.; Treuttel *v.* Barandon, 8 Taunt. R. 100.

5 Ibid.; Sigourney *v.* Lloyd, 3 Younge & Jerv. 229; Bayley on Bills, ch. 5, § 1, p. 128, 129, (5th edit. 1830); Story on Bills, § 211.

6 Pothier, De Change, n. 23, 42, 89; Pardessus, Droit Comm. Tom. 2, § 348; Merlin, Répertoire, *Endossement*.

other person, then the words are added, "or to his order" (*ou à son ordre*); and in that event, and in that only, the Bill may be negotiated to a third person, but still for the use of the indorser.[1] Heineccius informs us, that a like difference in the mode of making indorsements prevails in Germany, in order to accomplish the like purposes. "*Id vero præcipue observandum, Cambia cedi vel indossari bifariam. Aut enim ita improprie fit cessio, ut alter procurator indossantis fiat in rem alienam, quod fit formula, vor mich an Herrn Javolenus, soll mir gute Zahlung seyn, vel, es soll mir validiren; aut cessio est vera et propria, eum in finem facta, ut cessionarius fiat dominus cambii, quod fit formula, vor mich an Herrn Javolenus, Valuta von demselben. Prior indossatarius, quia tantum procurator est, cambium alterius indossare nequit; huic autem regulariter id est integrum. Unde sæpe sex vel plures cessiones dorso cambii inscriptæ leguntur, quale cambium tunc vocari solet ein Giro, vel, ein girirter Wechsel.*"[2]

§ 145. But, although restrictive indorsements are thus clearly allowed, both by our law and the foreign law, still, as they necessarily tend to impair the negotiability of Bills of Exchange, an intention to create such a restriction will not be presumed from equivocal language, and especially where it otherwise admits of a satisfactory interpretation. Thus, for example, an indorsement, "Pay the contents to A. B., being part of the consideration on a certain deed of assignment executed by the said A. B. to the indorser and others," has been held not to be restrictive.[3] So, where a Bill was

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[1] Pothier, ibid. See Pardessus, Tom. 2, art. 353–355.

[2] Heinecc. de Camb. cap. 2, § 10; Id. § 19; Story on Bills, § 212.

[3] Potts *v.* Reed, 6 Esp. R. 57; Bayley on Bills, ch. 5, § 1, p. 127, (5th edit. 1830); Chitty on Bills, ch. 6, p. 259, 260, (8th edit. 1833.)

made payable to A. and B. or bearer, and the name of their bankers was written across it, and afterwards A. transferred the check, on his own account, to another banker, it was held that the transfer to the latter was good, unless, by the common understanding of bankers, there was information of a special appropriation of the check to the bankers of A. and B.[1]

§ 146. A qualified indorsement differs from a restrictive indorsement in this, that whereas the latter restrains the negotiability of the instrument to a particular person or purpose, the former in no respect affects the negotiability of the instrument, but simply qualifies the duties, obligations, and responsibilities of the indorser, resulting from the general principles of law. Thus, for example, an indorsement of a Note to A., "without recourse," or "at his own risk," will not restrain the negotiability of the Note; but will simply exclude any responsibility of the indorser, on the non-acceptance or non-payment thereof.[2] Neither will an indorsement to A. "or order, for my use," restrain its negotiability, although the indorsee must take it, subject

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[1] Stewart *v.* Lee, 1 Mood. & Malk. 158; Chitty on Bills, ch. 6, p. 260, (8th edit. 1833); Bayley on Bills, ch. 8, p. 324 (5th edit. 1830); Story on Bills, § 210–213.

[2] Rice *v.* Stearns, 3 Mass. R. 225; Chitty on Bills, ch. 6, p. 251, 254, 261, (8th edit. 1833); Id. p. 37; Pike *v.* Street, 1 Mood. & Malk. 226; Goupy *v.* Harden, 7 Taunt. R. 159, 162; Welch *v.* Lindo, 7 Cranch, 159; Pardessus, Droit Comm. Tom. 2, art. 348; 3 Kent, Comm. Lect. 44, p. 92, 93, (4th edit.); Pothier, De Change, n. 42, 89. In Mott *v.* Hicks, 1 Cowen, R. 513, where a Note was payable to A. B. or order, A. B. indorsed it thus, "A. B. agent." It was held by the Court, that this was a restrictive or qualified indorsement, and exempted A. B. from all personal responsibility on the Note; and was equivalent to writing over it, that it was at the risk of the indorsee. But, quære, if this case can be supported at law. See Story on Agency, § 154, 159, 276, and cases there cited.

to my use.[1] And, *a fortiori*, an indorsement expressive of the consideration, for which the indorsement is made, will not restrain the negotiability; as, for example, an indorsement, "Pay the contents to A. B., being part payment of goods sold by him to me, or being in full of debt due to him by me."[2] [And the addition of the word "surety" or "security," by the indorsers of a Note, to their names, will not divest them of their character as indorsers, but will operate to give them the privileges of sureties in addition to their rights as indorsers.][3]

§ 147. And not only may the indorser by his indorsement qualify and restrain his own liability; but he may also, if he chooses, enlarge his ordinary responsibility as indorser. We have already seen, that the obligation created by law, in cases of indorsement, is conditional, and requires the holder to make due demand, and give due notice to the indorser of the non-payment of the Note; and, if he omits so to do, the indorser is discharged.[4] But an indorser may absolutely guarantee the payment of the Note in all events, and dispense with any such due demand or notice.[5] In such a case, there is no rea-

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[1] Story on Bills, § 211; Bayley on Bills, ch. 5, § 1, p. 128, 129, 134, (5th edit. 1830); Evans *v.* Cramlington, Carth. R. 5; 2 Vent. 307; Skinn. R. 264; Treuttel *v.* Barandon, 8 Taunt. R. 100.

[2] Potts *v.* Reed, 6 Esp. R. 57; Bayley on Bills, ch. 5, § 1, p. 127 (5th edit. 1830); Story on Bills, § 214.

[3] Bradford *v.* Corey, 5 Barbour, Sup. Ct. R. 461.

[4] Ante, § 135; Story on Bills, § 107–109.

[5] Upham *v.* Prince, 12 Mass. R. 14; Partridge *v.* Davis, 20 Vermont, R. 500. Post, § 465. But see contrà, Taylor *v.* Binney, 7 Mass. R. 479; Canfield *v.* Vaughan, 8 Martin, R. 682; Allen *v.* Rightmere, 20 John. R. 365; Ketchell *v.* Burns, 24 Wend. R. 456. I am aware, that some doubt may exist upon this point, although it appears to me, that the true principle is as stated in the text. The true import of such a guaranty seems to me to be, that the payee means to say, I indorse and transfer this Bill

son to infer, that the indorser means to restrain the further negotiability of the Note, even if he does mean to

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to you, and I agree absolutely to pay the same, if not paid by the acceptor, and waive my general rights as indorser, and claim only such demand and notice as a guarantor might have. In Taylor *v.* Binney, 7 Mass. R. 479, the Note was payable to A. B. or order; and after the Note became due, and remained unpaid, A. B. indorsed it, as follows; "Dec'r 13, 1805. I guaranty the payment of the within Note, in 18 months, provided it cannot be collected of the promisor before that time." A. B. then passed the Note, with this indorsement, to a third person, who passed it, without his own indorsement, to the plaintiff, who sued the indorser. The Court held the action not maintainable. There were many special circumstances in the case. Mr. Justice Sewall, in delivering the opinion of the Court, said; "In the case at bar, the plaintiff relies on an indorsement, which is not blank in the form of it, but completed by the indorser himself. The Note, with the words of the payee in his indorsement, are to be construed together as one written instrument. The special guaranty, expressed in that indorsement, is the whole ground, upon which the present action against this defendant can be maintained; and the plaintiff does not rely upon any implied responsibility, resulting from the indorsement in the common form. If this indorsement, in the whole tenor of it, may be construed to be, not only a guaranty, but also a transfer and assignment of the Note, which seems to have been the intention and understanding of the parties, the principal objection to the title of the plaintiff remains in force. There is no name inserted of the party to be entitled by the indorsement; and, if this omission might be supplied by extraneous evidence, the facts proved in the case render it certain, that the present plaintiff was not the party to the guaranty or assignment, when it was made; and no evidence has been offered of any subsequent privity or assent between him and the defendant. But the argument of the plaintiff is, that the omission of the name of the indorsee is evidence of an intention in the defendant and the other immediate party, whoever he was, to give an unlimited currency to this Note, and to accompany it with the collateral promise of the payee; according to the usage and construction, in ordinary cases, of blank indorsements upon negotiable Bills or Notes. But, in the case at bar, there is no necessary implication to this effect, arising from the circumstance of the omission of the name of the indorsee or party to the guaranty. This may have been a mistake or accident. The negotiation was not upon the credit of the original promisor, but wholly upon the final responsibility of the indorser; the ability of the promisor, considering the whole tenor of this indorsement, remaining at his risk; and the assignment seems to be rather a confidence for the collection of the Note, than an absolute transfer of the property. The guaranty, taken independently of the Note, is a promise restrain the effect of the guaranty to his immediate indorsee.[1] And, if the indorsement is either without the

not negotiable, being conditional, and not absolute; and, connected with it, the supposition is altogether unreasonable and improbable, of an unlimited currency intended for the Note itself, at the risk of the indorser. The plaintiff fails, therefore, in the evidence necessary to his title, even admitting the usage cited, respecting Notes indorsed in blank, to have any application, where the indorsement is full and restrictive, and not at all in the form of a blank indorsement, unless in the mere circumstance of omitting the name of the indorsee." In Upham *v.* Prince, 12 Mass. R. 14, the Note was payable to A. B. or order, on demand; A. B. indorsed the Note, "I guaranty the payment of this Note within six months;" and it was then transferred to C. D., who transferred it to the plaintiff. The Note not being paid at the end of the six months, the plaintiff brought a suit thereon against A. B. The Court, upon that occasion, said; "Whatever effect such a writing on the back of a Note might legally have, beyond that of an assignment of the Note, we do not think it necessary to decide. But we are all of opinion, that the Note did not lose its negotiability by this special indorsement, any more than it would, if it had been indorsed with the words, 'without recurrence to the indorser,' which is a common form of indorsement, where the indorser does not intend to remain liable. The defendant's engagement amounts to a promise, that the Note should, at all events, be paid within six months. Now, this promise may not be assignable in law; and yet the Note itself may be assignable by the party, to whom it was so transferred, so that, upon non-payment of it by the promisor, the holder would have a right of action against Prince, as indorser. A demand was made upon the promisor within a short time after the date of the Note; and notice was given to the indorser, as soon as he returned to this country, he being absent during the whole of the six months the Note was to run. It does not appear, that he had any dwelling-house or place of business here while he was absent, so that a call upon him, as soon as he returned, was all that could be done or required. We think, upon the facts agreed, that the defendant must be called." This last decision seems to me to contain the true doctrine; and it is not easy to perceive what reasonable objection lies to it. The indorsement amounts, in legal effect, to an agreement to be bound as indorser for six months, and that a demand need not be made upon the maker of the Note for payment at an earlier period. It is, therefore, a mere waiver of the ordinary rule of the law, as to reasonable demand and notice upon Notes payable on demand. Myrick *v.* Hasey, 14 Shepley, R. 9. See, as to guaranty of Bills, Pothier, De Change, n. 26, 50, 122, 123; Code de Comm. de l'Aval, art. 141, 142; Pardessus, Droit Comm. Tom. 1, art.

[1] Ibid.

name of any person, to whom it is indorsed, but a blank is left for the name, or if the Note is indorsed to a person or his order, or to the bearer, with such guaranty, there is certainly strong reason to contend, that he means to give the benefit of the guaranty to every subsequent holder;[1] and, at all events, such a holder has a right to hold him as indorser of the Note, as he has left its negotiability unrestrained.[2]

§ 148. Sometimes the indorsement contains a written agreement to dispense with any demand upon the maker, or with notice of the dishonor, if the Note is not duly paid. In such cases, the indorser will be liable thereon, not only to his immediate indorsee, but to every subsequent holder; for the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement.[3] And this proceeds upon the just maxim, *Quilibet potest renunciare juri pro se introducto.*[4] But where the agreement is not on the face of the

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351, 394–399; Chitty on Bills, ch. 6, p. 272, 273, (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 90, note (*d*), (4th edit.); Ketchell *v.* Burns, 24 Wend. R. 456.

[1] See on this point, Miller *v.* Gaston, 2 Hill, N. Y. R. 188; McLaren *v.* Watson, 26 Wend. R. 425; Story on Bills, § 372, and note; Id. § 455–458, and notes; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233.

[2] Upham *v.* Prince, 12 Mass. R. 14. Partridge *v.* Davis, 20 Vermont, R. 500. See Blakely *v.* Grant, 6 Mass. R. 386; Ketchell *v.* Burns, 24 Wend. R. 456; Allen *v.* Rightmere, 20 John. R. 365. But see, contrà, Taylor *v.* Binney, 7 Mass. 479; Canfield *v.* Vaughan, 8 Martin, R. 682. See, also, Lamourieux *v.* Hewit, 5 Wend. R. 307; Story on Bills, § 215.

[3] Fuller *v.* McDonald, 8 Greenl. R. 215; Lane *v.* Steward, 2 Appleton, R. 98; Story on Bills, § 317, 320, 371; Berkshire Bank *v.* Jones, 6 Mass. R. 524.

[4] 2 Co. Inst. 183; Wingate, Maxims, 483; Norton *v.* Lewis, 2 Connect. R. 478; Leonard *v.* Gary, 10 Wend. R. 504; Taunton Bank *v.* Richardson, 5 Pick. 436. But see Chitty on Bills, ch. 10, p. 483, 484, (8th edit. 1833); Central Bank *v.* Davis, 19 Pick. 373, 375; Andrews *v.* Boyd, 3 Metc. R. 434. Some of the cases upon this subject stand upon very nice

indorsement, but is merely oral between the indorser and his immediate indorsee, the effect would seem to be limited to the immediate parties; and even here doubts have been entertained, whether the evidence is admissible between them, since it has been thought to vary and control the ordinary obligations of an indorsement.[1] These doubts, however, have been overcome in America; and the doctrine is established, that such evidence is admissible.[2]

§ 149. A conditional indorsement is one, which involves some fact or event, upon the occurrence of which

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grounds, and are not, perhaps, always easily reconcilable with the general principle here stated. In Free *v.* Hawkins, 8 Taunt. R. 92, it was held, that evidence of a parol agreement between the holder and the indorser of a Promissory Note, at the time of making and indorsing it, that payment should not be demanded of the maker of the Note, at the time, when it became due, nor until after the sale of certain estates of the maker, was held inadmissible, because it controlled and varied the legal obligations of the indorser. Chitty on Bills, ch. 10, p. 483, (8th edit. 1833); Bayley on Bills, ch. 12, p. 491, 492, (5th edit. 1830.) The same point was, in effect, adjudged in Woodbridge *v.* Spooner, 3 Barn. & Ald. 233; Rawson *v.* Walker, 1 Stark. R. 361; Hoare *v.* Graham, 3 Camp. R. 57; Bank of United States *v.* Dunn, 6 Peters, R. 51; Spring *v.* Lovett, 11 Pick. R. 417; Trustees in Hanson *v.* Stetson, 5 Pick. R. 506. But there is some difficulty in reconciling this doctrine with that promulgated by the Supreme Court of the United States, in the case of Renner *v.* Bank of Columbia, 9 Wheat. R. 581. But parol evidence of a bargain, after a Note or Bill has been given or transferred, may be admissible to establish a waiver of notice, or a valid agreement to postpone payment, if founded on a sufficient consideration. Bayley on Bills, ch. 12, p. 493, (5th edit. 1830); Hoare *v.* Graham, 3 Camp. R. 57; Gibbon *v.* Scott, 2 Stark. R. 286; Story on Bills, § 317, note; Id. § 371.

1 Free *v.* Hawkins, 8 Taunt. R. 92; Hoare *v.* Graham, 3 Camp. R. 57; Bayley on Bills, ch. 12, p. 492, 493, (5th edit.)

2 Story on Bills, § 317, and note; Id. § 371; Taunton Bank *v.* Richardson, 5 Pick. R. 436, 443; Central Bank *v.* Davis, 19 Pick. R. 373, 375; Leffingwell *v.* White, 1 John. Cas. 99; Union Bank *v.* Hyde, 6 Wheat. R. 572. But see, contrà, Chitty on Bills, ch. 10, p. 466, 485 (8th edit.); Bayley on Bills, ch. 12, p. 492, 493, (5th edit.)

the validity of the indorsement is ultimately to depend; and which is either to give effect to it, or to avoid it;[1] and it may be either a condition precedent, or a condition subsequent. If it be a condition precedent, which is to give it validity, then, upon the occurrence of the fact or event, the title of the indorsee becomes absolute; if it be a condition subsequent, which is to avoid it, then the title of the indorsee, upon the occurrence of the fact or event, becomes void, or is defeated.[2] A condition attached to an indorsement has a very different operation from that attached to the original formation of the Note. In the latter case, as we have seen,[3] the instrument loses its character as a Promissory Note, and is not negotiable. But, in the former case, neither the original character of the Note, nor its negotiability, is controlled by the condition; and the only effect is to subject the title of the indorsee to its full operation.[4] If, therefore, the condition of the indorsement be precedent, until it is fulfilled, no title passes to the indorsee; if it be a condition subsequent, then, when fulfilled, his title is defeated.[5] And, of course, in each case, every subsequent holder takes the title subject to the same stipulations.[6] Thus, for example, if an indorsement on

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[1] Story on Bills, § 206.
[2] Chitty on Bills, ch. 6, 261, (8th edit.)
[3] Ante, § 22.
[4] Thomson on Bills, ch. 3, § 2, p. 275, 276, (2d edit.); Bayley on Bills, ch. 5, § 1, p. 126, (5th edit.); Chitty on Bills, ch. 6, p. 201 (8th edit.); Tappan *v.* Ely, 15 Wend. R. 362. See Blakely *v.* Grant, 6 Mass. R. 386; Upham *v.* Prince, 12 Mass. R. 14. But see Taylor *v.* Binney, 7 Mass. R. 479; Canfield *v.* Vaughan, 8 Martin, Louis. R. 682.
[5] Story on Bills, § 217; Bayley on Bills, ch. 5, § 1, p. 126, (5th edit.); Chitty on Bills, ch. 6, p. 261, (8th edit.); Wright *v.* Hay, 2 Stark. R. 398.
[6] Ibid.; Tappan *v.* Ely, 15 Wend. R. 362.

a Promissory Note be made, "Pay the contents to A. B. on my being gazetted ensign within two months," there, if the indorser is not so gazetted within the time, the title of the indorsee, and of every subsequent holder, becomes void, and the right thereto reverts to the original indorser.[1] On the other hand, if he is so gazetted within the time, then the title is absolute and irrevocable.[2] So, if a Note be indorsed, "Pay to A. B. or order, if he arrives at twenty-one years of age," or, "if he is living when it becomes due," is a conditional indorsement of the like nature, upon a condition precedent. On the other hand, if a Note be indorsed, "Pay to A. B. or order, unless, before payment, I give you notice to the contrary," or, "unless I pay him a debt, which I owe him, before the Note becomes due," is an indorsement upon a condition subsequent.

§ 150. The French Law, like ours, admits of restrictive, qualified, and conditional indorsements, and gives them full effect.[3] But that law, like ours, requires that the restriction, qualification, or condition, should appear on the face of the instrument, or, at least, should be known to the subsequent holder, otherwise it will not bind him.[4]

§ 151. There is no limit to the number of successive indorsements which may be made upon a Promissory

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[1] Bayley on Bills, ch. 5, § 1, p. 126, (5th edit.); Chitty on Bills, ch. 6, p. 261, (8th edit.); Robertson *v.* Kensington, 4 Taunt. R. 30; Thomson on Bills, ch. 3, § 2, p. 274, (2d edit.)

[2] Ibid.

[3] Pardessus, Droit Comm. Tom. 2, art. 341, 348.

[4] Pardessus, Droit Comm. Tom. 2, art. 341, 348; Bayley on Bills, ch. 5, § 1, p. 125-129 (5th edit.); Chitty on Bills, ch. 5, p. 161-164, (8th edit.); Hoare *v.* Graham, 3 Camp. R. 57.

Note; and if they cannot all be written on the Note itself, a paper may be annexed thereto, which is called, in France, *Alonge*,[1] on which the latter indorsements may be written, and which will be deemed a part of the Note, and of the same obligation as if written upon the Note itself.[2] Sometimes a Note, which has been indorsed by a prior indorser, comes back to him by re-indorsement in the course of business. In such a case, he will be reinstated in his original rights in the Note; but he will ordinarily have no claim upon any of the indorsers, subsequent to his own name. Peculiar circumstances may exist, which may vary the general rule; but then the party would not claim strictly in his character as a regular party to the Note, but upon the special contract growing out of the circumstances.[3]

§ 152. By our law, no particular form is prescribed, in which an indorsement on a Promissory Note is required to be made, the mere signature being of itself, (as we have seen,[4]) in general, sufficient; and, indeed, this (as has been justly observed) is the most concise mode of transferring an interest, or creating a contract, which could be invented, where the transfer is intended to be general and absolute, and the liabilities of the indorser precisely those which arise by law from the

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1 Story on Bills, § 204; Ante, § 121.

2 Chitty on Bills, ch. 6, p. 262, (8th edit. 1833); Story on Bills, § 204; Pardessus, Droit Comm. Tom. 2, art. 343; Pothier, De Change, n. 24; Folger *v.* Chase, 18 Pick. R. 63.

3 Chitty on Bills, ch. 2. p. 29, 30, (8th edit. 1833); Id. ch. 4, p. 239; Bishop *v.* Hayward, 4 Term R. 470; Britten *v.* Webb, 2 Barn. & Cressw. 483; Bayley on Bills, ch 9, p. 329-331, 388, (5th edit. 1830); Story on Bills, § 218.

4 Ante, § 121.

nature of an indorsement.[1] And, although the term indorsement, strictly speaking, seems to import a writing on the back of the Note itself; yet it is well established, that it may be made on the face of the Note;[2] and, as we have just seen, by a paper annexed thereto, (*une alonge.*)[3] Where the payee is unable to write, he has no other alternative or resource, than to make the indorsement as a marksman, with the attestation of another person, or, which is far better, by an agent expressly authorized.[4]

§ 153. In the next place, as to the rights, duties, and obligations of the indorsee, or holder, of a negotiable Promissory Note. These have been summed up by Mr. Bayley, in a very brief and expressive manner, and in language equally applicable to Bills and Notes. He says; "The receipt of a Bill or Note implies an undertaking from the receiver, to every party to the Bill or Note, who would be entitled to bring an action on paying it, to present in proper time, the one, where necessary, for acceptance, and each for payment; to allow no extra time for payment; and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment; and a default in any of these respects will discharge such person from all responsibility on account of a non-acceptance or non-payment, and will, unless the Bill or Note were on an improper stamp, make it operate as a satisfaction of any

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1 Chitty on Bills, ch. 6, p. 253, (8th edit.); Pardessus, Droit Comm. Tom. 2, art. 343.

2 Chitty on Bills, ch. 6, p. 253, (8th edit.); Rex *v.* Bigg, 1 Str. R. 18; Yarborough *v.* Bank of England, 16 East, R. 6, 12.

3 Ante, § 150.

4 Chitty on Bills, Pt. 2, ch. 5, p. 621, (8th edit.) See also Pardessus, Droit Comm. Tom. 2, art. 343.

debt or demand for which it was given."[1] The particular mode in which these duties are to be performed will come under our examination more fully in a future part of these Commentaries. And it is only necessary here to add, that this language requires some qualification, and cannot be strictly applied to the case of an accommodation maker of a Note, or an accommodation acceptor of a Bill; for, so far as the indorsee or holder is concerned, they are to be treated exactly as if they were the primary and original debtors.

§ 154. The remarks which have been thus far made, suppose that the Promissory Notes, of which we have been speaking, are made and indorsed in the same state or country, so that no diversity exists, as to the rights, duties, and obligations springing therefrom. But a Note may be made in one country, and indorsed successively in other different states and countries, governed by different laws, and, therefore, importing different rights, duties, and obligations. Under such circumstances, it becomes important to inquire by what laws the contracts thus created are to be governed. This subject properly belongs to a treatise upon the Conflict of Laws; and having been treated at large in my Commentaries on that subject, as well as in my Commentaries on Bills of Exchange, it will be here very briefly discussed; but as the present work is designed to be independent of any other, it ought not to be wholly passed over in silence.

§ 155. The general rule, then, is, that every contract, as to its validity, nature, interpretation, and effect, is to be governed by the law of the place where it is made,

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[1] Bayley on Bills, ch. 7, § 1, p. 217, 218, (5th edit.)

and is to be executed, which is compendiously expressed, as the *Lex Loci contractûs*.[1] In the first place, then, as to the validity of contracts. Generally speaking, the validity of a contract is to be decided by the law of the place where it is made. If valid there, it is, by the general law of nations, (*jure gentium*,) held valid everywhere, by the tacit or implied consent of the parties.[2] The rule is founded, not merely in the convenience, but in the necessities, of nations; for, otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation; and the nation which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state like that in which it now exists among savage tribes, among the barbarous nations of Sumatra, and among other portions of Asia, washed by the Pacific. *Jus autem gentium* (say the Institutes of Justinian) *omni humano generi commune est; nam, usu exigente, et*

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1 Story on Conflict of Laws, § 242-244; Id. § 266-270.

2 Story on Conflict of Laws, § 242; Pearsall *v.* Dwight, 2 Mass. R. 88, 89. See Casaregis, Disc. 179, § 1, 2; Willings *v.* Consequa, 1 Peters, C. C. R. 172; 2 Kent, Comm. Lect. 39, p. 457, 458, (3d edit.); De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 228; Smith *v.* Mead, 3 Connect. R. 253; Medbury *v.* Hopkins, 3 Connect. R. 472; Houghton *v.* Page, 2 N. Hamp. R. 42; Dyer *v.* Hunt, 5 N. Hamp. R. 401; Erskine's Inst. B. 3, tit. 2, § 39-41, p. 514-516; Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 159; S. C. 4 Moore & Scott, 695; Andrews *v.* Pond, 13 Peters, R. 65; Andrews *v.* His Creditors, 11 Louis. R. 465; Story on Conflict of Laws, § 316 *a*; Bayley on Bills, ch. (A) American Edit. by Phillips & Sewall, 1836, p. 78-86; 1 Burge, Comment. on Col. and For. Law, Pt. 1, ch. 1, p. 29, 30; Whiston *v.* Stodder, 8 Martin, R. 95; Bank of U. States *v.* Donnally, 8 Peters, R. 361, 372; Wilcox *v.* Hunt, 13 Peters, R. 378, 279.

humanis necessitatibus, gentes humanæ jura quædem sibi constituerunt. Et ex hoc jure gentium, omnes pene contractus introducti sunt, ut emptio et venditio, locatio et conductio, societas, depositum mutuum, et alii innumerabiles.[1] No more forcible application can be propounded of this imperial doctrine, than to the subject of international private contracts.[2] In this, as a general principle, there seems a universal consent of all courts and all jurists, foreign or domestic.[3]

§ 156. The same rule applies, *vice versâ*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are, generally, held void and illegal every where.[4] This would seem to be a princi-

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1 Inst. Lib. 1. tit. 2, § 2.

2 2 Kent, Comm. Lect. 39, p. 454, 455, and note, (3d edit.); 10 Toullier, art. 80, note; Pardessus, Droit Comm. Tom. 5, art. 1482; Chartres *v.* Cairnes, 16 Martin, R. 1.

3 The cases which support this doctrine, are so numerous that it would be a tedious task to enumerate them. They may, generally, be found collected in the Digests of the English and American Reports, under the head of Foreign Law, or Lex Loci. The principal part of them are collected in 4 Cowen, R. 510, note; and in 2 Kent, Comm. Lect. 39, p. 457, et seq. in the notes. See also, Fonblanque on Eq. B. 5, ch. 1, § 6, note (*t*), p. 443; Brackett *v.* Norton, 4 Connect. R. 517; Medbury *v.* Hopkins, 3 Connect. R. 472; Smith *v.* Mead, 3 Connect. R. 253; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 228; Trasher *v.* Everhart, 3 Gill & John. R. 234. The foreign jurists are equally full, as any one will find, upon examining the most celebrated of every nation. They all follow the doctrine of Dumoulin. "In concernentibus contractibus, et emergentibus tempore contractûs, inspici debet locus, in quo contrahitur." Molin. Comment. ad Consuet. Paris, tit. 1, § 12, Gloss. n. 37, Tom. 1, p. 224; Story on Conflict of Laws, § 260, 300, *d.* See Bouhier, ch. 21, § 190; 2 Boullenois, Observ. 46, p. 458. Lord Brougham, in Warrender *v.* Warrender, 9 Bligh, R. 110, made some striking remarks on this subject, which are cited in Story on Conflict of Laws, § 226, *b*, note; Story on Bills, § 132.

4 Story on Conflict of Laws, § 243; Huberus, Lib. 1, tit. 3, De Con-

ple derived from the very elements of natural justice. The Code has expounded it in strong terms. *Nullum enim pactum, nullam conventionem, nullum contractum, inter eos videri volumus subsecutum, qui contrahunt, lege contrahere prohibente.*[1] If a contract be void in its origin, it seems difficult to find any principle upon which any subsequent validity can be given to it in any other country.[2]

§ 157. But there is an exception to the rule, as to the universal validity of contracts, which is, that no nation is bound to recognize or enforce any contracts, which are injurious to its own interests, or to those of its own subjects.[3] Huberus has expressed it in the following terms; *Quatenus nihil potestati aut juri alterius Imperantis jeusque civium præjudicetur;*[4] and Mr. Justice Martin still more clearly expresses it, in saying, that the exception applies to cases, in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interests, or the con-

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flictu Leg. § 3, 5; Van Reimsdyk *v.* Kane, 1 Gallis. R. 375; R. 375; Pearsall *v.* Dwight, 2 Mass. R. 88, 89; Touro *v.* Cassin, 1 Nott & McCord, R. 173; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 225; Houghton *v.* Page, 2 N. Hamp. R. 42; Dyer *v.* Hunt, 5 N. Hamp. R. 401; Van Schaick *v.* Edwards, 2 John. Cas. 355; Robinson *v.* Bland, 2 Burr. R. 1077; Burrows *v.* Jemino, 2 Str. R. 732; Alves *v.* Hodgson, 7 T. R. 241; 2 Kent, Comm. Lect. 39, p. 457, 458 (3d edit.); La Jeune Eugenie, 2 Mason, R. 459; Andrews *v.* Pond, 13 Peters, R. 65, 78.

[1] Cod. Lib. 1, tit. 14, l. 5.

[2] Story on Bills, § 134.

[3] Story on Conflict of Laws, § 244; Greenwood *v.* Curtis, 6 Mass. R. 378, 379; Blanchard *v.* Russell, 13 Mass. R. 1, 6; Whiston *v.* Stodder, 8 Martin, R. 95; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 228; Trasher *v.* Everhart, 3 Gill & John. R. 234; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 779; Story on Conflict of Laws, § 348–351; Andrews *v.* Pond, 13 Peters, R. 65, 78.

[4] Huberus, Lib. 1, tit. 3, De Conflictu Leg. § 2.

venience, of such state, or of its citizens.[1] This exception results from the consideration, that the authority of the acts and contracts done in other states, as well as the laws, by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that state; and whatever effect is attributed to them elsewhere is from comity, and not of strict right.[2] And every independent community will and ought to judge for itself, how far that comity ought to extend.[3] The reasonable limitation is, that it shall not suffer any prejudice by its comity.[4]

§ 158. Another rule, naturally flowing from, or illustrative of, that already stated, respecting the validity of contracts, is, that all the formalities, proofs, or authentications of them, which are required by the *Lex Loci*, are indispensable to their validity everywhere else.[5] And this rule seems fully established in the Common Law. Thus, if, by the laws of a country, a contract is void, unless it is written on stamped paper, it ought to be held void everywhere; for, unless it be good there, it can have no obligation in any other country.[6] It might

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[1] Whiston *v.* Stodder, 8 Martin, R. 95, 97.

[2] Story on Conflict of Laws, § 7, 8, 18, 20, 22, 23, 36.

[3] Ibid.

[4] Story on Conflict of Laws, § 25, 27, 29; Huberus, Lib. 1, tit. 3, De Conflictu Leg. § 2, 3, 5; Trasher *v.* Everhart, 3 Gill & John. R. 234; Greenwood *v.* Curtis, 6 Mass. R. 378; 2 Kent, Comm. Lect. 39, p. 457, (4th edit.); Pearsall *v.* Dwight, 2 Mass. R. 88, 89; Eunomus, Dial. 3, § 67; Story on Bills, § 135.

[5] See Story on Conflict of Laws, § 260; 1 Burge, Comment. on For. and Col. Law, Pt. ch. 1, p. 29, 30; 3 Burge, Comm. Pt. 2 ch. 20, p. 752-764; Fœlix, Conflict. des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40-51, p. 346-360; Warrender *v.* Warrender, 9 Bligh, R. 111; Story on Conflict of Laws, § 260, *a*.

[6] Alves *v.* Hodgson, 7 T. R. 237; Clegg *v.* Levy, 3 Camp. R. 166. But see Chitty on Bills, p. 143, note (8th edit.); and Wynne *v.* Jackson,

be different, if the contract had been made payable in another country; or, if the objection were, not to the validity of the contract, but merely to the admissibility

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2 Russell, R. 351; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 762. — The case of Wynne *v.* Jackson, 2 Russell, R. 351, is certainly at variance with this doctrine. It was a Bill, brought to stay proceedings at law on a suit, brought in England by the holder, against the acceptor of Bills of Exchange, made and accepted in France, and which, in an action brought in the French courts, had been held invalid, for want of a proper French stamp. The Vice-Chancellor held, "that the circumstance of the Bills being drawn in France, in such a form that the holder could not recover on them in France, was no objection to his recovering on them in an English court." This doctrine is wholly irreconcilable with that in Alves *v.* Hodgson, 7 T. R. 241, and Clegg *v.* Levy, 3 Camp. R. 166; and if by the laws of France such contracts were void, if not on stamped paper, it is equally unsupportable upon acknowledged principles. In the case of James *v.* Catherwood, 3 Dowl. & Ryl. 190, where assumpsit was brought for money lent in France, and unstamped paper receipts were produced in proof of the loan, evidence was offered to show, that, by the laws of France, such receipts required a stamp to render them valid; but it was rejected by the Court, and the receipts were admitted in evidence, upon the ground that the Courts of England could not take notice of the revenue laws of a foreign country. But this is a very insufficient ground, if the loan required such receipt and stamp to make it valid as a contract. And, if the loan was good per se, but the stamp was requisite to make the receipt good as evidence, then another question might arise, whether other proof, than that required by the law of France, was admissible, of a written contract. This case also is inconsistent with the case in 3 Camp. R. 166. Can a contract be good in any country, which is void by the law of the place where it is made, because it wants the solemnities required by that law? Would a parol contract, made in England, respecting an interest in lands, against the Statute of Frauds, be held valid elsewhere? Would any court dispense with the written evidence required upon such a contract? On a motion for a new trial, the Court refused it, Lord Chief Justice Abbott saying; "The point is too plain for argument. It has been settled, or, at at least, considered as settled, ever since the time of Lord Hardwicke, that, in a British court, we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if, in every case, in which an instrument was executed in a foreign country, we were to receive in evidence, what the law of that country was, in order to ascertain, whether the instrument was, or was not, valid." With great submission to his Lordship, this reasoning is wholly inadmissible. The law is as clearly settled, as any thing can be, that a contract, void by the law

of other proof of the contract in the foreign court,[1] where a suit is brought to enforce it; or, if the contract concerned real or immovable property, situate in another country, whose laws are different, respecting which, as we shall presently see, there is a difference of opinion among foreign jurists, although, in England and America, the rule seems firmly established, that the law *rei sitæ*, and not that of the place of the contract, is to prevail.[2]

§ 159. In the next place, as to the nature of contracts, the like rule prevails, that the *Lex Loci contractûs* is to govern.[3] By the nature of a contract is meant those qualities which properly belong to it, and by law

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of the place, where it is made, is void everywhere. Yet, in every such case, whatever may be the inconvenience, courts of law are bound to ascertain, what the foreign law is. And it would be a perfect novelty in jurisprudence to hold, that an instrument, which, for want of due solemnities in the place where it was executed, was void, should yet be valid in other countries. We can arrive at such a conclusion only by overturning well-established principles. The case alluded to, before Lord Hardwicke, was probably Boucher *v.* Lawson, (Cases T. Hard. 85; Id. 194,) which was the case of a contract between Englishmen, to be executed in England, to carry on a smuggling trade against the laws of Portugal. Lord Hardwicke said, that such a trade was not only a lawful trade in England, but very much encouraged. The case is wholly distinguishable from the present case; and from that of any contract, made in a country and to be executed there, which is invalid by its laws. A contract made in Portugal by persons domiciled there, to carry on smuggling against its laws, would, or ought to be, held void everywhere. See, also, 3 Chitty on Comm. and Manuf. ch. 2, p. 166.

1 Ludlow *v.* Van Rensselaer, 1 John. R. 93; James *v.* Catherwood, 3 Dowl. & Ryl. 190. See Clarke *v.* Cochran, 3 Martin, R. 358, 360, 361; Brown *v.* Thornton, 6 Adolp. & Ellis, R. 185; Yates *v.* Thomson, 3 Clark & Fin. R. 544.

2 Story on Conflict of Laws, § 363-373, 435-445; Fœlix, Confl. dos Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40-50, p. 345-359; Story on Bills, § 137.

3 Story on Bills, § 139.

and custom always accompany it, or inhere in it.[1] Foreign jurists are accustomed to call such qualities *Naturalia contractus.*[2] *Ea enim, quæ auctoritate legis vel consuetudinis contractum comitantur, eidem adherent, Naturalia a Doctoribus appellantur. Lex enim altera est quasi natura, et in naturam transit. Atque quoad naturalia contractuum etiam forenses statuta loci contractus observare debent.*[3] Thus, whether a contract be a personal obligation, or a real obligation; whether it be conditional or absolute; whether it be a principal, or an accessary obligation; whether it be that of principal, or of surety; whether it be of limited, or of universal operation; these are points properly belonging to the nature of the contract, and are dependent upon the law and custom of the place of the contract, whenever there are no express terms in the contract itself, which otherwise control them. By the law of some countries, there are certain joint contracts, which bind each party for the

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[1] Pothier, as well as other jurists, distinguish between the essence, the nature, and the accidents of contracts; the former includes whatever is indispensable to the constitution of it; the next, whatever is included in it, without being expressly mentioned, by operation of law, but is capable of a severance without destroying it; and the last, those things which belong to it only by express agreement. Without meaning to contest the propriety of this division, I am content to include the two former in the single word, "nature," as quite conformable to our English idiom. Cujas also adopts the same course. See Pothier, Oblig. n. 5. See, also, 2 Boullenois, Observ. 46, p. 460-462: Bayon *v.* Vavassier, 10 Martin, R. 61; Merlin, Répertoire, *Convention*, § 2, n. 6, p. 357; Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Observ. App'x, 50; 1 Boullenois, Observ. 688; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 848-851.

[2] 1 Boullenois, Observ. 23, p. 446; 2 Boullenois, Observ. 46, p. 460, 461; Voet, De Stat. § 9 ch. 10, p. 287; Id. p. 325 (edit. 1661); Hertius, De Collis. Leg. Tom. 1, § 10, p. 127; Id. p. 179, 180 (edit. 1716); Story on Conflict of Laws, 263, 301, *f.*

[3] Lauterback, Diss. 104, Pt. 3, n. 58, cited 2 Boullenois, Observ. 46, p. 460.

whole, *in solido;* and there are other joint contracts, where the parties are, under certain circumstances, bound only for several and distinct portions.[1] In each case, the law of the place of the contract regulates the nature of the contract, in the absence of any express stipulations.[2] These may, therefore, be said to constitute the nature of the contract.[3]

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[1] 4 Burge, Comment on Col. and For. Law, Pt. 2, ch. 15, § 4, p. 722–735; Story on Conflict of Laws, § 263, 322.

[2] Pothier on Oblig. n. 261–268; Von Leeuwen, Comment. B. 4, ch. 4, § 1; Ferguson *v.* Flower, 16 Martin, R. 312; 2 Boullenois, Observ. 46, p. 463; Code Civil of France, art. 1197, 1202, 1220, 1222; Id. Code of Comm. art. 22, 140. One may see, how strangely learned men will reason on subjects of this nature, by consulting Boullenois. He puts the case of a contract made in a country, where all parties would be bound in solido, and, by the law of their own domicil, they would be entitled to the benefit of a division, and vice versâ; and asks, What law is to govern? In each case he decides, that the law should govern, which is most favorable to the debtor. "Ainsi, les obligés solidaires sont contracté sous une loi, qui leur est favorable; j'embrasse cette loi; elle leur est contraire, j'embrasse la loi de leur domicile." 2 Boullenois, Observ. 46, p. 463, 464. See also, Bouhier, ch. 21, § 198, 199.

[3] See Henry on Foreign Law, 39. Pothier on Obligations, n. 7, has explained the meaning of the words, "the nature of the contract," in the following manner: "Things, which are only of the nature of the contract, are those, which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract, that they shall be included and understood. These things have an intermediate place between those, which are of the essence of the contract, and those, which are merely accidental to it, and differ from both of them. They differ from those which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties; and they differ from things which are merely accidental to it, inasmuch as they form a part of it without being particularly expressed, as may be illustrated by the following examples. In the contract of sale, the obligation of warranty, which the seller contracts with the purchaser, is of the nature of the contract of sale; therefore the seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract; but, as the obligation is of the nature, and not of the essence, of the contract of sale, the contract of sale may subsist without it; and, if it is agreed, that the

§ 160. In the next place, as to the obligation of the contract, which, although often confounded with, is yet distinguishable from its nature.[1] The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of an obligation generally, we mean a legal obligation, that is, the right to performance, which the law confers on one party, and the corresponding duty of performance, to which it binds

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seller shall not be bound to warranty, such agreement will be valid, and the contract will continue a real contract of sale. It is also of the nature of the contract of sale, that, as soon as the contract is completed by the consent of the parties, although before delivery, the thing sold is at the risk of the purchaser; and that, if it happens to perish without the fault of the seller, the loss falls upon the purchaser, who is, notwithstanding the misfortune, liable for the price; but, as that is only of the nature, and not of the essence, of the contract, the contrary may be agreed upon. Where a thing is lent, to be specifically returned [commodatur], it is of the nature of the contract, that the borrower shall be answerable for the slightest negligence in respect of the article lent. He contracts this obligation to the lender by the very nature of the contract, and without any thing being said about it. But, as this obligation is of the nature, and not of the essence of the contract, it may be excluded by an express agreement, that the borrower shall only be bound to act with fidelity, and shall not be responsible for any accidents merely occasioned by his negligence. It is also of the nature of this contract, that the loss of the thing lent, when it arises from inevitable accident, falls upon the lender. But, as that is of the nature, and not of the essence, of the contract, there may be an agreement to charge the borrower with every loss, that may happen until the thing is restored. A great variety of other instances might be adduced from the different kinds of contracts. Those things which are accidental to a contract, are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due, the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract; because they are not included in it, without being particularly expressed." Story on Bills, § 139.

[1] Story on Conflict of Laws, § 266; Pardessus, Droit Comm. Tom. 5, art. 1495, p. 269–271. See 2 Boullenois, Observ. 46, p. 454, 460, 462–494; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 764, 765.

the other.[1] This is what the French jurists call, *Le lien du contrat* (the legal tie of the contract), *Onus conventionis,* and what the civilians generally call, *Vinculum juris,* or *Vinculum obligationis.*[2] The Institutes of Justinian have thus defined it; *Obligatio est juris vinculum, quo necessitate adstringimur alicujus rei solvendæ, secundum nostræ civitatis jura.*[3] A contract may, in its nature, be purely voluntary, and possess no legal obligation. It may be a mere naked pact (*nudum pactum*). It may possess a legal obligation; but the laws may limit the extent and force of that obligation *in personam,* or *in rem.* It may bind the party personally, but not bind his estate; or it may bind his estate, and not bind his person. The obligation may be limited in its operation or duration; or it may be revocable or dissoluble in certain future events, or under peculiar circumstances.[4]

§ 161. In the next place, the interpretation of contracts.[5] Upon this subject, there would scarcely seem to be any room for doubt or disputation. There are certain general rules of interpretation, recognized by all nations, which form the basis of all reasoning on the subject of contracts. The object is to ascertain the real intention of the parties in their stipulations; and when the latter are silent, or ambiguous, to ascertain what is the true sense of the words used, and what ought to be implied, in order to give them their true and full

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1 See 3 Story, Comm. on Constitution, § 1372-1379; Ogden *v.* Saunders, 12 Wheaton, 213; Pothier on Oblig. art. 1, n. 1, p. 173-175.

2 2 Boullenois, Observ. 46, p. 458-460.

3 Inst. Lib. 3 tit. 14; Pothier, Pandect. Lib. 44, tit. 7, P. 1, art. 1, § 1; Pothier on Oblig. n. 173, 174.

4 See 2 Boullenois, Observ. 46, p. 452, 454; Code Civil of France, art. 1168-1196; Story on Bills, § 141.

5 Story on Conflict of Laws, § 270.

effect.[1] The primary rule in all expositions of this sort, is that of common sense, so well expressed in the Digest. *In conventionibus contrahentium voluntas, potius quam verba, spectari placuit.*[2] But, in many cases, the words used in contracts have different meanings attached to them in different places, by law, or by custom. And, where the words are, in themselves, obscure or ambiguous, custom and usage in a particular place may give them an exact and appropriate meaning. Hence, the rule has found admission into almost all, if not into all,

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[1] See Lord Brougham's striking remarks on this subject, cited in Story on Conflict of Laws, § 226, *c*. In Prentiss *v*. Savage, 13 Mass. R. 23, Mr. Chief Justice Parker said; "It seems to be an undisputed doctrine, with respect to personal contracts, that the law of the place, where they are made, shall govern in their construction; except when made with a view to performance in some other country, and then the law of such country is to prevail. This is nothing more than common sense and sound justice, adopting the probable intent of the parties as to the rule of construction. For, when a citizen of this country enters into a contract in another, with a citizen or subject thereof, and the contract is intended to be there performed, it is reasonable to presume, that both parties had regard to the law of the place, where they were, and that the contract was shaped accordingly. And it is also to be presumed, when the contract is to be executed in any other country, than that in which it is made, that the parties take into their consideration the law of such foreign country. This latter branch of the rule, if not so obviously founded upon the intention of the parties as the former, is equally well settled, as a principle in the law of contracts." Mr. Chancellor Walworth, in Chapman *v*. Robertson, 6 Paige, R. 627, 630, used equally strong language. "It is an established principle," said he, "that the construction and validity of personal contracts, which are purely personal, depend upon the laws of the place, where the contract is made, unless it was made with reference to the laws of some other place or country, where such contract, in the contemplation of the parties thereto, was to be carried into effect and performed." 2 Kent, Comm. Lect. 39, p. 457, 458, (3d edit.); 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 752-764.

[2] Dig. Lib. 50, tit. 16, l. 219. — Many rules of interpretation are found in Pothier on Obligations, n. 91-102; in Fonblanque on Equity, B. 1, ch. 6, § 11-20, and notes; 1 Domat, Civil Law, B. 1, tit. 1, § 2; 1 Powell on Contracts, 370 et seq.; Merlin Répertoire, *Convention*, § 7, p. 366.

systems of jurisprudence, that if the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place where it is made, that course is to be adopted. Such is the rule of the Digest. *Semper in stipulationibus et in cæteris contractibus id sequimur, quod actum est. Aut si non appareat, quod actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur.*[1] *Conservanda est consuetudo regionis et civitatis* (says J. Sandè) *ubi contractum est. Omnes enim actiones nostræ (si non aliter fuerit provisum inter contrahentes) interpretationem recipiunt a consuetudine loci, in quo contrahitur.*[2] Usage is, indeed, of so much authority, in the interpretation of contracts, that a contract is understood to contain the customary clauses, although they are not expressed, according to the known rule, *In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis.*[3] Thus, if a tenant is, by custom, to have the outgoing crop, he will be entitled to it, although not expressed in the lease.[4] And, if a lease is entirely silent as to the time of the tenant's quitting, the custom of the country will fix it.[5] By the law of England, a month means, ordinarily, in common contracts, as in leases, a lunar month; but in mercantile contracts, it means a calendar month.[6] A contract,

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[1] Dig. Lib. 50, tit. 17, l. 34; 1 Domat, Civil Law, B. 1, tit. 1, § 2, n. 9; 2 Boullenois, Observ. 46, p. 490; 3 Burge, Comm, on Col. and For. Law, Pt. 2, ch. 20, p. 775, 776.

[2] J. Sand. Op. Comm. de Reg. Jur. l. 9, p. 17; Story on Bills, § 143.

[3] Pothier on Oblig. n. 95; Merlin, Réportoire, *Convention*, § 7; 2 Kent, Comm. Lect. 39, p. 555, (3d edit.)

[4] Wigglesworth *v.* Dallison, Doug. R. 201, 207.

[5] Webb *v.* Plummer, 2 Barn. & Ald. 746.

[6] 2 Black. Comm. 141; Catesby's case, 6 Coke, R. 62; Lacon *v.* Hooper, 6 T. R. 224; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 776, 777.

therefore, made in England, for a lease of land for twelve months, would mean a lease for forty-eight weeks only.[1] A Promissory Note, to pay money in twelve months, would mean in one year, or in twelve calendar months.[2] If a contract of either sort were required to be enforced in a foreign country, its true interpretation must be everywhere the same, that it is, according to the usage in the country where the contract was made.

§ 162. The same word, too, often has different significations in different countries.[3] Thus, the term *usance*, which is common enough in negotiable instruments, means, in some countries, a month, in others, two or more months, and, in others, half a month. A Note, payable at one usance, must be construed, everywhere, according to the meaning of the word in the country, where the contract is made.[4] There are many other cases illustrative of the same principle. A Note, made in England, for one hundred pounds, would mean one hundred pounds sterling. A like Note, made in America, would mean one hundred pounds in American currency, which is one fourth less in value. It would be monstrous, to contend, that, on the English Note, sued in America, the less sum only ought to be recovered; and on the other hand, on the American Note, sued in England, that one third more ought to be recovered.[5]

§ 163. The like interpretation would be applied to

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[1] Ibid.

[2] Chitty on Bills, p. 406, (8th edit. 1833); Lang *v.* Gale, 1 M. & Selw. 111; Cockell *v.* Gray, 3 Brod. & Bing. 187; Leffingwell *v.* White, 1 John. Cas. 99.

[3] Story on Conflict of Laws, § 271.

[4] Chitty on Bills, p. 404, 405, (8th edit. 1833.) See, also, 2 Boullenois, Observ. 46, p. 447.

[5] See, also, Powell on Contracts, 376; 2 Boullenois, Observ. 46, p. 498, 503; Henry on Foreign Law, Appendix, 233; Pardessus, Droit Comm.

the case of a Promissory Note, drawn in one country, and payable in another country, where the same denomination of currency existed in both countries, but represented different values. Thus, for example, a Note drawn in Boston for one hundred pounds, payable in London, would be construed to be for one hundred pounds sterling; whereas, if a Note were drawn for the same sum in London, and payable in Boston, it would be construed to be for one hundred pounds of the lawful currency of Massachusetts, which, as we have just seen, is one quarter less in value. In each case, the ground of interpretation is the presumed intention of the parties, derived from the nature and objects of the instrument.

§ 164. Hence, it is adopted by the Common Law as a general rule in the interpretation of contracts, that they are to be deemed contracts of the place, where they are made, unless they are positively to be performed or paid elsewhere. Therefore, a Bill or Note made in France, and payable generally, will be treated as a French Note, and governed accordingly by the laws of France, as to its obligation and construction. So, a policy of insurance, executed in England, on a French ship, for the French owner, on a voyage from one French port to another, would be treated as an English contract, and, in case of loss, the debt would be treated as an English debt. Indeed, all the rights, and duties, and obligations, growing out of such a policy, would be governed by the law of England, and not by the law of France, if the laws respecting insurance were different in the two countries.[1]

§ 165. But, where the contract is, either expressly or

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art. 1492; 3 Burge, Comm. on Col. and For Law, Pt. 2, ch. 20, p. 772, 773; Story on Conflict of Laws, § 272, *a*, 307, 308.

[1] Don *v.* Lippmann, 5 Clark & Fin. 1, 18—20; Story on Conflict of Laws, § 317.

tacitly, to be performed in any other place, there the general rule is, in conformity to 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.[1] This would seem to be a result of natural justice; and the Roman Law has adopted it as a maxim; *Contraxisse unusquisque in eo loco intelligitur in quo ut solveret, se obligavit;*[2] and again, in the law, *Aut ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia.*[3] The rule was fully recognized, and acted on, in a recent case, by the Supreme Court of the United States, where the Court said, that the general principle, in relation to contracts made in one place, to be executed in another, was well settled; that they are to be governed by the laws of the place of performance.[4]

§ 166. The like question, also, often arises in cases respecting the payment of interest.[5] The general rule is, that the interest is to be paid on contracts according to the law of the place, where they are to be performed, in all cases, where interest is expressly or impliedly to be paid.[6] *Usurarum modus ex more regionis, ubi contrac-*

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[1] Story on Conflict of Laws, § 280; 2 Kent, Comm. Lect. 37, p. 393, 394, and Lect. 39, p. 459, (4th edit.); Casaregis, Disc. 179; 1 Emérigon, c. 4, § 8; Voet, De Stat. § 9, ch. 2, n. 15, p. 271, (edit. 1715); Id. p. 328, (edit. 1661); Boullenois, Quest. Contr. des Lois, p. 330, &c.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771, 772; Don. *v.* Lippmann, 5 Clark & Finn. R. 1, 13, 19.

[2] Dig. Lib. 44, tit. 7, l. 21; Story on Conflict of Laws, § 233.

[3] Dig. Lib. 42, tit. 5, l. 3; Story on Bills, § 147.

[4] Andrews *v.* Pond, 13 Peters, R. 65; Goddin *v.* Shipley, 7 B. Munroe, R. 578.

[5] Story on Conflict of Laws, § 281.

[6] Story on Conflict of Laws, § 292 - 293 *e*, 304; Conner *v.* Bellamont, 2 Vern. R. 382; Cash *v.* Kennion, 11 Ves. R. 314; Robinson *v.* Bland, 2

tum est, constituitur, says the Digest.[1] Thus, a Note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent.,

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Burr. R. 1077; Ekins *v.* East India Company, 1 P. W. 695; Ranelaugh *v.* Champante, 2 Vern. R. 395, and note, Ibid. by Raithby; 1 Chitty on Comm. and Manuf. ch. 12, p. 650, 651; 3 Chitty, Id. ch. 1, p. 109; Eq. Abridg. *Interest*, E.; Henry on Foreign Law, 43, note; Id. 53; 2 Kaimes, Equity, B. 3, ch. 8, § 1; 2 Fonbl. Eq. B. 5, ch. 1, § 6, and note; Bridgman, Equity Digest, *Interest*, vii.; Fanning *v.* Consequa, 17 John. R. 511; S. C. 3 John. Ch. R. 610; Hosford *v.* Nichols, 1 Paige R. 220; Houghton *v.* Page, 2 N. Hamp. R. 42; Peacock *v.* Banks, 1 Minor, R. 387; Lapice *v.* Smith, 13 Louis. R. 91, 92; Thompson *v.* Ketcham, 4 John. R. 285; Healy *v.* Gorman, 3 Green, N. J. R. 328; 2 Kent, Comm. Lect. 39, p. 460, 461, (3d edit.). — A case illustrative of this principle, recently occurred before the House of Lords. A widow, in Scotland, entered into an obligation to pay the whole of her deceased husband's debts. It was held, by the Court of Session in Scotland, that the English creditors, on contracts made in England, were entitled to recover interest in all cases, where the law of England gave interest, and not, where it did not. Therefore, on Bonds, and Bills of Exchange, interest was allowed, and, on simple contracts, not. And this decision was affirmed by the House of Lords. Montgomery *v.* Bridge, 2 Dow & Clarke, R. 297. The case of Arnott *v.* Redfern, 2 Carr. & Payne, 88, may, at first view, seem inconsistent with the general doctrine. There, the original contract was made in London, between an Englishman and a Scotchman. The latter agreed to go to Scotland, as agent, four times a year, to sell goods and collect debts for the other party, to remit the money, and to guarantee one fourth part of the sales; and he was to receive one per cent. upon the amount of sales, &c. The agent sued, for a balance of his account, in Scotland, and the Scotch Court allowed him interest on it. The judgment was afterwards sued in England; and the question was, whether interest ought to be allowed. Lord Chief Justice Best said; — "Is this an English transaction? For, if it is, it will be regulated by the rules of English law. But, if it is a Scotch transaction, then the case will be different." He afterwards added; — "This is the case of a Scotchman, who comes into England, and makes a contract. As the contract was made in England, although it was to be executed in Scotland, I think it ought to be regulated according to the rules of the English Law. This is my present opinion. These questions of international law do not often occur." And he refused interest, because it was not allowed by the Law of England. The Court afterwards ordered

[1] Dig. Lib. 22, tit. 1, l. 1; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 860-862.

bears English interest only.[1] Loans, made in a place, bear the interest of that place, unless they are payable elsewhere.[2] And, if payable in a foreign country, they may bear any rate of interest, not exceeding that which is lawful by the laws of that country.[3] And on this account, a contract for a loan, made and payable in a foreign country, may stipulate for interest higher than that allowed at home.[4] If the contract for interest be illegal there, it will be illegal everywhere.[5] But, if

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interest to be given, upon the ground, that the balance of such an account would carry interest in England. But Lord Chief Justice Best rightly expounded the contract, as an English Contract, though there is a slight inaccuracy in his language. So far as the principal was concerned, the contract to pay the commission was to be paid in England. The services of the agent were to be performed in Scotland. But the whole contract was not to be executed exclusively there by both parties. A contract, made to pay money in England, for services performed abroad, is an English contract, and will carry English interest.

[1] Schofield *v.* Day, 20 John. R. 192.

[2] De Wolf *v.* Johnson, 10 Wheaton, R. 367, 383; Consequa *v.* Willings, 1 Peters, Cir. Ct. R. 225; 2 Boullenois, Observ. 46, p. 477, 478; Andrews *v.* Pond, 13 Peters, R. 65, 78.

[3] Ibid.; 2 Kent, Comm. Lect. 39, p. 460, 461, (3d edit.); Thompson *v.* Ketcham, 4 John. R. 285; Healy *v.* Gorman, 3 Green, N. J. R. 328.

[4] 2 Kent, Comm. Lect. 39, p. 460, 461, (3d edit.); Hosford *v.* Nichols, 1 Paige, R. 220; Houghton *v.* Page, 2 N. Hamp. R. 42; Thompson *v.* Powles, 2 Simons, R. 194. — In this last case, the Vice-Chancellor said; "With respect to the question of usury, in order to hold the contract to be usurious, it must appear, that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be made abroad, it would not be usurious." See, also, Andrews *v.* Pond, 13 Peters, R. 65, 78; De Wolf *v.* Johnson, 10 Wheat. R. 383.

[5] 2 Kaimes, Equity, B. 3, ch. 8, § 1; Hosford *v.* Nichols, 1 Paige, R. 220; 2 Boullenois, Observ. 46, p. 477. — In the case of Thompson *v.* Powles, 2 Simons, R. 194, the Vice-Chancellor said; "In order to have the contract (for stock) usurious, it must appear, that the contract was made here, and that the consideration for it was to be paid here." See, also, Yrisarri *v.* Clement, 2 Carr. & Payne, R. 223. In Hosford *v.* Nichols, 1 Paige, R. 220, where a contract was made for the sale of lands in New York, by citizens then resident there, and the vendor afterwards

it be legal, where it is made, it will be of universal obligation, even in places, where a lower interest is prescribed by law.[1]

§ 167. The question, therefore, whether a contract is usurious or not, depends, not upon the rate of the interest allowed, but upon the validity of that interest in the country, where the contract is made, and is to be executed.[2] A contract, made in England, for advances to be made at Gibraltar, at a rate of interest beyond that of England, would, nevertheless be valid in England; and so, a contract to allow interest upon credits given in Gibraltar, at such higher rate, would be valid of the English creditor.[3]

§ 168. In the next place, as to the effect. In the effect of the *Lex loci contractûs* are included those consequences and incidents, which, by law, are attached to, or operate upon, contracts. Some of these have been already enumerated in considering the obligation of contracts. There are others, again, that deserve to be here enumerated. And, here, it is important to suggest, that, although the law acts upon contracts, it does not enter into them, or form a part of the agreement itself.[4] It simply regulates the rights, which are acquired under the contract, the obligations, which may be conferred, and the circumstances, which will dissolve,

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removed to Pennsylvania, where the contract was consummated, and a mortgage given to secure the unpaid purchase money, with New York interest, (which was higher than that of Pennsylvania,) the Court thought the mortgage not usurious, it being only a consummation of the original bargain made in New York.

1 Ibid.

2 Story on Conflict of Laws, § 292; Harvey *v.* Archbold, 1 Ryan & Mood, R. 184; Andrews *v.* Pond, 13 Peters, R. 65, 78; Story on Conflict of Laws, § 243.

3 Ibid.; Story on Bills, § 143–149.

4 Ogden *v.* Sanders, 12 Wheat. 213, 324, 338–344.

qualify, or annul those obligations; or, in other words, what shall be a valid defence upon the merits to them, and what a good discharge of them. And here the general rule is, that a defence or discharge, good by the law of the place, or country, where the contract is made, or is to be performed, is to be held of equal validity and force in every other place or country, where the question may arise, or be litigated.[1] Hence, infancy, if a valid defence by the *Lex loci contractûs*, will be a valid defence everywhere.[2] So, a tender and refusal, good by the same law, either as a full discharge, or as a present fulfilment of the contract, is of equal validity, and will be equally respected everywhere else.[3] Payment in paper-money bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere.[4] And, on the other hand, where a payment by negotiable Bills or Notes is, by the *Lex loci*, held to be conditional payment only, it will be so held, even in states, where such payment, under the domestic law, would be held absolute.[5] So, if by the law of the place of a contract, (even although negotiable,) equitable defences are allowed in favor of the maker, any subsequent indorsement will not change his rights in regard to the holder.[6] The latter must take it *cum onere*.[7]

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[1] Story on Conflict of Laws, § 331, 335, 336, 339, 351, *a*–351, *d*; Story on Bills, § 161–163; Powers *v.* Lynch, 3 Mass. R. 77.

[2] Story on Conflict of Laws, § 332.

[3] Story on Conflict of Laws, § 332; Thompson *v.* Ketcham, 8 John. R. 190.

[4] Warder *v.* Arell, 2 Wash. Virg. R. 359; 1 Brown, Ch. R. 376; Seawright *v.* Calbraith, 4 Dall. 325; Bartsch *v.* Atwater, 1 Conn. R. 409.

[5] Bartsch *v.* Atwater, 1 Conn. R. 409. See other cases cited, 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 876–878.

[6] Story on Conflict of Laws, § 317.

[7] Ory *v.* Winter, 16 Martin, R. 277. See also Evans *v.* Gray, 12 Mar-

The same rule applies to the acceptance of a Bill of Exchange; although it is absolute by our law, yet, if it be qualified by the law of the country, where the acceptance is made, the qualification thus acting upon it accompanies it everywhere.[1] Hence it is, also, that a discharge under the bankrupt or insolvent law of the country, where the contract is made, or to be performed, is a valid discharge thereof everywhere.[2]

§ 169. The converse doctrine is equally well established, and turns upon the like considerations, namely, that a discharge of a contract by the law of a country where it is not made, or to be performed, will not be a discharge of it in any other country.[3] Therefore, a discharge of the debtor under the insolvent laws of a country where it was not made, or to be performed, will not be a discharge of the contract in any other country.[4] And this doctrine applies, as well to negotiable instruments, as to other contracts.[5]

§ 170. A few illustrations of these rules, as applicable to Promissory Notes, and not already suggested, may be useful in this place. Thus, for example, if a Promissory

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tin, R. 475; Chartres *v.* Cairnes, 16 Martin, R. 1; Story on Conflict of Laws, § 332.

1 Story on Conflict of Laws, § 333; Burrows *v.* Jemino, 2 Str. R. 733; Story on Bills, § 165.

2 Story on Conflict of Laws, § 335, 336, 340, 341; Baker *v.* Wheaton, 5 Mass. R. 509; Hicks *v.* Brown, 12 John. R. 142; Powers *v.* Lynch, 3 Mass. R. 77; Hull *v.* Blake, 13 Mass. R. 153.

3 Story on Conflict of Laws, § 342; Story on Bills, § 165.

4 Story on Conflict of Laws, § 342; Smith *v.* Buchanan, 1 East, R. 6, 11; Lewis *v.* Owen, 4 Barn. & Ald, 654; Van Raugh *v.* Van Arsdaln, 2 Caines, R. 154; Le Roy *v.* Crowinshield, 2 Mason, R. 151; Smith *v.* Smith, 2 John. R. 235; Bradford *v.* Farrand, 13 Mass. R. 18; 3 Kent, Comm. Lect. 37, p. 392, 393, (5th edit.); Id. Lect. 39, p. 458, 459, (5th edit.)

5 Story on Conflict of Laws, § 343–346; Story on Bills, § 166–171.

Note is made in one country, but is payable in another country, the days of grace allowable thereon will be governed by the law and custom of the place, where the Note is payable.[1] Another illustration is to be found in the different effects of an indorsement in different countries. In France, (as we have seen,[2]) a blank indorsement of a Promissory Note conveys no title or property in the Note to the holder, but only a simple authority to receive the money due thereon; and this law will regulate the rights of the holder, as well against the maker, as against the indorser, in a suit brought in any other country, where a different rule prevails.[3]

§ 171. Another illustration may be derived from the different obligations, which an indorsement creates, in different states. By the general Commercial Law, in order to entitle the indorsee to recover against any antecedent indorser upon a nogotiable Note, it is only necessary, that due demand should be made upon the maker of the Note at its maturity, and due notice of the dishonor, given to the indorser. But, by the laws of some of the American States, it is required, in order to charge an antecedent indorser, not only that due demand should be made, and due notice given, but that a suit shall be previously commenced against the maker, and prosecuted with effect in the country, where he re-

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[1] Story on Bills, § 155, 170, 177, 334; Story on Conflict of Laws, § 316, 347, 361; 2 Kent, Comm. Lect. 39, p. 459, 460, (5th edit.); Chitty on Bills, ch. 5, p. 191, 193, (8th edit.); Id. ch. 9, p. 409; Bank of Washington *v.* Triplett, 1 Peters, Sup. Court, R. 30, 34; Pothier, De Change, n. 15, 155; Pardessus, Droit Comm. Tom. 5, § 1495; 2 Boullenois, Observ. 28, p. 531, 532; Mascard. Conclus. 7, note 72.

[2] Ante, § 140.

[3] Story on Conflict of Laws, § 272; Story on Bills, § 156; Trimbey *v.* Vignier, 1 Bing. New Cas. 151, 158, 160.

sides; and then, if payment cannot be obtained from him under the judgment, the indorsee may have recourse to the indorser. In such a case, it is clear, upon principle, that the indorsement, as to its legal effect and obligation, and the duties of the holder, must be governed by the law of the place, where the indorsement is made.[1]

§ 172. Another illustration of the doctrine may arise in the case of a note made in one country, and indorsed by the payee to the holder, in another country. What law is to govern in respect to the rights of the holder against the maker? This depends upon the place where the maker undertakes to pay the Note; for the law of that place is to govern as to his rights and obligations. Now, a negotiable Note, made in a particular country, is to be deemed a Note governed by the law of that country, whether it is expressly made payable there, or is payable generally, without naming any particular place; since, at most, under the latter circumstances, it is as much payable in that country, as elsewhere.[2] Hence, such a Note makes the maker liable only according to the law of the country where the Note is executed, although indorsed in another country; and his liabilities, and so, also, his rights, as, for example, the right to set up equitable defences against the Note, if allowed by the country, where the Note is executed, are regulated by the law of the same country.[3]

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[1] Story on Conflict of Laws, § 316; Story on Bills, § 157; Williams *v.* Wade, 1 Metc. R. 82, 83; Worcester Bank *v.* Wells, 8 Metc. R. 107; Bernard *v.* Barry, 1 Greene, Iowa, R. 388; Carroll *v.* Upton, 2 Sandford, Superior Ct. N. Y. R. 171.

[2] Story on Conflict of Laws, § 317, 332, 340, 343, 344; Story on Bills, § 158, 164, 166-169; Ory *v.* Winter, 16 Martin, Louis. R. 277.

[3] Ibid.; Story on Conflict of Laws, § 346; Ory *v.* Winter, 16 Martin,

§ 173. Questions have also arisen, whether negotiable Notes and Bills, made in one country, are transferable in other countries, so as to found a right of action in the holder against the other parties. Thus, a question occurred in England, in a case, where a negotiable Note, made in Scotland, and there negotiable, was indorsed, and a suit brought in England by the indorsee against the maker, whether the action was maintainable. It was contended, that the Note, being a foreign Note, was not within the statute of Anne (3 and 4 Anne, ch. 9,) which made Promissory Notes payable to order, assignable and negotiable; for that statute applied only to inland Promissory Notes. But the Court overruled the objection, and held the Note suable in England by the indorsee, as the statute embraced foreign, as well as domestic Notes.[1] In another case, a Promissory Note, made in England, and payable to the bearer, was transferred in France; and the question was made, Whether the French holder could maintain an action thereon in England? such Notes not being by the law of France negotiable; and it was held that he might.[2] But in each of these cases the decision was expressly put upon the provisions of the statute of Anne respecting Pro-

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R. 277; Slacum *v.* Pomeroy, 6 Cranch, 221; De la Chaumette *v.* Bank of England, 9 Barn. & Cressw. 208. Contra, Blanchard *v.* Russell, 13 Mass. R. 1, 11, 12; Story on Bills, § 163, 170.

[1] Story on Conflict of Laws, § 353; Milne *v.* Graham, 1 Barn. & Cressw. 192. — It does not distinctly appear upon the Report, whether the indorsement was made in Scotland or in England. But it was probably in England. But see Carr *v.* Shaw, Bayley on Bills, p. 16, note, (5th edit. 1830); Id. p. 22, (American edition, by Phillips & Sewall, 1836).

[2] De la Chaumette *v.* the Bank of England, 2 Barn. & Adolph. R. 385; S. C. 9 Barn. & Cressw. 208; and see Chitty on Bills, p. 551, 552, (8th edit.); Story on Conflict of Laws, § 346.

missory Notes, leaving wholly untouched the general doctrine of international law.[1]

§ 174. Several other cases may be put upon this subject. In the first place, suppose a Note, negotiable by the law of the place, where it is made, is there transferred by indorsement; can the indorsee maintain an action in his own name against the maker in a foreign country, (where both are found,) in which there is no positive law on the subject of negotiable Notes applicable to the case? If he can it must be upon the ground, that the foreign tribunal would recognize the validity of the transfer by the indorsement, according to the law of the place where it is made. According to the doctrine maintained in England, as choses in action are by the Common Law (independent of statute) incapable of being transferred over, it might be argued that he could not maintain an action, notwithstanding the instrument was well negotiated, and transferred by the law of the place of the contract.[2] So far as this principle of the non-assignability of choses in action would affect transfers in England, it would seem reasonable to follow it. But the difficulty is, in applying it to transfers made in a foreign country, by whose laws the instrument is negotiable, and capable of being transferred, so as to vest the property and right in the assignee. In such a case, it would seem, that the more correct rule would be, that the *Lex loci contractûs* ought to govern; because the holder under the indorsement has an immediate and absolute right in the contract vested in him,

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1 Story on Bills, § 57, 171; Story on Conflict of Laws, § 353; Ante, § 38.

2 Story on Conflict of Laws, § 354. See 2 Black. Comm. 442; Innes *v.* Dunlop, 8 T. R. 595; Jeffery *v.* McTaggart, 6 Maule & Selw. R. 326; Story on Conflict of Laws, § 565, 566.

as much as he would have in goods transferred to him. Under such circumstances, to deny the legal effect of the indorsement is, to construe the obligation, force, and effect of a contract, made in one place, by the law of another place. The indorsement, in the place where it is made, creates a direct contract between the maker and the first indorsee; and, if so, that contract ought to be enforced between them everywhere. It is not a question, as to the form of the remedy, but as to the right.[1]

§ 175. In the next place, let us suppose the case of a negotiable Note, made in a country, by whose laws it is negotiable, and actually indorsed in another, by whose laws a transfer of Notes by indorsement is not allowed. Could an action be maintained by the indorsee, against the maker, in the courts of either country. If it could be maintained in the country, whose laws do not allow such a transfer, it must be upon the ground that the original negotiability, by the *Lex loci contractûs*, is permitted to avail, in contradiction to the *Lex fori*. On the other hand, if the suit should be brought in the country where the Note was originally made, the same objection might arise, that the transfer was not allowed by the law of the place, where the indorsement took place. But, at the same time, it may be truly said that the transfer is entirely in conformity to the intent of the parties, and to the law of the original contract.[2]

§ 176. In the next place, let us suppose the case of

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[1] See Trimbey *v.* Vignier, 1 Bing. New Cases, 159–161; Story on Conflict of Laws, § 353, *a*, where the same reasoning seems to have applied; Id. § 565, 566.

[2] Story on Conflict of Laws, § 356. See Chitty on Bills, ch. 6, p. 218, 219, (8th London edit.) See Kaimes on Equity, B. 3, ch. 8, § 3; Story on Conflict of Laws, § 353, 354. — In the cases of Milne *v.* Graham, 1

a Note, not negotiable by the law of the place, where it is made, but negotiable by the law of the place where it is indorsed. Could an action be maintained in either country, by the indorsee, against the maker? It would seem, that, in the country, where the Note was made, it could not; because it would be inconsistent with its own laws. But the same difficulty would not arise in the country, where the indorsement was made; and, therefore, if the maker used terms of negotiability in his contract, capable of binding him to the indorsee, there would not seem to be any solid objection to giving the contract its full effect there. And so it has been accordingly adjudged, in the case of a Note made in Connecticut, payable to A., or order, but by the laws of that State, not negotiable there, and indorsed in New York, where it was negotiable. In a suit in New York, by the indorsee against the maker, the exception was taken and overruled. The Court on that occasion, said, that personal contracts, just in themselves, and lawful in the place, where they are made, are to be fully enforced, according to the law of the place, and the intent of the parties, and that this is a principle which ought to be universally received and supported. But this admission of the *Lex loci contractûs* can have reference only to the nature and construction of the contract and its legal effect, and not to the mode of enforcing it. And the Court ultimately put the case expressly upon the ground that the Note was payable to the payee, or order; and, therefore, the remedy might well be pursued, according

Barn. & Cressw. 192, De la Chaumette *v.* Bank of England, 2 Barn. & Adolp. 385, and Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, the Promissory Notes were negotiable in both countries, as well where the note was made as where it was transferred.

to the law of New York, against a party who had contracted to pay to the indorsee.[1] But, if the words, "or order," had been omitted in the Note, so that it had not appeared that the contract between the parties originally contemplated negotiability, as annexed to it, a different question might have arisen, which would more properly come under discussion in another place; since it seems to concern the interpretation and obligation of contracts, although it has sometimes been treated as belonging to remedies.[2]

§ 177. In the next place, suppose a negotiable Note is made in England, by a person domiciled there, but it is payable in Paris, and is indorsed by the payee in England, to a holder domiciled there; if, upon due presentment for payment in Paris, it should be dishonored, what notice is to be given by the holder to the indorser, (the payee)? Is it to be according to the law of France, or of England? for, as to the time of giving notice, the law of France differs from that of England. It has been held, in the case of a Bill, (and it is not distinguishable from that of a Note,) that the notice is to be given according to the law of France, and not of England.[3] But there is some reason to doubt the correctness of the decision, since the indorsement carries as an incident, the right to notice, and the contract, created by the indorsement, when written out, would seem to import, that the indorser agrees to pay upon notice, ac-

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[1] Story on Conflict of Laws, § 357; Lodge *v.* Phelps, 1 John. Cas. 139; S. C. 2 Caines, Cas. in Error, 321. See Kaimes on Equity, B. 3, ch. 8, § 4; 3 Kent, Comm. Lect. 44, p. 88, (5th edit.)

[2] See Chitty on Bills, ch. 6, p. 218, 219, (8th London edit.); 3 Kent, Comm. Lect. 44, p. 77, (5th edit.); Story on Conflict of Laws, § 253, *a*, 257; Story on Bills, § 173–175.

[3] Rothschild *v.* Currie, 1 Adolp. & Ellis, New R. 43.

cording to the law of the place, where the contract is made.[1]

§ 178. There remain some few other considerations, applicable to transfers by indorsement, which require notice in this place. In the first place, then, as to the time of transfer. In general, it may be stated, that a transfer may be made at any time, while the Note remains a good subsisting unpaid Note, whether it be before or after it has arrived at maturity.[2] But the rights of the holder against the antecedent parties may be most materially affected by the time of the transfer. If the transfer is made before the maturity of the Note to a *bonâ fide* holder, for a valuable consideration, he will take it free of all equities between the antecedent parties, of which he has no notice.[3] If the transfer is after

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1 Story on Bills, § 177, note; Id. § 285, 296, 366, 391. This subject will be more fully considered under the chapter on Notices.

2 Chitty on Bills, ch. 6, p. 242, (8th edit. 1833); Mutford *v.* Walcot, 1 Ld. Raym. 574; Boehm *v.* Stirling, 7 Term. R. 423; Bayley on Bills, ch. 5, § 3, p. 156–158, (5th edit. 1830); 1 Bell. Comm. B. 3, ch. 2, § 4, p. 402, 403, (5th edit.); Havens *v.* Huntington, 1 Cowen, R. 387; Leavitt *v.* Putnam, 1 Sandford, Superior Ct. N. Y. R. 199; Story on Bills, § 183, 191. — Notes are now rarely drawn payable on demand, and, therefore, the principles applicable to the point, when they are to be deemed overdue, or not, will more naturally arise, when we come to the consideration of the cases of Notes and checks payable on demand. In the cases of Notes made payable at sight, or at so many days after sight, the time when they should be presented, and, of course, the time when they shall be deemed overdue, will be discussed under the head of the time when Notes are to be presented.

3 Story on Bills, § 14, 187; Chitty on Bills, ch. 6, p. 220, 221, 240–243, (8th edit. 1833); Boehm *v.* Stirling, 7 T. R. 423; Bayley on Bills, ch. 5, § 3, p. 157–163, 166, (5th edit. 1830); Taylor *v.* Mather, 3 Term. R. 83, note; Brown *v.* Davis, 3 Term. R. 80; Bosanquet *v.* Dudman, 1 Stark. R. 1; Dunn *v.* O'Keeffe, 5 M. & Selw. 282, 6 Taunt. R. 305; Thompson *v.* Gibson, 13 Martin, R. 150; Marston *v.* Allen, 8 Mees. & Wels. 504; Savings Bank of New Haven *v.* Bates, 8 Conn. R. 505; Swift *v.* Tyson, 16 Peters, R. 1.

the maturity of the Note, the holder takes it as a dishonored Note, and is affected by all the equities between the original parties, whether he has any notice thereof or not.[1] But when we speak of equities between the parties, it is not to be understood, by this expression, that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular Note, and, as between those parties, would be available, to control, qualify, or extinguish any rights arising thereon.[2] [The true test to determine whether a Note is subject to an equity, set up by the maker, is this: Could the payee at the time he transferred the Note, have maintained a suit upon it against the maker, if it had then been mature?[3]] Still, however, subject to such equities, the holder, by indorsement after the maturity of a Note, will be clothed with the same rights and advantages, as were possessed by the indorser, and may avail himself of them accordingly.[4]

§ 179. The law of France, in a great measure, recognizes the like distinction between indorsements before, and indorsements after, the maturity of a Note.

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1 Ibid; Bayley on Bills, ch. 5, § 3, p. 162, 163, (5th edit. 1830); Chitty on Bills, ch. 6, p. 243, 244, (8th edit. 1833); Lee *v.* Zagury, 8 Taunt. R. 114; Rothschild *v.* Corney, 9 Barn. & Cressw. 391; 3 Kent, Comm. Lect. 45, p. 91, 92, (4th edit.); Down *v.* Halling, 4 Barn. & Cressw. 330; Andrews *v.* Pond, 13 Peters, R. 65. — It seems, that, in Scotland, the indorsement of a Bill, which is overdue, does not affect the indorsee with the equities between the original parties, unless there are some marks of dishonor on the Bill. 1 Bell, Comm. B. 3, ch. 2, § 4, p. 403, (5th edit.)

2 Bayley on Bills. ch. 5, § 3, p. 161, 162, (5th edit. 1830); Burrough *v.* Moss, 10 Barn. & Cressw. 563; Story on Bills, § 187, note (3); Whitehead *v.* Walker, 10 Mees. & Wels. 696.

3 Furnis *v.* Gilchrist, 1 Sandford, Superior Ct. N. Y. R. 53.

4 Chitty on Bills, ch. 6, p. 245, (8th edit. 1833); Chalmers *v.* Lanion, 1 Camp. R. 383.

In the latter case, all the equities between the other parties are not only let in, but even those of the creditors of the indorser, who have, before the indorsement, and after the maturity, levied attachments of the debt in the hands of the debtor.[1]

§ 180. But there is a period, when Promissory Notes cease altogether to be negotiable, in whosesoever hands they may then be, so far as respects the antecedent parties thereto, who would be discharged therefrom by the payment thereof. Thus, for example, when a Note has once been paid by the maker, after it has become due, (although not, if paid before due, and the fact be unknown to the holder,[2]) it loses all its validity, and can no longer be negotiable.[3] So, if it be dishonored by the maker, and it is then taken up by the payee, or first indorser, he cannot negotiate it, so as to charge the subsequent indorsers, although he might, so as to charge himself, or the maker, if the latter be liable to him.[4] Still, however, Notes remain negotiable even after payment, so far as respects all parties, who shall knowingly negotiate the same afterwards; for, in such a case, the negotiation cannot prejudice any other persons, and will only charge themselves.[5] [But the indorsement of a

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[1] Pardessus, Droit Comm. Tom. 2, art. 351, 352; Chitty on Bills, ch. 6, p. 242, and note *c*, (8th edit. 1833); Story on Bills, § 220, 221.

[2] Bayley on Bills, ch. 5, § 3, p. 166, (5th edit. 1830); Burridge *v.* Manners, 3 Camp. R. 194; Chitty on Bills, ch. 6, p. 248, 249, (8th edit. 1833.)

[3] Bayley on Bills, ch. 5, § 3, p. 165, 166, (5th edit. 1830); Beck *v.* Robley, 1 H. Black. 89, note; Chitty on Bills, ch. 6, p. 248, (8th edit. 1833); Bartrum *v.* Caddy, 9 Adolp. & Ellis, 275, 281.

[4] Ibid.; Callow *v.* Lawrence, 3 Maule & Selw. 95; Hubbard *v.* Jackson, 4 Bing. R. 390; Leavitt *v.* Putnam, 1 Sandford, Superior Ct. N. Y. R. 199; Chitty on Bills, ch. 6, p. 248, 249, (8th edit. 1833.)

[5] Bayley on Bills, ch. 5, § 3, p. 166, (5th edit. 1830); Boehm *v.* Stirling, 7 Term R. 423; Callow *v.* Lawrence, 3 M. & Selw. 95; Hubbard *v.* Jackson, 4 Bing. R. 390; Guild *v.* Eager, 17 Mass. R. 615; Havens *v.*

negotiable Note, after its dishonor, is a new and independent contract distinct from the original Note, and in its effect between the indorser and indorsee, distinct from the negotiable character of such Note; so that if indorsed to a particular person, by name, without adding the words, "or order," or equivalent words of negotiability, he cannot transfer it by indorsement so as to enable his indorsee to sue upon it in his own name.[1]]

Huntington, 1 Cowen, R. 387; Mead *v.* Small, 2 Greenl. R. 207; Story on Bills, § 223.

[1] Leavitt *v.* Putnam, 1 Sandford, Superior Ct. R. N. Y. 199.

CHAPTER V.

PROMISSORY NOTES — CONSIDERATION, WHAT IS SUFFICIENT, AND BETWEEN WHOM NECESSARY.

§ 181. Having thus ascertained the general rights, obligations, and duties of the different parties to Promissory Notes, and the operation of the *Lex loci contractûs*, which is resorted to, in order to ascertain and regulate the rights, obligations, and duties, growing out of them, we may next proceed to the examination of the question, What consideration is, in point of law, required, in order to give those rights, obligations, and duties a solid support, so as to make them capable of being enforced and vindicated in courts of justice? Promissory Notes, like Bills of Exchange, enjoy, as has been already suggested,[1] the privilege, conceded to no other unsealed instruments, of being presumed to be founded upon a valid and valuable consideration. Hence, between the original parties, and, *a fortiori*, between others, who, by indorsement or otherwise, become *bonâ fide* holders, it is wholly unnecessary to establish, that a Promissory Note was given for such a consideration; and the burden of proof rests upon the other party, to establish the contrary, and to rebut the presumption of validity and value, which the law raises for

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[1] Ante, § 7.

the protection and support of negotiable paper.[1] Still, however, this does not dispense, as we shall presently see, with the existence of an actual, valid, and valuable consideration to support the Note; but it only shifts the burden of proof from the plaintiff to the defendant.[2]

§ 182. But, besides the question of the existence of a consideration, another may arise; In what cases, and between what parties, the consideration, on which the Note is founded, or on which it has been transferred, is inquirable into? And under what circumstances may the want, or failure, or illegality of the consideration be insisted on, by way of defence or bar to the right of recovery on the Note, not only between the original parties, but also between them and others, possessing a derivative title thereto, under an indorsement, or otherwise, from them?[3] Let us, therefore, in the first place, examine what consideration, in point of law, is necessary, to give legal operation and support to a Note; and, in the next place, between what parties, and under what circumstances, the consideration is inquirable into, as a defence or bar to an action brought thereon.

§ 183. And, in the first place, as to what consideration is necessary to maintain a Promissory Note. At the Common Law, (and the same rule pervades the Roman Law and the foreign Commercial Law,[4]) a valuable consideration is, in general, necessary to support every

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[1] Chitty on Bills, ch. 3, § 1, p. 78–85, (8th edit. 1833); Id. p. 90–92; Collins v. Martin, 1 Bos. and Pull. R. 651; Holliday v. Atkinson, 5 Barn. & Cressw. 501; Bristol v. Warner, 19 Conn. R. 7.

[2] Story on Bills, § 193, 194; Jennison v. Stafford, 1 Cushing, R. 168.

[3] Ibid.

[4] Pothier on Oblig. n. 4, p. 42.

contract, otherwise it is treated as a nude and void pact, *Nudum pactum;* and the maxim, in such a case, is, *Ex nudo pacto non oritur actio.*[1] This rule is equally applicable, under the limitations before suggested, to Promissory Notes, as it is to other contracts.[2] And there must not only be a consideration, but, in the just sense of the law, it must be legal, as well as adequate.[3]

§ 184. What consideration is deemed valuable and sufficient in point of law, or not, to support contracts generally, or Promissory Notes in particular, may be stated in a few words. First; a consideration, founded in mere love, or affection, or gratitude, (which, in a technical sense, is called a good consideration, in contradistinction to a valuable consideration,) is not sufficient to maintain an action on a Note. Thus, a Note drawn by the maker, as a gift to a son or other relative, or to a friend, is not sufficient to sustain the Note between the original parties.[4]

§ 185. A mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a Note between the same parties. It has, indeed, in some cases been broadly laid down, that where

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[1] Chitty on Bills, ch. 3, § 1, p. 79 – 85, (8th edit. 1833); Bayley on Bills, ch. 12, p. 494 – 504, (5th edit. 1830); Sharington *v.* Strotton, Plowden, R. 308; Dig. Lib. 2, tit. 14, l. 7, § 4; Pothier, Pand. Lib. 2, tit. 14, n. 33; Pothier on Oblig. n. 4, p. 42; Pothier, by Evans, Vol. 2, n. 2, p. 19 – 25.

[2] Chitty on Bills, ch. 3, § 1, p. 78 – 85, (8th edit. 1833); Bayley on Bills, ch. 12, p. 494, 495, (5th edit. 1830.)

[3] Chitty on Bills, ch. 3, § 1, p. 78 – 80, (8th edit. 1833); Bayley on Bills, ch. 12, p. 494, 495, (5th edit. 1830.)

[4] Chitty on Bills, ch. 3, p. 85, 86, and notes, (8th edit. 1833); Bayley on Bills, ch. 12, p. 502 – 504, (5th edit. 1830); Fink *v.* Cox, 18 John. R. 145; Holliday *v.* Atkinson, 5 Barn. & Cressw. 501; Blogg *v.* Pinkers, 1 Ryan & Mood. R. 125. But see, contra, Bowers *v.* Hurd, 10 Mass. R. 427. It seems difficult to support this last case upon principle or authority.

a man is under a moral obligation, which no court of law or equity can enforce, and he promises the honesty and rectitude of the thing, is a consideration.[1] But this doctrine must be received with many qualifications; and is now restricted to much narrower limits.[2] The true doctrine, as now established, 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. 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, unless 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.[3] Thus, for example, if A. has paid a debt due by B., without the request of B., the law will not raise a promise by B., by implication, to repay the money to A.; but, if B., in consideration thereof, makes an express promise, it is valid and obligatory.[4] So, if a debt is discharged by mere operation of law without payment, as by the statute of limitations, or by a discharge in bankruptcy, an express promise by the party to pay

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[1] Hawkes *v.* Saunders, Cowp. R. 289; Lee *v.* Muggeridge, 5 Taunt. R. 36; Seago *v.* Deane, 4 Bing. R. 459.

[2] Littlefield *v.* Shee, 2 Barn. & Adolp. 811; Eastwood *v.* Kenyon, 11 Adolp. & Ellis, 438, 450.

[3] See Wennall *v.* Adney, 3 Bos. & Pull. 247, and the note of the learned Reporters, p. 249, note (*a*); Eastwood *v.* Kenyon, 11 Adolp. & Ellis, 438; Bayley on Bills, ch. 12, p. 504, (5th edit. 1830); Chitty on Bills, ch. 3, p. 84, (8th edit. 1833.)

[4] See Serg. Williams's note (1) to Osborne *v.* Rogers, 1 Saund. R. 264; Hayes *v.* Warren, 2 Str. R. 933; Stokes *v.* Lewis, 1 Term R. 20.

it will revive the obligation.[1] So, if a contract is voidable, but founded in a consideration otherwise valuable or sufficient, an express promise to pay it will support and confirm its obligation; but not, if it be originally void.[2] Thus, a promise, after age, by a person, to pay a debt not for necessaries, contracted during his infancy, will be binding; and a negotiable security given therefor will acquire validity by such new promise or confirmation of it.[3] But a promise by a woman, who is sole, to pay a debt, which she had previously contracted, while she was married and under coverture, would not be valid; because such a contract, on her part, is *ab initio* void, and not merely voidable.[4] [So, also a note given by a person to an officer of a benevolent society, for his initiation fee as a member, and for his quarterly dues, will not have a sufficient consideration.[5]]

§ 186. Secondly. What, then, is a valuable consideration in the sense of the law? It may, in general terms, be said to consist either in some right, interest, profit, or benefit, accruing to the party, who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labor, or service, on the other side.[6] And, if either of these exists, it will furnish a sufficient valuable consideration to sustain the making, or indors-

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1 Eastwood *v.* Kenyon, 11 Adolp. & Ellis, 438; Hawkes *v.* Saunders, Cowp. R. 289, 290.

2 Littlefield *v.* Shee, 2 Barn. & Adolp. 811; Eastwood *v.* Kenyon, 11 Adolp. & Ellis, 438.

3 Hawkes *v.* Saunders, Cowp. R. 289, 290; Eastwood *v.* Kenyon, 11 Adolph. & Ellis, 238.

4 Eastwood *v.* Kenyon, 11 Adolp. & Ellis, 238; Loyd *v.* Lee, 1 Str. R. 94. But see post, § 274, 275.

5 Nash *v.* Russell, 5 Barbour, Sup. Ct. R. 556.

6 Com. Dig. *Action on the Case, Assumpsit*, B. 1-15.

ing, a Promissory Note in favor of the payee, or other holder. Thus, for example, not only money paid, or advances made, or credit given, or the discharge of a present debt, or work and labor done, will constitute a sufficient consideration for a Note; but, also, the receiving a Note as security for a debt, or forbearance to sue a present claim or debt, or an exchange of securities, or becoming a surety, or doing any other act at the request, or for the benefit, of the maker or indorser, will constitute a sufficient consideration for a Note.[1] The common case of bankers, receiving Bills of their customers for collection, affords an apt illustration of this doctrine; for they are deemed holders, for value, not only to the amount of advances already made by them, either specifically or upon account, but also for future responsibilities incurred upon the faith of them.[2] So, also, any act, done at the request of the party, making the contract, for the benefit of a third person, such as paying the debt of a third person, or forbearing to sue for a debt due by such person, or discharging such debt, or guaranteeing such debt, or becoming liable for the acts or defaults of a third person, will, in like manner, be a sufficient consideration to support the contract.[3] [So,

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[1] Com. Dig. *Action of Assumpsit*, B. 1, 2, 4, 5, 9, 10; Bayley on Bills, ch. 12, p. 505, (5th edit. 1830); Chitty on Bills, ch. 3, p. 84, 85, (8th edit. 1833); Bosanquet *v.* Dudman, 1 Stark. R. 1; Heywood *v.* Watson, 4 Bing. R. 496; Kent *v.* Lowen, 1 Camp. R. 179, note; Rolfe *v.* Caslon, 2 H. Black. 571; Hornblower *v.* Proud, 2 Barn. & Ald. 327; Post, § 194.

[2] Bosanquet *v.* Dudman, 1 Stark. R. 1; Ex parte Bloxham, 8 Ves. R. 531; Heywood *v.* Watson, 4 Bing. R. 496; Bramah *v.* Boberts, 1 Bing. N. Cas. 469; Percival *v.* Frampton, 2 Cromp. Mees. & Rosc. 180; Swift *v.* Tyson, 16 Peters, R. 1, 21, 22; Bank of the Metroplis *v.* New England Bank, 1 Howard, Sup. Ct. R. 239; S. C. 17 Peters, R. 174; Barnett *v.* Brandao, 6 Mann. & Gr. 630, 670; Post, § 195.

[3] Com. Dig. *Action of Assumpsit*, B. 3, 11, 15; Bayley on Bills, ch. 12,

under the charter of a mutual insurance company, the mutual agreement and association of the parties respectively giving notes for premiums in advance, have been held a sufficient consideration for the Notes.[1]] A preexisting debt is equally as available, as a consideration, as is a present advance, or value, given for the Note.[2] Even the settlement of a doubtful claim, preferred against the party, will be a sufficient and valid consideration, without regard to the legal validity of the claim, if it be fairly made.[3]

§ 187. The objection to a Note may be, that there is a total want of consideration to support it; or that there is only a partial want of consideration.[4] In the first case, it goes to the entire validity of the Note, and avoids it. In the latter case, it affects the Note with nullity only *pro tanto*.[5] The same rule applies to cases,

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p. 504, (5th edit. 1830); Chitty on Bills, ch. 3, p. 80, 84, (8th edit. 1833); Poplewell *v.* Wilson, 1 Str. R. 264; Ridout *v.* Bristow, 1 Tyrw. R. 84; S. C. 1 Cromp. & Jerv. 231. A promise by an executor or administrator, to pay a debt of the intestate or testator, is not valid, unless he has assets. Ten Eyck *v.* Vanderpoel, 8 John. R. 120; Schoonmaker *v.* Roosa, 17 John. R. 301; Bank of Troy *v.* Topping, 9 Wend. R. 273. But see Ridout *v.* Bristow, 1 Cromp. & Jerv. 231; S. C. 1 Tyrw. 84.

[1] Browner *v.* Appleby, 1 Sandford, Sup. Ct. N. Y. R. 158; Hone *v.* Allen, Ibid. 171; Hone *v.* Folger, Ibid. 177.

[2] Townsley *v.* Sumrall, 1 Peters, R. 170; Swift *v.* Tyson, 16 Peters, R. 11.

[3] Russell *v.* Cook, 3 Hill, R. 504.

[4] See Bayley on Bills, ch. 12, p. 494–504, (edit. 1830); Id. (Amer. edit. 1836, by Sewall & Phillips,) p. 531–556, where many of the American cases are collected; Swift *v.* Tyson, 16 Peters, R. 1; Post, § 194.

[5] Chitty on Bills, ch. 3, § 1, p. 79–83, (8th edit.); Bayley on Bills, ch. 12, p. 494, 495, (5th edit. 1830); Barber *v.* Backhouse, Peake, R. 61; Darnell *v.* Williams, 2 Stark. R. 166; Sparrow *v.* Chisman, 9 Barn. & Cressw. 241; Lewis *v.* Cosgrave, 2 Taunt. R. 2; Wintle *v.* Crowthier, 1 Tyrw. R. 213, 216; Lee Gascoigne *v.* Smith, McClell. & Younge,

where there was originally no want of consideration; but there has been a subsequent failure thereof, either in whole, or in part. For a subsequent failure of the consideration is equally fatal with an original want of consideration, not, indeed, in all cases, but in many cases;[1] at least, where it is a matter capable of definite computation, and not mere unliquidated damages.[2] So, if a Note is given as an indemnity, it is a sufficient answer to it, that the party has not been damnified at all, or that the original claim has been extinguished.[3] So, if a Note is originally a gift, in whole or in part;[4] or if it is founded upon a sale of goods, to which the title afterwards fails, in whole or in part; it will, *pro tanto*, be void as between those parties.[5]

§ 188. In the next place, a Promissory Note will be

338; Stephens *v.* Wilkinson, 2 Barn. & Adolp. 320; Allaire *v.* Hartshorne, Zabriskie, N. Jersey R. 665.

[1] Chitty on Bills, ch. 3, § 1, p. 85–88, (8th edit. 1833); Bayley on Bills, ch. 12, p. 494.–496, (5th edit. 1830); Jackson *v.* Warwick, 7 Term R. 121; Mann *v.* Lent, 10 Barn. & Cressw. 877; Day *v.* Nix, 9 Moore, R. 159.

[2] Day *v.* Nix, 9 Moore, R. 159; Chitty on Bills, ch. 3, p. 88, 89, and note (*b*), (8th edit. 1833); Ledger *v.* Ewer, Peake, R. 216; Bayley on Bills, ch. 12, p. 495–499, (5th edit. 1830); Solomon *v.* Turner, 1 Stark. R. 51; Morgan *v.* Richardson, 1 Camp. R. 40, note; Tye *v.* Gwynne, 2 Camp. R. 346; Moggridge *v.* Jones, 14 East, R. 486; Grant *v.* Welchman, 16 East, R. 207; Obbard *v.* Betham, 1 Mood. & Malk. 483. See the masterly judgment of Mr. Baron Parke, in Mondel *v.* Steel, 8 Mees. & Wels. 858; Bracey *v.* Carter, 12 Adolp. & Ellis, 373. A total failure of consideration will sometimes, but not always, be a good bar or defence to an action of covenant. Cooch *v.* Goodman, 2 Adolp. & Ellis, New R. 580, 599; Com. Dig. *Fait*, C. 2.

[3] Chitty on Bills, ch. 3, p. 84, 85, (8th edit. 1833.)

[4] Ibid.; Nash *v.* Brown, cited Chitty on Bills, p. 85, note (*c*); Holliday *v.* Atkinson, 5 Barn. & Cressw. 50; Blogg *v.* Pinkers, 1 Ryan & Mood. R. 125; Bayley on Bills, ch. 12, p. 502, 503, (5th edit.) See Tate *v.* Hilbert, 2 Ves. jr. 111; S. C. 4 Bro. Ch. R. 486.

[5] Ibid.

void, where it is founded upon fraud, or duress, or imposition, or circumvention, or taking an undue advantage of the party; as where he is intoxicated.[1] And this doctrine is so completely coincident with the dictates of natural justice, that it probably has a full recognition in the jurisprudence of every civilized country. Certain it is, that it has a most perfect sanction in the Roman Law, and in the jurisprudence of all the states of continental Europe.[2]

§ 189. In the next place, a Promissory Note will be void, if the consideration is illegal.[3] It may be illegal, (as has been already suggested,) either because it is against the general principles and doctrines of the Common Law; or, because it is specially prohibited or interdicted by statute. The former illegality exists, wherever the consideration is founded upon a transaction against sound morals, public policy, public rights, or public interests; as, for example, contracts of any sort made with an alien enemy; contracts in general restraint of trade or marriage; contracts for the perpetration, or concealment, or compounding of some crime; contracts offensive to Christian morals and virtue, as for

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1 Chitty on Bills, ch. 2, § 1, p. 21, (8th edit. 1833); Id. ch. 3, p. 83, 84; Duncan *v.* Scott, 1 Camp. R. 100; Rees *v.* Marquis of Headfort, 2 Camp. R. 574; Grew *v.* Bevan, 3 Stark. R. 134; Gladstone *v.* Hadwen, 1 M. & Selw. 517; Noble *v.* Adams, 7 Taunt. R. 59; Bayley on Bills, ch. 5, § 2, p. 143, (5th edit. 1830); Id. ch. 2, § 6, p. 56, 57; Lord Gallway *v.* Mathew, 10 East, R. 264; Shirreff *v.* Wilks, 1 East, R. 48; Fleming *v.* Simpson, 1 Camp. R. 40, note; Pitt *v.* Smith, 3 Camp. R. 33; Gregory *v.* Fraser, 3 Camp. R. 454.

2 Pothier on Oblig. n. 28–33, and Pothier, by Evans, Vol. 2, No. 2, p. 19–25; Id. No. 3, p. 28, 29; Dig. Lib. 4, tit. 14, l. 7, § 7; Id. l. 10, § 2.

3 Bayley on Bills, ch. 12, p. 504–524, (5th edit. 1830); Story on Conflict of Laws, § 243–260; Pothier on Oblig. n. 43–45; Pothier, by Evans, Vol. 2, No. 2, p. 19; Bell *v.* Quin, 2 Sandford, Superior Ct. R. 146.

illicit cohabitation; contracts for the purchase of a public office; contracts for indemnity against an act of known illegality; contracts in fraud of the rights and interests of third persons; contracts justly reprehensible for their injurious effects upon the feelings of third persons; and contracts by way of wager, upon occasions not allowed by the general policy of law, if, indeed, in a just sense, mere wagers ought ever to be held legal.[1] The latter illegality (that which is created by statute) exists, not only where there is an express prohibition or interdiction of the act or contract; but also where it is implied from the nature and objects of the statute.[2] The Roman Law has inculcated the same general principles in an emphatic manner. *Quod turpi ex causâ promissum est, non valet.*[3] And it is followed out and supported in the French Law.[4]

§ 190. In the next place, between what parties, and under what circumstances, is the consideration of a Promissory Note inquirable into, for the purpose of a defence or a bar to an action brought thereon? The general rule is, that the total or partial want or failure

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[1] Chitty on Bills, ch. 3, p. 93-99, (8th edit. 1833); Bayley on Bills, ch. 12, p. 508-511, (5th edit. 1830); Story on Conflict of Laws, § 243-259 *b*.

[2] Chitty on Bills, ch. 3, p. 99-118, (8th edit. 1833); Bayley on Bills, ch. 12, p. 504-514, (5th edit. 1830). — It has seemed to me unnecessary to go at large, in this place, into the doctrine of the illegality of consideration, as the elementary works above cited contain a large collection of the cases, all of which, however, turn upon one or more of the principles, which are stated in the text. Story on Conflict of Laws, § 243-260; 1 Story on Eq. Jurisp. § 296, 298-300; 1 Fonbl. Eq. Jurisp. B. 1, ch. 4, § 5-7, and notes; 1 Harrison's Dig. tit. *Contract*, § 3-8. Mr. Evans, in his translation of Pothier on Oblig. Vol. 2, No. 1, p. 1-19, has examined this whole subject with much ability.

[3] Instit. Lib. 3, tit. 20, § 24.

[4] Pothier on Oblig. n. 43-46.

of consideration, or the illegality of consideration, may be insisted upon as a defence or a bar between any of the immediate or original parties to the contract. It may be insisted by the maker against the payee, and by the payee against his indorsee.[1] Thus, for example, it is a good defence or bar to an action between these parties, that the Note is a mere accommodation Bill, that the maker is a mere accommodation maker, and the payee an accommodation indorser.[2] The same rule will apply to any derivative title under them by any person, who acts merely as their agent, or has given no value for the Note.[3] It will also apply to all cases, where the party takes the Note, even for value, after it has been dishonored, or is overdue; for then he takes it subject to all the equities, which properly attach thereto between the antecedent parties.[4] So, if he has notice, at

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[1] Bayley on Bills, ch. 12, p. 494–523, (5th edit. 1830); Chitty on Bills, ch. 3, p. 78–83, (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 80–82, (4th edit.); Jackson *v.* Warwick, 7 Term R. 121; Barber *v.* Backhouse, Peake, R. 61; Ledger *v.* Ewer, Peake, R. 216; Darnell *v.* Williams, 2 Stark. R. 166; Jones *v.* Hibbert, 2 Stark. R. 304; Pike *v.* Street, 1 Mood. & Malk. 226; Lewis *v.* Cosgrave, 2 Taunt. R. 2; Sumner *v.* Brady, 1 H. Black. R. 647; Knight *v* Hunt, 5 Bing. R. 432; Walker *v.* Perkins, 3 Burr. R. 1568; Clark *v.* Ricker, 14 New Hampsh. R. 44.

[2] Bayley on Bills, ch. 10, p. 420, 421, (5th edit. 1830); Id. ch. 12, p. 495; Chitty on Bills, ch. 3, p. 81, (8th edit. 1833); Darnell *v.* Williams, 2 Stark. R. 166; Wiffen *v.* Roberts, 1 Esp. R. 261; Jones *v.* Hibbert, 2 Stark. R. 304; Sparrow *v.* Chisman, 9 Barn. & Cressw. 241; De Launey *v.* Mitchill, 1 Stark. R. 439; Allaine *v.* Hartshorne, Zabriskie, R. 665; Dowe *v.* Schutt, 2 Denio, R. 621.

[3] Ibid.; Denniston *v.* Bacon, 10 John. R. 198; Grew *v.* Burditt, 9 Pick. R. 265.

[4] Chitty on Bills, ch. 3, p. 92, 93; Id. 113, 116; Id. ch. 6, p. 244, 245, (8th edit. 1833); Bayley on Bills, ch. 5, § 3, p. 157, 158; Id. ch. 12, p. 512, (5th edit. 1830); Id. (Amer. edit. 1836, by Sewall & Phillips), p. 544–548; Taylor *v.* Mather, 3 Term R. 83, note; Brown *v.* Davies, 3 Term R. 80; Cruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259; Ayer *v.* Hutchins, 4 Mass. R. 370; Thompson *v.* Hale,

the time, when he purchases it, that the Note is void in the hands of the party, from whom he purchases it, either from fraud, or want, or failure, or illegality of consideration, he will take it subject to the same equities as that party.[1] There is one peculiarity in cases of illegality of consideration, in which it is distinguishable from the want or failure of consideration. In the latter, if there be a partial want or failure of consideration, it avoids the Note only *pro tanto;* but, where the consideration is illegal in part, there it avoids the Note *in toto.*[2] The reason of this distinction seems to be founded, partly, at least, upon the ground of public policy, and partly upon the technical notion, that the security is

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6 Pick. R. 259; Tucker *v.* Smith, 4 Greenl. R. 415; Brown *v.* Turner, 7 Term R. 630; Boggs *v.* Lancaster Bank, 7 Watts & Serg. 331. The equities, which are here intended, are not all the equities, which may exist between the parties, arising from other transactions; but all the equities, attaching to the particular Bill in the hands of the holder. Ante, § 178; Story on Bills, § 220; Burrough *v.* Moss, 10 Barn. & Cressw. 558; Whitehead *v.* Walker, 10 Mees. & Wels. 696. But see the cases collected in Bayley on Bills, ch. 12, (Amer. edit. 1836, by Sewall & Phillips), p. 546-552; Baxter *v.* Little, 6 Metc. R. 1. A Bill, which has been accepted, payable on demand with interest, will not be treated as overdue, unless it has been presented for payment; for it may have been the intention of the parties, that it should be negotiated, and remain outstanding for some time. Barough *v.* White, 4 Barn. & Cressw. 325. But see Ayer *v.* Hutchins, 4 Mass. R. 370; Thompson *v.* Hale, 6 Pick. R. 259; Bayley on Bills, (Amer. edit. 1836, by Sewall & Phillips), ch. 12, p. 546-552; Furniss *v.* Gilchrist, 1 Sandford, Superior Ct. N. Y. R. 53.

[1] Ibid.; Bayley on Bills, ch. 12, p. 512, (5th edit. 1830); Amory *v.* Meryweather, 2 Barn. & Cressw. 573; Evans *v.* Kymer, 1 Barn. & Adolp. 528; Kasson *v.* Smith, 8 Wend. R. 437; Skilding *v.* Warren, 15 John. R. 270; Harrisburg Bank *v.* Meyer, 6 Serg. & Rawle, 537; Chitty on Bills, ch. 3, p. 92, 93, (8th edit. 1833); Id. p. 115, 116; Steers *v.* Lashley, 6 Term R. 61.

[2] Robinson *v.* Bland, 2 Burr. R. 1077; Bayley on Bills, ch. 12, p. 514, (5th edit. 1830); Scott *v.* Gillmore, 3 Taunt. R. 226; Clark *v.* Ricker, 14 N. Hampsh. 44. But see Chitty on Bills, ch. 3, p. 114, and note, (8th edit. 1833).

entire, and cannot be apportioned. Probably a similar ground would be assumed in cases of fraud, at least where the ingredients were grossly offensive, or where the transactions were so connected, as to be incapable of a clear and definite separation. There is much force in the suggestion, which has sometimes been made, that, where the parties have woven a web of fraud, it is no part of the duty of courts of justice to unravel the threads, so as to separate the sound from the unsound.

§ 191. On the other hand, the partial or total failure of consideration, or even fraud between the antecedent parties, will be no defence or bar to the title of a *bonâ fide* holder of a Note, for a valuable consideration, at or before it becomes due, without notice of any infirmity therein.[1] The same rule will apply, although the present holder has such notice, if he yet derives a title to the Note from a prior *bonâ fide* holder for value.[2] This doctrine, in both its parts, is indispensable to the security and circulation of negotiable instruments; and it is founded in the most comprehensive and liberal principles of public policy. No third person could otherwise safely purchase any negotiable instrument; for his title might be completely overturned by some latent defect of this sort, of which he could not have any adequate means of knowledge, or institute any inquiries, which might not end in doubtful results, or

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[1] Chitty on Bills, ch. 3, p. 78, 79, (8th edit. 1833); Bayley on Bills, ch. 12, p. 499, 500, (5th edit. 1830); Collins *v.* Martin, 1 Bos. & Pull. 651; Bramah *v.* Roberts, 1 Bing. N. Cas. 469; Story on Bills, § 14, 189, 191, 193, 417; Robinson *v.* Reynolds, 2 Adolp. & Ellis, New R. 196, 211.

[2] Ibid.; Haly *v.* Lane, 2 Atk. 182; Lickbarrow *v.* Mason, 2 Term R. 71; Chalmers *v.* Lanion, 1 Camp. R. 383; Robinson *v.* Reynolds, 2 Adolp. & Ellis, New R. 196, 211.

embarrassing difficulties. Hence it is, that a *bonâ fide* holder for value, without notice, is entitled to recover upon any negotiable instrument, which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person, from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery.[1] [But even such *bonâ fide* holder can recover only the amount he has actually advanced.][2]

§ 192. The same doctrine will generally apply to all cases of a *bonâ fide* holder for value, without notice before it becomes due, where the original Note, or the indorsement thereof, is founded on an illegal consideration; and this, upon the same general ground of public policy, without any distinction between a case of illegality, founded in moral crime or turpitude, which is *malum in se*, and a case founded in the positive prohibition of a statute, which is *malum prohibitum;* for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped.[3] The only exception

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[1] 3 Kent, Comm. Lect. 44, p. 79, 80, (5th edit.); Bayley on Bills, ch. 12, p. 524–528, (5th edit. 1830); Miller *v.* Race, 1 Burr. R. 452; Grant *v.* Vaughan, 3 Burr. R. 1516; Peacock *v.* Rhodes, 2 Doug. R. 633; Lowndes *v.* Anderson, 13 East, R. 130; Solomons *v.* Bank of England, 13 East, R. 135, note (*a*); Thurston *v.* McKown, 6 Mass. R. 428; Wheeler *v.* Guild, 20 Pick. R. 545.

[2] Allaire *v.* Hartshorne, Zabriskie, N. Jersey R. 665; Hollman *v.* Hobson, 8 Humphreys's Tenn. R. 127; Wiffen *v.* Roberts, 1 Esp. R. 261; Jones *v.* Hibbert, 2 Stark. R. 204; Edwards *v.* Jones, Carr. & Payne, R. 633; S. C. 2 Mees. & Welsby, 414; Robins *v.* Maidstone, 4 Adolph. & Ellis, N. S. 811; Williams *v.* Smith, 2 Hill, N. Y. 301; Valette *v.* Mason, 1 Smith, Indiana R. 84.

[3] Chitty on Bills, ch. 3, p. 92, 93, (8th edit. 1833); Id. p. 115, 116, Lowes *v.* Mazzaredo, 1 Stark. R. 385; Wyat *v.* Bulmer, 2 Esp. R. 538;

is, where the statute, creating the prohibition, has, at the same time, either expressly, or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice, or not. There are few cases, in which any statute has created a positive nullity of such instruments, either in England or America. The most important seem to be the statutes against gaming, and the statutes against usury.[1] And the policy of these enactments has been

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3 Kent, Comm. Lect. 44, p. 79, 80, and note, (4th edit.); Bayley on Bills, ch. 12, p. 512–516; Gould *v.* Armstrong, 2 Hall, R. 266; Smedberg *v.* Simpson, 2 Sandford, Superior Ct. N. Y. R. 85.

[1] Bowyer *v.* Bampton, 2 Str. R. 1155; Peacock *v.* Rhodes, 2 Doug. R. 636; Lowe *v.* Walker, 2 Doug. R. 736; Ackland *v.* Pearce, 2 Camp. R. 599; 3 Kent, Comm. Lect. 44, p. 79, 80, (4th edit.); Bayley on Bills, ch. 12, p. 512–519, (5th edit. 1830); Preston *v.* Jackson, 2 Stark. R. 237; Shillito *v.* Theed, 7 Bing. R. 405; Henderson *v.* Benson, 8 Price, R. 281; Chitty on Bills, ch. 3, p. 115, 116, (8th edit. 1833). — In Bayley on Bills, ch. 12, p. 517, (5th edit. 1830), it is said; "The objection of illegality of consideration is, in some cases, confined to those persons, who were parties or privy to such illegality, and those, to whom they have passed the Bill or Note without value; in other cases, it is extended even to holders bonâ fide, and for value. The latter cases are, where the consideration is, either wholly or in part, signing a bankrupt's certificate; money lost by gaming as aforesaid, or by betting on the sides of persons so gaming; money knowingly lent for such gaming or betting; money lent, at the time and place of such play, to any person either then gaming or betting, or who shall, during the play, play or bet; money lent on an usurious contract; the ransom, or money knowingly lent to enable the owner to obtain the ransom, of the ship or vessel of any British subject, or any merchandise or goods on board the same." On the other hand, Mr. Chancellor Kent, in his learned Commentaries, restricts the cases to those under the statutes against gaming and usury, and says, that there are no others, in which the instrument is void in the hands of an innocent indorsee for value. 3 Kent, Comm. Lect. 44, p. 79, 80, (5th edit.) The former probably exhibits the present state of the English Law most accurately. See Chitty on Bills, ch. 3, p. 115, 116, (8th edit. 1833.) And it seems, that, wherever the defence of usury is set up, since the Statute of 58 Geo. 3, ch. 93, the plaintiff is compellable to prove, that he gave value for the Bill, otherwise he is not deemed to be within the protection of the Statute. Wyatt *v.* Campbell, 1 Mood. & Malk. 80; Bayley on Bills, ch. 12. p. 521, (5th edit. 1830.)

brought into so much doubt in our day, that in England the rule, as to usury, and gaming, and some other cases, has been changed by recent statutes; and a total repeal, or partial relaxation of it, has found its way into the legislation of America.[1]

§ 193. In respect to cases of illegality, also, this farther distinction may become important. The illegality may not only occur between the original parties to the Note; but, where the Note was originally given for a legal and valid consideration, there may be illegality in the subsequent indorsement or other transfer of it. In the latter case, the illegality will displace the title of the parties thereto, but not the title of any *bonâ fide* holder for value under them, who has no notice of the illegality, and is not bound to deduce his title to the Note through such parties, or to state or prove their signatures.[2] As, for example, if the first indorsement be in blank, and the second indorsement for an illegal consideration, a subsequent *bonâ fide* holder may claim title as indorsee of the first indorser, and thereby escape from the necessity of establishing his title by devolution through the second indorsement. In such a case he will be completely protected.[3] But, if the holder is compellable to make his title through the parties to the illegal consideration, and the transfer is as between

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[1] 3 Kent, Comm. Lect. 44, p. 79, 80, (5th edit.); Stat. 58 Geo. 3, ch. 98; Stat. 5 and 6 Will. 4, ch. 41; Bayley on Bills, ch. 12, p. 517, 521, (5th edit. 1830); Smedberg *v.* Simpson, 2 Sandford, Superior Ct. N. Y. R. 85. See, also, Bayley on Bills, ch. 12, p. 557–580, (Amer. edit. 1836, by Sewall & Phillips,) where the principal American cases are collected in the notes.

[2] Bayley on Bills, ch. 12, p. 522, 523, (5th edit. 1830); Chitty on Bills, ch. 3, p. 93, 109, 116, (8th edit. 1833.)

[3] Ibid.; Parr *v.* Eliason, 1 East, R. 92; Daniel *v.* Cartony, 1 Esp. R. 274; Munn *v.* Commission Company, 15 John. R. 44.

them declared absolutely void by statute, it seems, that the holder is not entitled to recover upon the Note against any of the antecedent parties.[1] But, as between the holder and any subsequent parties, his title will be good, if it is itself free from any illegality.[2]

§ 194. Neither is it any defence or bar, that the Note was known to the holder to be an accommodation Note between the other parties, if he takes it for value, *bonâ fide*, before it has become due.[3] The reason is, that the very object of every accommodation Note is, to enable the parties thereto, by a sale or other negotiation thereof, to obtain a free credit and circulation thereof; and this object would be wholly frustrated, unless the pur-

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[1] Bayley on Bills, ch. 12, p. 522, 523, (5th edit. 1830); Chitty on Bills, ch. 3, p. 93, 109, 110, (8th edit. 1833); Lowes *v.* Mazzaredo, 1 Stark. R. 385; Ackland *v.* Pearce, 2 Camp. R. 599; Chapman *v.* Black, 2 Barn. & Ald. 590; Henderson *v.* Benson, 8 Price, R. 288; Gaither *v.* Farmers' & Mechanics' Bank of Georgetown, 1 Peters, R. 43; Lloyd *v.* Scott, 4 Peters, R. 205, 228. — The authorities on this point are in conflict with each other. Parr *v.* Eliason, 1 East, R. 92, and Daniel *v.* Cartony, 1 Esp. R. 274, affirm the right. But the text is supposed to contain the better established doctrine. The true distinction seems to be, between cases, where the indorsement is merely void, and cases, where it is voidable. In the former case, it is obvious, that no title can be deduced through a void title; in the latter, a title may be, at least against all parties except the person, who is entitled to avoid it. See Knights *v.* Putnam, 3 Pick. R. 184, (2d edit.), where many of the authorities are collected. See, also, Nichols *v.* Fearson, 7 Peters, R. 103; Reading *v.* Weston, 7 Conn. R. 409; Bush *v.* Livingston, 2 Cain. Cas. in Err. 66; Braman *v.* Hess, 13 John. R. 52; Munn *v.* Commission Company, 15 John. R. 44.

[2] Chitty on Bills, ch. 3, p. 109, 110, (8th edit. 1833); Bayley on Bills, ch. 12, p. 523, 524, (5th edit. 1830); Edwards *v.* Dick, 4 Barn. & Ald. 212; Bowyer *v.* Bampton, 2 Str. R. 1155; O'Keefe *v.* Dunn, 6 Taunt. R. 315.

[3] Ibid.; Charles *v.* Marsden, 1 Taunt. R. 224; Smith *v.* Knox, 3 Esp. R. 46; Scott *v.* Lifford, 1 Camp. R. 246; Bank of Ireland *v.* Beresford, 6 Dow, R. 237; Grandin *v.* Leroy, 2 Paige, R. 509; Powell *v.* Waters, 17 John. R. 176. Martros *v.* Clark, 2 Sandford, Superior Ct. N. Y. R. 115.

chaser, or other holder for value, could hold such a Note by as firm and valid a title, as if it were founded in a real business transaction. The mere fact, that an accommodation Note has been indorsed even after it became due, does not of itself, without some other equity in the maker, defeat the rights of the holder.[1] In short, the parties to every accommodation Note 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 them, or on their account, and at their request. The French Law seems to inculcate an equally broad and comprehensive doctrine.[2]

§ 195. Every person is, in the sense of the rule, treated as a *bonâ fide* holder for value, not only when he has advanced money or other value for it; but when he has received it in payment of a precedent debt, or when he has a lien on it, or has taken it as collateral security for a precedent debt, or for future, as well as for past advances.[3] Thus, a banker, who is accustomed

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[1] Sturtevant *v.* Ford, 4 Scott, R. 668.

[2] Pothier De Change, n. 118 - 121 ; Code de Comm. art. 117 ; Pardessus, Droit Comm. Tom. 2, art. 378 ; Story on Bills, § 191.

[3] Chitty on Bills, ch. 3, p. 85, (8th edit. 1833) ; Heywood *v.* Watson, 4 Bing. R. 496 ; Bayley on Bills, ch, 12, p. 500, 501, (5th edit. 1830) ; Bosanquet *v.* Dudman, 1 Stark. R. 1 ; Ex parte Bloxham, 8 Ves. 531 ; Townsley *v.* Sumrall, 2 Peters, R. 170 ; Swift *v.* Tyson, 16 Peters, R. 1 ; Bachellor *v.* Priest, 12 Pick. R. 399 ; Norton *v.* Waite, 2 Applet. R. 175 ; Homes *v.* Smith, 16 Maine, R. 117 ; Ante, § 186 ; Barnett *v.* Brandao, 6 Mann. & Gr. 630, 670. Allaire *v.* Hartshorne, Zabriskie, N. Jersey, R. 665 ; Russell *v.* Haddick, 3 Gilman, Illinois, R. 233. The earliest cases in the New York Reports (Warren *v.* Lynch, 5 John. R. 239 ; Bay *v.* Coddington, 5 John. Ch. R. 54) are coincident with the doctrine stated in the text. Some cases afterwards brought the doctrine into doubt, and in which it was decided, that taking a Bill in payment of a precedent debt did not entitle the creditor to be deemed a bonâ fide purchaser within the sense

to make advances or acceptances, from time to time, for his customers, and has in his possession negotiable

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of the rule. See Bay *v.* Coddington, 20 John. R. 637; Wardell *v.* Howell, 9 Wend. 170; Bristol *v.* Sprague, 8 Wend. R. 423; Rosa *v.* Brotherson, 10 Wend. R. 85; Ontario Bank *v.* Worthington, 12 Wend. R. 593; Payne *v.* Cutler, 13 Wend. 606. The latter cases, however, seem gradually receding from these decisions, and inclining to uphold the old rule. See Bank of Salina *v.* Babcock, 21 Wend. R. 499; Bank of Sandusky *v.* Scoville, 24 Wend. R. 115; Williams *v.* Smith, 2 Hill, N. Y. R. 301. Seneca Co. Bank *v.* Neass, 5 Denio, R. 330; Hunt *v.* Fish, 4 Barbour, Sup. Ct. R. 324; Mortross *v.* Clark, 2 Sandford, Sup. Ct. N. Y. R. 115. The leading authorities were cited and commented on in Swift *v.* Tyson, 16 Peters, R. 15–22. On that occasion the Court said: "There is no doubt, that a bonâ fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity, as between the antecedent parties, if he takes under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bonâ fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and, therefore, it is incumbent upon the defendant to establish by way of defence, satisfactory proofs of the contrary, and thus to overcome the primâ facie title of the plaintiff. In the present case, the plaintiff is a bonâ fide holder without notice for what the law deems a good and valid consideration, that is, for a preëxisting debt; and the only real question in the cause is, whether under the circumstances of the present case, such a preëxisting debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for, the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its Courts, as well upon general principles, as by the express provisions of the thirty-fourth section of the judiciary act of 1789, ch. 20. And then it is further contended, that, by the law of New York, as thus expounded by its Courts, a preëxisting debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. In the first place, then, let us examine into the decisions of the Courts of New York securities, belonging to them, for collection, is deemed to be a holder for value, to the extent of such advances

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upon this subject. In the earliest case, Warren *v.* Lynch, 5 Johns. R. 286, the Supreme Court of New York appear to have held, that a preexisting debt was a sufficient consideration to entitle a bonâ fide holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in Bay *v.* Coddington, 5 John. Ch. R. 54. Upon that occasion he said, that negotiable paper can be assigned or transferred by an agent or factor, or, by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the Notes; thus directly affirming, that a preëxisting debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries (3 Kent, Comm. § 44, p. 81, 5th edit.) The decision in the case of Bay *v.* Coddington was afterwards affirmed in the Court of Errors, 20 John. R. 637, and the general reasoning of the Chancellor was fully sustained. There were, indeed, peculiar circumstances in that case, which the Court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the Notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the Court upon that occasion, several of them holding that the decree ought to be reversed, others affirming, that a preëxisting debt was a valuable consideration, sufficient to protect the holders, and others again insisting, that a preëxistent debt was not sufficient. From that period, however, for a series of years, it seems to have been held by the Supreme Court of the State, that a preëxisting debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially Rosa *v.* Brotherson, 10 Wend. R. 85; The Ontario Bank *v.* Worthington, 12 Wend. R. 593; and Payne *v.* Cutler, 13 Wend. R. 605, and directly in point. But the more recent cases of The Bank of Salina *v.* Babcock, 21 Wend. R. 499, and The Bank of Sandusky *v.* Scoville, and acceptances.[1] In every such case he is deemed to have a lien on such securities for the balances due to

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24 Wend. R. 115, have greatly shaken, if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least, of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain, that the Court of Errors have not pronounced any positive opinion upon it." And again; "It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a preëxisting debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true, (which, however, may well admit of some doubt, from the generality of the language,) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it, in the usual course of trade and business, for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of, or as security for, a preëxisting debt, is according to the known usual course of trade and business. And why, upon principle, should not a preëxisting debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, preëxisting debts. The creditor is thereby enabled to realize, or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, preëxisting debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new Notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably

[1] Bosanquet *v.* Dudman, 1 Stark. R. 1; Ex parte Bloxham, 8 Ves. 531. Spring's Appeal, 10 Burr, R. 235.

him from time to time, as well as for such acceptances, by the implied consent or agreement of his customers, resulting from the usage or course of business.[1]

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more than one half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for preëxisting debts. This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a preëxisting debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of Coolidge *v.* Payson, 2 Wheaton, R. 66, 70, 73, and Townsley *v.* Sumrall, 2 Peters, R. 170, 182, are directly in point. In England the same doctrine has been uniformly acted upon. As long ago as the case of Pillans and Rose *v.* Mierop and Hopkins, 3 Burr. R. 1664, the very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the Bill of Exchange, there drawn in discharge of a preëxisting debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the Bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole Court held the plaintiff entitled to recover. From that period downward, there is not a single case to be found in England in which it has ever been held by the Court, that a preëxisting debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in Smith *v.* De Witts, 6 Dowl. & Ryl. 120, and De la Chaumette *v.* The Bank of England, 9 Barn. & Cressw. 209, where, however, the decision turned upon very different considerations. Mr. Justice Bayley, in his valuable work on Bills of Exchange and Promissory Notes, lays down the rule in the most general terms. 'The want of consideration,' says he, 'in toto or in part, cannot be insisted on, if the plaintiff or any intermediate party between him and the defendant took the Bill or Note bonâ fide, and upon a valid consideration.' Bayley on Bills, p. 499, 500, (5th London edition, 1830.) It is observable, that he here uses the words 'valid consideration,' obviously intending to make the distinction, that it is not intended to apply solely to cases, where a present consideration for advances of money on goods or otherwise takes place at the time

[1] Ibid.

§ 196. In the ordinary course of things, the holder is presumed to be *prima facie*, a holder for value; and

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of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of Bosanquet *v.* Dudman, 1 Stark. R. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every Bill he holds of that customer's, bonâ fide, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon, in Ex parte Bloxham, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of Heywood *v.* Watson, 4 Bing. R. 496, and Bramah *v.* Roberts, 1 Bing. New Cas. 469, and Percival *v.* Frampton, 2 Cromp. Mees. & Rosc. 180, are to the same effect. They directly establish, that a bonâ fide holder, taking a negotiable Note in payment of, or as secutrity for a preëxisting debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English Courts upon this subject. (See Wilkinson on Law of Shipping, p. 236, edit. 1843.) In the American Courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In Brush *v.* Scribner, 11 Conn. R. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a preëxisting debt was a valuable consideration, sufficient to convey a valid title to a bonâ fide holder against all the antecedent parties to a negotiable Note. There is no reason to doubt, that the same rule has been adopted, and constantly adhered to, in Massachusetts; and certainly, there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial States, it may fairly be presumed, that whatever constitutes a valid and valuable consideration in other cases of contract to support titles of the most solemn nature, is held a fortiori to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a bonâ fide holder, for a preëxisting debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consihe is not bound to establish, that he has given any value for the Note, until the other party has established the want, or failure, or illegality of the consideration, or that the Note had been lost or stolen, before it came to the possession of the holder.[1] It may then be incumbent upon him to show, that he has given value for it; for, under such circumstances, he ought not to be placed in a better situation than the antecedent parties, through whom he obtained the Note.

§ 197. What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the Note, so as to let it in as a bar or defence against a holder for value, has been a matter of much discussion, and of no small diversity of judicial opinion. It is agreed on all sides, that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character,

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deration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court." See, also, 3 Kent, Comm. Lect. 44, p. 80-82, (5th edit.); and Evans *v.* Smith, 4 Binn. R. 367; Bosanquet *v.* Dudman, 1 Stark. R. 1; Pillans *v.* Mierop, 3 Burr. R. 1664; Ex parte Bloxham, 8 Ves. 531; Heywood *v.* Watson, 4 Bing. R. 496; Bramah *v.* Roberts, 1 Bing. New Cas. 469; Percival *v.* Frampton, 2 Cromp. Mees. & Rosc. 180; Brush *v.* Scribner, 11 Connect. R. 388. In the recent case of Stalker *v.* McDonald, 6 Hill, N. Y. R. 93, the Court of Errors of New York seem to have affirmed, that the receiving a Note as collateral security was not a valuable consideration, entitling the party to the protection of the rule above stated. See Mickles *v.* Colvin, 4 Barbour, Sup. Ct. R. 304. Furniss *v.* Gilchrist, 1 Sandford, Sup. Ct. N. Y. R. 53; Fenly *v.* Pritchard, 2 Sandford, Sup. Ct. N. Y. C. 151.

[1] See Bayley on Bills, ch. 12, p. 529-531, (5th edit. 1830); Chitty on Bills, ch. 6, § 3, p. 277-284, (8th edit. 1833); Goodman *v.* Harvey, 4 Adolp. & Ellis, 870; Arbouin *v.* Anderson, 1 Adolp. & Ellis, New R. 498, 504. In this last case Lord Denman said; "The owner of a Bill is entitled to recover upon it, if he came to it honestly; that fact is implied primâ facie, by possession, and, to meet the inference so raised, fraud, felony, or some such matter, must be proved." Story on Bills, § 415, 416; Knight *v.* Pugh, 4 Watts & Serg. R. 445.

as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry.[1] For a considerable length of time, the doctrine prevailed, that, if the holder took the Note under suspicious circumstances, or without due caution and inquiry, although he gave value for it, yet he was not to be deemed a holder *bona fide* without notice.[2] But this doctrine has been since overruled and abandoned, upon the ground of its inconvenience, and its obstruction to the free circulation and negotiation of Exchange, and transferable paper.[3]

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[1] Cone *v.* Baldwin, 12 Pick. R. 545 ; Hall *v.* Hale, 8 Conn. R. 336.

[2] Gill *v.* Cubitt, 3 Barn. & Cressw. 466 ; Snow *v.* Peacock, 3 Bing. R. 406 ; Strange *v.* Wigney, 6 Bing. R. 677 ; Slater *v.* West, 1 Dans. & Lloyd, 15 ; Easley *v.* Crockford, 10 Bing. R. 243 ; Nicholson *v.* Patton, 13 Louis. R. 213, 216 ; 3 Kent, Comm. Lect. 44, p. 81, 82, (4th edit.) ; Down *v.* Halling, 4 Barn. & Cressw. 330 ; Beckwith *v.* Corrall, 3 Bing R. 444 ; Chitty on Bills, ch. 6, § 3, p. 277-284, (8th edit. 1833) ; Bayley on Bills, ch. 12, p. 524, 529-531, (5th edit. 1830.)

[3] Goodman *v.* Harvey, 4 Adolp. & Ellis, 870 ; Uther *v.* Rich, 10 Adolp. & Ellis, 784 ; Stephens *v.* Foster, 1 Cromp. Mees. & Rosc. 849 ; Arbouin *v.* Anderson, 1 Adolp. & Ellis, New R. 498, 509 ; Story on Bills, § 415, 416. The whole of this chapter, mutatis mutandis, has been extracted from Story on Bills, § 178-194, with a few alterations, and with the addition of some new illustrations, and notes, and authorities. On examining the chapter, I found little to add to it ; and the subject is so important, that it could not be omitted in the present volume, which is designed to be a complete and independent treatise of itself.

CHAPTER VI.

PRESENTMENT OF PROMISSORY NOTES FOR PAYMENT.

§ 198. We come, in the next place, to the consideration of the presentment of Promissory Notes for payment. We have already seen, that the contract or engagement of the maker is, to pay the Note upon due presentment thereof, at its maturity, or when it becomes due, at the place designated therefor.[1] We have also seen that the contract or engagement of the indorser is, that, if upon such due presentment the Note is not paid by the maker, he will, upon due notice being given to him of the dishonor, pay the same upon demand.[2] Hence, we see, that while the engagement of the maker is absolute, that of the indorser is conditional, and any neglect, or laches, of the holder, in not making due presentment, will discharge him.[3] It becomes important, therefore, to consider, first, what is a due presentment for payment; and, secondly, what is a due notice of the dishonor.

§ 199. Let us, then, inquire, in the first place, what is a due presentment for payment. This, necessarily, involves various considerations; (1.) The time, when the Note arrives at maturity, or becomes due; (2.) The place, where it is payable; (3.) The mode of present-

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[1] Ante, § 113.

[2] Ante, § 135; Bayley on Bills, ch. 7, § 1, p. 217, 218, (5th edit.)

[3] Ibid.; Magruder *v.* Bank of Georgetown, 3 Peters, Sup. Ct. R. 90; Whittlesey *v.* Dean, 2 Aikens, R. 263.

ment for payment; (4.) The person, by whom it is to be presented for payment; (5.) The person, to whom it is to be presented for payment; and (6.) What will constitute a sufficient justification or excuse, or not, for the want of a due presentment; and (7.) Notice, and other proceedings to be had on non-payment of the Note. Of these we shall treat in succession, in the order in which they are named.

§ 200. And, in the first place, as to the time of presentment for payment. It is obvious, that, where a Note is made payable at a particular time, either with reference to its date, or to the sight thereof, or otherwise, payment is demandable only when that time has expired, and not before. Still, however, although then demandable, the holder might not choose to demand payment of the maker at that time, but might omit and delay it at his pleasure, to a future time, unless there were some known rule of law, which should compel him to strict punctuality in point of time. Now, it would be highly injurious to the interests of commerce, and to the security of the drawers and indorsers of negotiable instruments, if the holder were at liberty to consult his own mere pleasure as to the time of making any demand of payment after a Note became due, and might, after long delays and non-payment, still have recourse over against the drawer or indorsers. It would expose the latter to serious, and, perhaps, to irremediable losses, which an earlier demand might have prevented; and thus it would have a tendency to discourage the use and circulation of negotiable paper.[1]

§ 201. Hence, the Commercial Law, which, through-

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[1] Story on Bills, § 324, 325, 344; Chitty on Bills, ch. 9, p. 385, (8th edit. 1833); Id. p. 402.

out all its departments, inculcates the doctrine of reasonable diligence, and frowns upon and discourages laches, has introduced a rule of great strictness on this subject, which, although it may sometimes be found harsh, and, perhaps, severe in its practical operation, yet, is, for the general purposes of business, highly useful to the commercial community, by introducing promptness, fidelity, and exactness, in the demand of payment. In respect to the maker, who is held to be the party primarily liable, and the absolute debtor, the holder is at liberty to allow him whatever indulgence or delay he may please, short of the period, which will, under the statute of limitations, or prescription of the particular state or country, where the suit is brought, operate as a bar to his claim. But, as to the indorsers, who are only collaterally and conditionally liable, the rule is far different. It is, that in order to charge them, a demand of payment should be made of the maker on the very day, on which, by law, the Note becomes due; and unless the demand be so made, it is, generally, a fatal objection to any right of recovery against the indorsers, although the maker himself may, and will, still be held liable on the Note.[1]

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[1] Chitty on Bills, ch. 9, p. 385, 386, 422, 423, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 217, 232, 247, (5th edit. 1830); Pothier, De Change, n. 129; Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Bridges *v.* Berry, 3 Taunt. R. 130; Jackson *v.* Newton, 8 Watts, R. 401; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 408-410, (5th edit.); Robinson *v.* Blen, 2 Appleton, R. 109. Mr. Chitty has remarked: "It is a general rule of law, that, where there is a precedent debt or duty, the creditor need not allege or prove any demand of payment before the action brought, it being the duty of the debtor to find out his creditor, and tender him the money; and, as it is technically said, the bringing of the action is a sufficient request. It might not, perhaps, be unreasonable, if the law, in all cases, required presentment to the acceptor of a Bill, or maker of a Note, before an action be

§ 202. The like rule prevails in the foreign law.— Whenever a Promissory Note becomes due, there must, in order to charge the indorsers, be a demand of payment on that very day, otherwise the indorsers will be discharged from their obligations, because the reciprocal obligations of the holder have not been performed.[1]

§ 203. Even the death, or known bankruptcy or insolvency of the maker, will (as we shall presently more

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commenced against him; because, otherwise, he might, on account of the negotiable quality of the instrument, and the consequent difficulty to find out the holder of it on the day of payment, in order to make a tender to him, be subjected to an action without any default whatever; and the engagement of the acceptor of a Bill, or maker of a Note, is, to pay the money, when due, to the holder, who shall, for that purpose, make presentment. And one reason, why a party cannot recover at law on a lost Bill or Note, is, that the acceptor of the one, and maker of the other, has a right to insist on having it delivered up to him, on his paying it. It seems, however, that in general, the acceptor or maker of a note cannot resist an action, on account of neglect to present the instrument at the precise time, when due, or of an indulgence to any of the other parties. And, on the above-mentioned principle, that an action is, of itself, a sufficient demand of payment, it has been decided, that the acceptor or maker of a Note cannot set up, as a defence, the want of a presentment to him, even before the commencement of the action, and although the instrument be payable on demand. But, in such a case, upon an early application, the Court would stay proceedings without costs." Chitty on Bills, ch. 9, p. 391, 392, (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 214, 215, (5th edit. 1830); Id. ch. 9, p. 402; Dingwall *v.* Dunster, Doug. R. 247; Anderson *v.* Cleveland, cited in Esp. Digest, N. Prius, 58, (4th edit.); and in 13 East, R. 430, note; Rumball *v.* Ball, 10 Mod. R. 38; Reynolds *v.* Davies, 1 Bos. & Pull. 625; Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Williams *v.* Waring, 10 Barn. & Cressw. 2; Macintosh *v.* Haydon, Ryan & Mood. R. 363; 2 Chitty, R. 11; 1 Tidd, Pract. 145, (9th edit.); Story on Bills, § 325, 344.

[1] Code de Comm. art. 161; Locré, Du Code de Comm. Tom. 1, art. 161, p. 502, 503; Pothier, De Change, n. 138-141. See Heinecc. de Camb. cap. 4, § 24; Nouguier, Des Lettres de Change, Tom. 1, Liv. 3, ch. 9, § 2, p. 378; Id. Liv. 4, § 3, 4, p. 493, 494; Thomson on Bills, ch. 6, § 1, p. 417, 418, (2d edit.); Id. § 2, p. 430; Id. ch. 5, § 2, p. 376, 377; Story on Bills, § 345.

fully see,[1]) be no excuse for the omission to demand payment at the time, when the Note becomes due.[2] The French Law is precisely the same upon this point.[3] And it will make no difference in the application of the rule by our law, whether the Note has been taken or transferred for a precedent debt, or for money advanced on a purchase thereof. In the former case, the right to recover the precedent debt, as well as the right to recover on the Note, will be gone, and so also the right to recover back the money, or recover on the Note, in the latter case.[4] Nor will the circumstance, that the holder has received the Note so near the time, when it becomes due, as to render it impracticable to make a presentment for payment at its maturity, constitute any excuse for the want of a due presentment, as to the other parties to the Note; whatever might be the case as to the party, from which he then first received it. In respect to the latter, perhaps all, which, under such circumstances, can be required, is to present it with reasonable diligence, as soon as it can be, for payment, and, if dishonored, to give him due notice thereof.[5] The French

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[1] Post, § 241; Story on Bills, § 346.

[2] Story on Bills, § 234, 279, 307, 318, 319, 346; Chitty on Bills, ch. 8, p. 360, (8th edit. 1833); Id. ch. 9, p. 386, 389; Bayley on Bills, ch. 7, § 1, p. 251, (5th edit. 1830); Molloy, B. 2, ch. 10, § 34; Russell *v.* Langstaffe, Doug. R. 515; Esdaile *v.* Sowerby, 11 East, R. 117; Bowes *v.* Howe, 5 Taunt. R. 30; S. C. 16 East, R. 112, 1 Maule & Selw. 555; Nash *v.* Harrington, 2 Aikens, R. 9.

[3] Pothier, De Change, n. 146, 147; Pardessus, Droit Comm. Tom. 2, art. 424; Id. Tom. 5, art. 1497; Story on Bills, § 347.

[4] Chitty on Bills, ch. 9, p. 385 - 387, 417, 418, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 232 - 234, (5th edit. 1830); Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Bridges *v.* Berry, 3 Taunt. R. 130.

[5] Chitty on Bills, ch. 9, p. 423, (8th edit. 1833); Anderton *v.* Beck, 16 East, R. 248; Bayley on Bills, ch. 7, § 1, p. 243, (5th edit. 1830.)

Law, upon this point, also, seems exactly in coincidence with ours.[1]

§ 204. The old French Law was equally as expressive as ours, that the bankruptcy or insolvency of the acceptor, at the maturity of the Bill, (and the same rule was applied to a Promissory Note,) constitutes no excuse for the want of a due presentment for payment by the holder at that time.[2] The modern Code of Commerce positively declares, that the holder of a Bill of Exchange or a Promissory Note, is not dispensed from protesting the Bill for the non-payment thereof, either by its having been protested for non-acceptance, or by the death or failure of the drawee, or maker.[3] And it adds, that in case of the failure of the acceptor or maker, before the Bill or Note becomes due, the holder may cause it to be protested, and have his recourse against the other parties to the Bill or Note for payment, or for security for payment.[4] The French Law seems even to go further, and to require that the demand and protest should be made in cases of such bankruptcy and insolvency, although, by the law of the place, where the Bill or Note is payable, no demand or protest is, in such a case required.[5] Pardessus puts this as clear, and says that if a Bill be drawn in France, payable in a foreign country, it will be necessary, al-

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1 Pardessus, Droit Comm. Tom. 2, art. 426; Id. Tom. 5, art. 1497; Story on Bills, § 326, 346, 347.

2 Pardessus, Droit Comm. Tom. 2, art. 424; Id. Tom. 5, art. 1497; Pothier, De Change, n. 147; Savary, Le Parfait Négociant, Tom. 2, Parère 45, p. 360; Story on Bills, § 319, 326.

3 Code de Comm. art. 163, 187.

4 Ibid.; Sautayra, sur Code de Comm. art. 163, p. 110; Story on Bills, § 322.

5 Pardessus, Droit Comm. Tom. 5, art. 1497; Story on Bills, § 177, note.

though the law of the place dispenses with a protest in case of such bankruptcy or insolvency, and that the holder should still protest the Bill, under the peril of otherwise losing his recourse against the French drawer; for, in such a case, the law of France, where the contract between the drawer and the payee, or other holder, was made, is to govern as to the acts to be done, to entitle the latter to a recovery.[1] And he applies the same rule as to the remedy of the holder against the indorsers, under the like circumstances.[2] It is almost unnecessary to add, that what is here said as to Bills of Exchange is equally applicable to Promissory Notes, *mutatis mutandis*.[3]

§ 205. Still, however, there are certain grounds, (as we shall more fully see hereafter,) which will, ordinarily, excuse the want of a due presentment for payment at the maturity of the Note, resulting either from a moral, or a physical inability, or from other causes, which the law deems a sufficient dispensation, or excuse, for the delay or omission to make due demand on the very day of payment. These are, for the most part, the same, which will ordinarily excuse the want of due notice of the dishonor of the Note, and will come under our consideration more fully hereafter.[4] Among these, we may mention the sudden illness or death of the holder or his agent; the absconding of the maker before the day of payment, or his place of residence being deserted or unknown, or unfound, after diligent search therefor; the

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1 Ibid.

2 Ibid. But see Story on Bills, § 176, 177, and note.

3 See Code de Comm. art. 187; Story on Bills, § 347.

4 See Story on Bills, § 308, 326, 327, 344; Chitty on Bills, ch. 10, p. 486-488, (8th edit.); Post, § 257-263, § 355-360.

general prevalence of a malignant disease, such as the yellow fever or cholera, to an extent, which stops all business and trade in the place; the impossibility of reaching the place where the maker resides, from snows or freshets, or overwhelming accidents; the occurrence of war, or the interdiction of commercial intercourse with the country where the maker resides; and the day of the maturity of the Note, occurring on a public holy-day, or a religious festival, or a solemn fast, celebrated according to the known usage, or the ordinances of the country.[1]

§ 206. Pothier lays down a rule equally broad and satisfactory, in respect to the due demand and protest of Bills of Exchange, (and the like doctrine is applicable to Promissory Notes,) namely, that any inevitable accident, or irresistible force, or unforeseen occurrence, which could not be provided against, will constitute a sufficient excuse for the neglect or omission. And for this, he relies upon the general maxim of the Roman Law, in cases of contract: *impossibilium nulla obligatio est.*[2] Indeed, this seems to be admitted by foreign jurists, as the general rule which governs their jurisprudence. But of this, more will be said in our subsequent pages.

§ 207. Promissory Notes are not ordinarily made payable at sight, or at a fixed time after sight, although they may be so;[3] but they are ordinarily made payable

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[1] Story on Bills, § 233, 234, 308, 327; Post, § 257-263; Chitty on Bills, ch. 8, p. 360, (8th edit.); Id. ch. p. 389-392, (8th edit.); Id. p. 422, 423; Id. ch. 10, p. 485, 524.

[2] Pothier, De Change, n. 144; Dig. Lib. 50, tit. 17, l. 185; Pardessus, Tom. 2, art. 426.

[3] Bayley on Bills, ch. 7, § 1, p. 248, (5th edit.); Thomson on Bills, ch. 6, § 2, p. 430, 431, (2d edit.); Chitty on Bills, ch. 9, p. 407, (8th edit.)

either at a fixed period after date, or upon demand. If a Note is made payable on demand, the time at which payment thereof must be demanded, must depend upon the circumstances of each particular case, and no general rule can be laid down, except that payment must be demanded within a reasonable time.[1] If the Note be

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[1] Story on Bills, § 231; Bayley on Bills, ch. 7, § 1, p. 234, (5th edit.); Thomson on Bills, ch. 6, § 2, p. 430, 431; Rice *v.* Wesson, 11 Metc. R. 400; Lockwood *v.* Crawford, 18 Conn. R. 361. Mr. Bayley says; "A Bill or Note, payable on demand, is payable immediately upon presentment; and, unless put into circulation, must be presented within a reasonable time after the receipt." Bayley on Bills, ch. 7, § 1, p. 234, (5th edit.); Id. p. 232. He applies the same rule to Bills or Notes, payable at sight, as to Bills payable on demand. Id. p. 236. Mr. Chitty affirms the same doctrine as to Notes payable on demand. Chitty on Bills, ch. 9, p. 402, (8th edit.); Id. p. 412, 413. He here says; — "Upon this question, it has been observed, that there is no other settled general rule, than that the presentment must be made within a reasonable time, which must be accommodated to other business and affairs of life, and that a party is not bound, in any case, to present a Bill or Note, payable on demand, on the same day it is issued or received by him; for a man ought not to be required to neglect every other business for the purpose of making so prompt a presentment; and it would be very inconvenient to have an inquiry in each particular case, whether or not the holder could conveniently have presented the instrument on the same day. And, as observed by Lord Mansfield, it would be unreasonable to suppose that a tradesman should be compelled to run about the town with a dozen drafts, from Charing Cross to Lombard Street, on the same day; and he directed the jury to consider that twenty-four hours were the usual time allowed for the presentment for payment. The notion, however, that twenty-four hours was the limit is not the present rule; and it suffices, in all cases, for a party to present a Bill or Note, payable on demand, at any time during the hours of business on the day after he received it. But although this rule universally prevails between the party delivering and the party receiving from him a Bill or Note so payable, yet it must not be understood, that the ultimate presentment for payment can be delayed for any indefinite time, by successive transfers between numerous parties, and by each party, on the day after he has received the Bill or Note, transferring it to another; for if there should, by any means, be an unreasonable number of days occupied, the party or parties first transferring the instrument, and other of the earlier parties, would probably be considered discharged from liability, in case the bankers,

payable at sight, or at so many days after sight, the same rule would seem to prevail as upon Bills of Ex-

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or person who issued the Note, so payable, should in the mean time fail; and no prudent party should permit any delay in presentment, especially if there be the least reason to doubt the solvency of the party to pay. It is perfectly clear that if a party who has received such a Bill or Note, does not, on the next day, present it, or forward it for presentment, in due time on the next day, nor transfer it, but locks it up, or keeps it, he thereby forfeits all claim upon the person from whom he received it. It seems, that, with respect to the length of time, Bills and Notes, payable on demand, may be kept in circulation, a distinction may be taken between the Notes of a private individual and country bankers' Notes, and also with reference to the persons by and between whom they have been circulated; and it has been considered, that upon a Bill or Note, payable on demand, and given for cash, by a person who makes the profit by the money on such Bills or Notes a source of his livelihood, (as in the case of country bankers issuing their Notes;) it is difficult to say, what length of time such person shall be entitled to consider unreasonable; but that upon such Bills or Notes given by way of payment, or paid into a banker's, any time, beyond what the common course of business warrants, is unreasonable. This position is explained by a recent case, where the defendants themselves, country bankers, transferred another country banker's Bill, some days after they had kept it, to the plaintiff's traveller, who did not remit it to the correspondents for some days; and, on its being presented, it was dishonored; and it was held, that the defendants were not discharged from liability; because, as Lord Tenterden observed, the character of the Bill, and the course of dealing must be attended to. It was a Bill by a country banker upon his London banker, and it did not seem unreasonable to treat such Bills as not requiring immediate presentment, but as being retainable by the holders for use within a moderate time, as part of the circulating medium of the country; and the defendants themselves, by the time they kept it, showed they so considered this Bill, but he left it to the jury to say whether they thought the delay unreasonable or not, and they found for the plaintiff. Upon a Bill or Note of this kind (i. e. payable on demand) given by way of payment, the course of business formerly was, to allow the party to keep it, if it was payable in or near the place, where it was given, until the morning of the next day of business, after it was received; and, according to more modern decisions, it is settled, that if such a Bill or Note be payable by or at a banker's, it suffices to present it for payment at any time during banking hours on the day after it is received. Thus, where a note of this kind, payable in London, was given there in the morning, a presentment the next morning was held by the Court sufficiently change, drawn at or after sight.[1] That is to say, the date of the Note would be treated as if it were the date of a Bill, payable at or after sight, and the time would begin to run from the presentment of the Note, as it would from the presentment for acceptance. In short, although the maker of a Note payable at sight, (which is, however, allowed the usual days of grace, as we shall presently see,[2]) or payable after sight, has sight of the instrument, when he makes it; yet a distinct and subsequent presentment must afterwards be made, and the time of payment be reckoned from the day of such presentment and exclusive thereof.[3]

§ 208. Now, the rule in relation to Bills of Exchange, whether foreign or domestic, payable at or after sight, unequivocally is, that they must be presented for acceptance, (and by analogy the rule applies to presentment

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early, though juries endeavored to establish a contrary rule, and to find, that the instrument must be presented on the very day it was received; and though it has been supposed, that the presentment must be in the forenoon of the next day, yet, in other cases, it was considered, that the party has twenty-four hours, or, according to a more recent decision, he has the whole of the banking hours, or hours of business of the next day, to make the presentment; and this last decision may now be relied upon as the fixed rule. It has been held, that a Bill or Note of this kind, given by way of payment to a banker, must be presented by him as soon as if it had been paid into his hands by a customer, and that if such a Bill or Note be paid into a banker's, and be payable at the place where the banker lives, it must be presented the next time the banker's clerk goes his rounds, but that doctrine has been overruled, and it should seem, that in all cases it suffices for a banker to present such check the day after he receives it." See, also, Foster *v.* Barney, 3 Verm. R. 60; Brentzer *v.* Wightman, 7 Watts & Serg. 264.

[1] Bayley on Bills, ch. 7, § 1, p. 227, 234, 236, (5th edit.)

[2] Bayley on Bills, ch. 3, § 10, p. 98; Post, § 211.

[3] Chitty on Bills, ch. 9, p. 406, 407, (8th edit.); Sturdy *v.* Henderson, 4 Barn. & Ald. 592, 593; Bayley on Bills, ch. 3, § 10, p. 98, (5th edit.); Story on Bills, § 355, note.

of Notes payable at and after sight) within a reasonable time; and what that reasonable time is must depend upon the circumstances of each particular case.[1] The holder of such a Note is not at liberty to keep it in his possession for an unreasonable time without presentment, and to lock it up from circulation. If he does, he will make the note his own, and will discharge the antecedent indorsers thereon from all responsibility.[2] But if the Note is kept in circulation, and not held by any one holder, through whose hands it passes, an unreasonable time, it seems difficult to assign any particular time in which it ought to be presented to the maker, so as the time of payment should begin to run thereon.[3] There may be some limitations upon this rule, in its application to particular classes of cases, resulting from the common course of business, or the circulation of

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[1] Bayley on Bills, ch. 7, § 1, p. 227, 228, 232, 234; Story on Bills, § 231; Chitty on Bills, ch. 7, p. 301–305, (8th edit.)

[2] Bayley on Bills, ch. 7, § 1, p. 227–230, 232, (5th edit.)

[3] Bayley on Bills, ch. 7, p. 232, 233, (5th edit.); Story on Bills, § 231; Chitty on Bills, ch. 7, p. 301–305; Muilman *v.* D'Eguino, 2 H. Black. 565, 569; Goupy *v.* Harden, 7 Taunt. R. 159; Mellish *v.* Rawdon, 9 Bing. R. 416; Fry *v.* Hill, 7 Taunt. R. 397; Gowan *v.* Jackson, 20 John. R. 176; Robinson *v.* Ames, 20 John. R. 146. On this subject Mr. Chitty (p. 301,) says; "With respect to the time when Bills, payable at or after sight, should be presented for acceptance, the only rule, whether the Bill be foreign or inland, and whether payable at sight, or at so many days after sight, or in any other manner, is, that they must be presented within a reasonable time; and, as the drawer may sustain a loss by the holder's keeping it any great length of time, it is advisable in all cases, to present it as soon as possible; but he is not obliged to send it by the first opportunity. According to the French Law, Bills payable at or after sight must be presented for acceptance within certain specified periods, according to the places at which they are drawn; and the French Law has also provided against a purposely hasty presentment and demand of acceptance, before the drawee can have received advice, and that the holder must allow as many days as there are five leagues, or fifteen miles, between the place of drawing and the place in which drawn."

particular classes of Notes, such as those of bankers and banks; bút these all resolve themselves into questions of usage.[1]

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[1] Story on Bills, § 231; Bayley on Bills, ch. 7, § 1, p. 227, 228, 236, (5th edit.); Chitty on Bills, ch. 7, p. 303, 304, (8th edit.) Mr. Chitty (p. 303,) says; "The holder of an inland Bill, payable after sight, is not bound instantly to transmit the Bill for acceptance; he may put it into circulation, and, if he do not circulate it, he may take a reasonable time to present it for acceptance, and the keeping it even an entire day after he received it, and a delay to present until the fourth day, a Bill on London, given within twenty miles thereof, is not unreasonable. In a late case, it seems to have been considered, that a distinction may be taken as to the nature of the Bill, and whether it was intended for immediate payment, or to be kept some time in circulation, as is the case of Bills after sight, drawn by country bankers on London bankers, and put in circulation by the former, especially if the party objecting to the delay has himself kept the Bill in his possession for some days." Mr. Bayley (p. 236 – 243,) says; "Upon a Bill or Note, payable on demand or at sight, and given for cash by a person, who makes the profit by the money on such Bills or Notes a source of his livelihood, it is difficult to say what length of time such person shall be entitled to consider unreasonable; but, upon such Bills or Notes, given by way of payment, or paid into a banker's, any time beyond what the common course of business warrants, is unreasonable. Upon a Bill or Note of this kind, given by way of payment, the course of business seemed formerly to allow the party to keep it, if payable in the place, where it was given, until the morning of the next day of business after its receipt; and till the next post, if payable elsewhere; but not longer. Thus, where a Note of this kind, payable in London, was given there in the morning, a presentment the next morning was held sufficiently early; a presentment at two the next afternoon too late. In a later modern case, where a similar Note was given in London at one, and not presented till the next morning, three juries held the delay unreasonable, but it was against the opinion of the court. But in a more recent case, where such a Note, payable in London, was given in the country, it was held, that the person receiving it was not bound to send it to London till the following day. And, that the person receiving it in London was not bound to present it till the next day. A Bill or Note of this kind, given by way of payment to a banker, must be presented by him as soon as if it had been paid into his hands by a customer. And it has been held, that a Bill or Note of this kind, if payable at the place, where the banker lives, must be presented the next time the banker's clerk goes his rounds. But, if a London banker receive a check by the general post, he is not bound

§ 209. Pothier, upon general principles, holds the same doctrine in cases of Bills of Exchange, payable at or after sight, that there is no absolute rule, as to the time in which they should be presented for payment; and that it must be left to the judgment of the Court, whether the presentment has been made within a reasonable time; for it would not be equitable, that the holder should, by too long a delay, throw the risk of the solvency of the drawee upon the drawer.[1] The present Commercial Code of France has positively fixed the different periods, within which Bills, drawn at or after sight, shall be presented for acceptance, varying the time according to the different places where the Bills are drawn, and the different places on which the Bills are drawn.[2] It is true, that the doctrine here stated is applied by him in the text, solely to Bills of Exchange; but it is equally applicable to cases of Promissory Notes, and therefore is not separately discussed, either by Pothier, or in the Code of Commerce.[3] By

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to present it for payment until the following day. And where a person in London received a check upon a London banker, between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing-house; the court held, that there had been no unreasonable delay, either by the holder, in not presenting it for payment on the first day, which he might have done, or by his banker in presenting it at the clearing-house only, on the following day at noon; it being proved to be the usage among such bankers, not to pay checks presented by one banker to another after four o'clock, but only to mark them if good, and to pay them the next day at the clearing-house."

1 Pothier, De Change, n. 143; Pardessus, Droit Comm. Tom. 2, art. 358.

2 Code de Comm. Liv. 1, tit. 8, art. 160; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 160; p. 499 - 502; Pardessus, Droit Comm. Tom. 2, art. 358, 359; Story on Bills, § 232.

3 See Code de Comm. art. 187.

the law of Russia, Bills of Exchange are divided into two sorts, one, where the Bill is drawn by the drawer on himself, the other, where it is drawn on some third person; the former is called *simple*, the other, *transmissible*. The simple Bill seems exactly our Promissory Note.[1] By the same law, a Bill payable at sight is payable twenty-four hours after its presentment for acceptance; if payable after sight, it falls due after the last day indicated in the Bill, counting from the day of presentment, which is not included.[2]

§ 210. In our subsequent remarks, we shall refer altogether to Promissory Notes, payable at a fixed period after their date, unless some exceptions are specially stated. The rule here is, that the Note must be presented on the very day on which it becomes due, or arrives at maturity.[3] This, also, is the rule of the foreign law; and, although it is generally laid down in terms applicable to Bills of Exchange, it is equally applicable to Promissory Notes.[4]

§ 211. But the question will still remain: At what time is a Note properly due, or when does it arrive at maturity? At first view, an uninstructed reader might imagine, that this could scarcely present any practical difficulties as to its solution. Upon farther inquiry, however, it will be found to involve questions of a highly important character, and originally not without difficulty,

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[1] Nouguier, De Change, Tom. 2, p. 504; Art. 294 of Russian Code of 1832; Louis. Law Journ. Vol. 1, p. 64.

[2] Id. Tom. 2, p. 519, ch. 2, art. 350; Louis. Law Journ. p. 78.

[3] Story on Bills, § 325, 344; Chitty on Bills, ch. 9, p. 385, (8th edit.); Ante, § 201.

[4] Heinecc. De Camb. cap. 4, § 24; Pothier, De Change, n. 139, 172; Code de Comm. art. 131–135, 161; Story on Bills, § 334, 338.

although now the rule is fixed and established beyond any reasonable controversy. Let us, for example, suppose a Note to be drawn on the first day of January, 1842, payable at ten days after date, without grace. Is it due on the tenth day of January, or on the eleventh day of January? It is now settled that it is due on the eleventh day of January, or in other words, the day of the date is excluded from the computation.[1] The same question might be propounded as to a Note payable ten days after sight, without grace, and presented on the first day of January; and it ought to receive a similar answer.[2] But it will be found, that, in other cases, not of a commercial nature, great controversies have arisen at the Common Law, as to the computation of the time, when deeds and other instruments are to have effect and operation, whether from the date, or from the day of the date thereof, or with reference thereto, and whether the day of the date is to be taken as exclusive or inclusive.[3]

§ 212. The French Law recognizes the same doctrine, that the time when a Note becomes due, if it is payable at a certain time after date, is to be calculated exclusive of the day of the date of the Note. For it is the maxim of that law, *Dies termini non computatur in termino;* and

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1 Chitty on Bills, ch. 9, p. 403, 404, 406, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 248 – 250, (5th edit. 1830); Bellasis *v.* Hester, 1 Ld. Raym. 280; Coleman *v.* Sayer, 1 Barnard. R. 303; Blanchard *v.* Hilliard, 11 Mass. R. 85; Woodbridge *v.* Brigham, 12 Mass. R. 403; S. C. 13 Mass. R. 556; Henry *v.* Jones, 8 Mass. R. 453.

2 Ibid.

3 See Pugh *v.* the Duke of Leeds, Cowp. 714; Glassington *v.* Rawlins, 3 East, R. 407; Lester *v.* Garland, 15 Ves. 254; Castle *v.* Burditt, 3 Term R. 623; 4 Kent, Comm. Lect. 56, p. 95, note *b*, (5th edit.) See Bigelow *v.* Willson, 1 Pick. R. 485; Presbrey *v.* Williams, 15 Mass. R. 193; Story on Bills, § 329.

this applies not only as to the commencement, but, also, to the end of the time specified.[1]

§ 213. Again. Suppose a Note, drawn on the thirtieth day of January, payable in a month, without grace; how is the month to be reckoned? Is it a lunar month, or a calendar month, or the period of thirty days? By the Common Law of England, a month is constantly deemed a lunar month, as well in computations made in the construction of statutes, as in the construction of mere Common Law contracts.[2] But, by the universal rule of the commercial world, including England and America, a month is now deemed, in all cases of negotiable instruments, and, indeed, in all commercial contracts, to be a calendar month.[3] Hence, in the case above supposed, the Note will, without grace, be payable on the last day of February, it being the day on which the month will expire; and no allowance will be made for the fact, that February may or does contain only twenty-eight days.[4] A Promissory Note, therefore, dated on the first day of January, and payable six

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[1] Delvincourt, Droit Comm. Tom. 1, Liv. 1, tit. 77, (2d edit.); Pothier De Change, n. 138.

[2] Chitty on Bills, ch. 9, p. 406, (8th edit. 1833); 2 Black. Comm. 141; Lacon *v.* Hooper, 6 Term R. 225; Castle *v.* Burditt, 3 Term R. 623; Catesby's case, 6 Co. Rep. 61; Lang *v.* Gale, 1 Maule & Selw. 111; In the matter of Swinford and Horn, 6 Maule & Selw. 226.

[3] Story on Bills, § 143; Bayley on Bills, ch. 7, § 1, p. 247, 250, (5th edit. 1830); Chitty on Bills, ch. 9, p. 403, 404, (8th edit. 1833); 4 Kent, Comm. Lect. 56, p. 95, note *b*, (5th edit.); Jolly *v.* Young, 1 Esp. R. 186; Titus *v.* Lady Preston, 1 Str. R. 652. — In America, the computation has generally, but not universally, been by calendar months, and not by lunar months, as well in the construction of statutes, as of common contracts. See Kent, Comm. Lect. 56, p. 95, note *b*, (5th edit.); Hunt *v.* Holden, 2 Mass. R. 170; Avery *v.* Pixley, 4 Mass. 4. 460; Thomas *v.* Shoemaker, 6 Watts & Serg. R. 179.

[4] Tassell *v.* Lewis, 1 Ld. Raym. R. 743; 3 Kent, Comm. Lect. 44, p. 102 - 104, (5th edit.); Chitty on Bills, ch. 9, p. 406, (8th edit.)

months after date, or after sight, without grace, will be payable on the corresponding day of the sixth month, viz.: the first day of July, for then the six months will expire, whatever number of days the intermediate months may contain.[1]

§ 213 *a.* Other cases may be put, which involve more nicety. Suppose a Note dated on the twenty-eighth, twenty-ninth, thirtieth, or thirty-first day of January, payable in one month; on what day will it become due? The true answer will be, on the twenty-eighth of February, if the year is not bissextile, and if it be, then on the twenty-ninth day of February, and grace is to be calculated thereon from and after the twenty-eighth or twenty-ninth day of February accordingly.[2] Suppose a Note dated on an impossible day, as the thirty-first of September, payable in six months, it will be deemed payable as if dated on the thirtieth day of September, that is, it will be due on the thirtieth day of March,[3] and the days of grace are to be added.[4] So, if a Note is dated on the twenty-eighth of February, payable in one month, it will be due on the twenty-eighth of March, and adding the days of grace, on the thirty-first of March.[5] If a Note is dated on the twenty-ninth of February, in a bissextile year, payable in one month, it will be due in like manner on the twenty-ninth of March, and with grace on the first of April. If a Note is dated on the thirtieth of April, payable in one month, it will be due on the thirtieth of May, (and not on the thirty-first,) and with grace added on the second of June.[6] So, a Note dated on the twenty-ninth of

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[1] Chitty on Bills, ch. 9, 406, (8th edit.); Story on Bills, § 330.
[2] Wagner *v.* Kenner, 2 Rob. Louis. R. 120.
[3] Ibid. [4] Ibid. [5] Ibid. [6] Ibid.

August, payable in six months, will be due, including days of grace, on the third of March following.[1] So a Note dated on the twenty-ninth of August, payable in six months after date, will be due in common years on the twenty-eighth day of February, and including grace on the third day of March.[2] In all these various cases, the same general rule prevails, to construe the month as meaning a calendar month, and to end the month with the corresponding day of the succeeding month if there be one; and if there be none, then to adopt the nearest day, by the doctrine of *cy-pres*. Thus, if the date begins on the last day of any month, whether it be on the twenty-eighth, the twenty-ninth, the thirtieth, or the thirty-first day of that month, then to end the succeeding month on the same day, if there be one; if there be none, to take the latest day of the same month, as the nearest approximation thereto. The rule is not an arbitrary one, but is deduced as the presumed real intention of the parties. Of course, in this statement the days of grace have been excluded from our consideration, in order to simplify the illustration; but practically they are to be added in all the cases, to ascertain the actual time when the Note becomes due.

§ 214. As Notes, made in one country, are sometimes payable in another, it becomes necessary, here, to advert, in a brief manner, to the difference of style in different countries, which may require, in the computation of time, a reference to the style of the country, where the Note is made. Thus, for example, Russia still continues to use the old style, although all the other countries of Europe use the new. Under the old style, the course

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[1] Wood *v.* Mullen, 3 Rob. Louis. R. 299. [2] Ibid. 395.

of reckoning is according to the Julian Calendar; but under the new, it is according to the Gregorian Calendar; the difference between the two styles being, at the present time, twelve days; that is to say, twelve days are added to the time reckoned by the old style, to bring the time to the corresponding day of the new style. Thus, for example, if a Note is dated in Russia, on the first day of January, 1842, old style, it precisely corresponds to the thirteenth of January, 1842, according to the new style, which is used in America and England, and, perhaps, all the countries of Europe, except Russia;[1] and, conversely, if a Note is drawn in England, or America, dated on the first day of January, 1842, the corresponding day in the old style is the twentieth day of December, preceding. Hence it is, that, if a Note be drawn in London, dated the first day of January, 1842, new style, (that is, the twentieth day of December, old style,) payable at St. Petersburg, (Russia,) one month after date, (excluding all days of grace,) it will, if accepted, be payable, not on the first day of February, 1842, but on the twentieth day of January, 1842, for that is the corresponding day, when the month expires, by the old style. On the other hand, if a Note is drawn in St. Petersburg, dated the first day of January, 1842, payable in London, in one month after date, without grace, it will, if accepted, be payable not on the first day of February, but on the thirteenth day of February, 1842, and if payable with grace, on the third or last day of grace, after that day.[2]

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[1] See Kyd on Bills, p. 7, (3d edit.); Marius on Bills, p. 22, 23, (edit. 1794.)

[2] Bayley on Bills, ch. 7, § 1, p. 249, (5th edit. 1830); Chitty on Bills, ch. 9, p. 403, (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 2,

§ 215. But, besides these elements in the computation of the time, at which Promissory Notes become due

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p. 608, (edit. 1813). — Mr. Chitty says; "When a Bill is drawn at a place using one style, and payable on a day certain, at a place using another, the time when the Bill becomes due, must be calculated according to the style of the place, where it is payable; because the contract, created by the making of a Bill of Exchange, is understood to have been made at that place, and, consequently, should be construed according to the laws of it. In other works it is laid down, that, upon a Bill, drawn at a place using one style, and payable at a place using another, if the time is to be reckoned from the date, it shall be computed according to the style of the place at which it is drawn, otherwise, according to the style of the place where it is payable; and, in the former case, the date must be reduced or carried forward to the style of the place, where the Bill is payable, and the time reckoned from thence. Thus, on a Bill dated the 1st of May, old style, and payable here two months after, the time must be computed from the corresponding day of May, new style, namely 13th of May; and on a Bill, dated the 1st of May, new style, and payable at St. Petersburg, two months after date, from the corresponding day of April, old style, namely, 19th of April." Chitty on Bills, ch. 9, p. 403, (8th edit. 1833); Bayley (on Bills, ch. 7, § 1, p. 249, 5th edit. 1830,) lays down the latter position in the same language. In the earlier editions of both works, the reverse mode of computation of the time, under the old and new styles, was, by mistake, given. See, also, Kyd on Bills, ch. 1, p. 7, 8, (3d edit.); Story on Bills, § 331. Marius, who first published his work on Bills of Exchange in 1651, on this subject, says, (p. 22, 23, edit. 1794); "A Bill of Exchange, dated the second of March, new style, which is the twentieth of February, old style, (except in leap year, which is the twenty-first of February,) payable in London at double usance, will be due the two-and-twentieth of April, old style, and not the twentieth of April, as some do erroneously imagine, who would deduct the ten days (to reduce the new style to old style) at the end of the double usance, and so they would go as far as the second of May, new style, and then go backwards ten days, when of right they should go forwards from the date of old style, relating to the place where it is payable, and reckon the double usance from the very date of the Bill, thus; A Bill dated the second of March, new style, is the twentieth of February, old style, February having but twenty-eight days, (for the twentieth of February, old style, is the second of March, new style, even to the very day of the week,) so from the twentieth of February to the twenty-third of March is one usance, and from the twenty-third of March to the twenty-second of April there is another usance; and so in like manner, if a Bill of Exchange be dated the tenth of March, new style, which is the last of February, old style, payable at treble usance, such and payable, there is another allowance of time, which is of general, although not of universal operation and usage, and is different in different countries.[1] This is,

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a Bill will be due the last of May in London, and not the twenty-eighth of May, as some do imagine, because February hath but twenty-eight days. Also, if a Bill be dated the eighth of January in Rouen, payable at double usance in London, it will fall due the twenty-sixth of February, and if from that date payable at treble usance, it will fall due the twenty-ninth of March, as is manifest by the almanac, or table, at the end of this book; for you must always count your usances from the very date of the Bill, as I have made evidently appear by what hath been before declared concerning usances; and I have seen divers Bills of Exchange which have been sent from beyond the seas, wherein the drawers have written the old and new style both together in the date of their Bills one above another, thus:

Amsterdam adj. 3-13 February 16 54-55 for £200 sterling.
Middleborough adj. 15-25 March 16 54-55 for £150 sterling.
Adj. 17 March, } 1655, in Genoa dollars, 245 at 57 d.
6 April, } £58. 3s. 9d. sterling.

And the like, which is very plain and commendable in those, that do so write, thereby to make things evident to the capacity of the weakest, and to avoid any further disputes thereupon, although in those Bills of Exchange, where the old and new style are not positively expressed, yet the same thing is intended and meant, and ought to be understood as if particularly set down; for if you have the date in new style, you may soon see what date it is in old style. And I have taken the more pains to make this out to every man's understanding, because I do perceive that many men for their own advantage, and in their own case, are subject to be biased, and judge amiss; but I conceive I have herein so clearly evidenced the truth and reason of my opinion, that it cannot but convince those, that are, or have been, of a contrary judgment, of their error and mistake, except they are wilfully blind, and then none so blind; or, that they can give me any better reason for their contrary opinion, and then I will submit unto them; for all Bills of Exchange, (as I have said before, and is notoriously known and assented unto by all,) which are made payable at usances, must be reckoned directly from the date of the Bill, which, if it be new style, and payable in London, or any other place where they write old style, the date must first be found out in the old style, and then count forward and you cannot mistake."

[1] Heineccius, on this subject, says; "Quamvis vero id tempus vocari soleat tempus fatale solutionis: quibusdam tamen locis etiam elapso illo tempore, quod in cambio expressum est, acceptanti dari solent induciæ

the allowance of what are technically called the days of grace; to which, incidentally, allusion has been already made.[1] These days of grace, which take their name from their being days of indulgence, or respite, granted to the maker for the payment of the Note, seem to have had their origin at a very early period in the history of negotiable paper. They were, probably, originally introduced by the usage of merchants, in the first place, to enable the acceptor of a Bill 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.[2] In both views, the

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aliquot dierum, e. gr. trium, quatuor, quinque, sex, qui vocantur Respitvel Discretiones-Tage, nec non Nach-vel Ehren-Tage, de quibus singularem in hac Academia dissertationem scripsit Io. Christoph. Frankius. Hæ induciæ in terris Brandenburgicis sunt trium dierum, O. C. Brandenb. art. 24; in Saxonia vero ob fidem mercatorum vacillantem plane sunt abolitæ." By the Code of Russia of 1832, a Bill of Exchange, payable so many days or months after date, falls due after the expiration of the last day. Nouguier, De Change, Tom. 2, p. 519; Code of Russia, art. 351; Louis. Law Journ. Vol. 1, p. 78, (1842.)

1 Ante, § 170; Story on Bills, § 155, 170, 177; Chitty on Bills, ch. 9, p. 407, (8th edit. 1833); Heinnec. de Camb. cap. 2, § 13, 14.

2 Mr. Chief Justice Marshall, in Ogden *v.* Saunders, 12 Wheat. R. 213, 342, speaking on this subject, as applicable to Promissory Notes, says; "The usage of banks, by which days of grace are allowed on Notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience and partly in the indulgence of the creditor. By the terms of the Note, the debtor has to the last hour of the day on which it becomes payable, to comply with it; and

usage was, at first, probably discretionary and voluntary on the part of the holder, and gradually, from its general convenience and utility, it ripened into a positive right, as it certainly now is, and was also applied to Promissory Notes.[1]

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it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace, generally, to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat. R. 581, is a Note discounted in bank. In all such cases, the bank receives, and the maker of the Note pays, interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his Note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure does not arise until the failure has taken place; and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened."

1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, (5th edit.); Kyd on Bills, ch. 1, p. 9, 10, (3d edit.); Chitty on Bills, ch. 9, p. 407, (8th edit. 1833); Heinecc. de Camb. cap. 2, § 14. — Mr. Kyd (on Bills, ch. 1, p. 9, 3d edit.) gives the old rule, or usage, as the days of grace in different countries, thus: "A custom has obtained among merchants, that a person, to whom a Bill is addressed, shall be allowed a little time for payment, beyond the term mentioned in the Bill, called days of grace. But the number of these days varies, according to the custom of different places. Great Britain, Ireland, Bergamo, and Vienna, three days; Frankfort, out of the time of the fair, four days; Leipsic, Naumburg, and Augsburg, five days; Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremberg, and Portugal, six days; Dantzic, Konigsberg, and France, ten days; Hamburg and Stockholm, twelve days; Naples eight, Spain fourteen, Rome fifteen, and Genoa thirty days; Leghorn, Milan, and some other places in Italy, no fixed number. Sundays and holydays are included in the respite days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, Konigsberg, and France; but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day, on which the Bill falls due, makes one of the days of grace, but it is not so elsewhere." Mr. Chitty (Chitty on Bills, ch. 9, p. 407, 408, 8th edit. 1833,) gives the more modern rule, or usage, thus; "The number of these days varies, accord-

§ 216. In respect to the allowance, or non-allowance, of days of grace, the rule is, that it is to be governed altogether by the law of the place, where the Promis-

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ing to the ancient custom or express law prevailing in each particular country. In the former edition of this work was given a table of the days of grace, allowed in the time of Beawes, but various alterations were introduced by the Code Napoleon, and, therefore, the following table, acknowledged to be the most accurate, is substituted; —

Altona. Sundays and holydays included, and Bills falling due on a Sunday or holyday must be paid, or in default thereof, protested, on the day previous.	12 days.
America,	3 days.
Amsterdam. Abolished since the Code Napoleon.	none.
Antwerp. Ditto.	none.
Berlin. When Bills, including them, do not fall due on a Sunday or holyday, in which case, they must be paid or protested the day previous.	3 days.
Brazil. Rio Janeiro, Bahia, including Sundays, &c., as in the last case.	15 days.
England, Scotland, Wales, and Ireland,	3 days.
France. Abolished by the Code Napoleon, Livre 1, tit. 8, § 5, pl. 135; 1 Pardessus, 189. Ten days were formerly allowed, Pothier, pl. 14, 15.	none.
Frankfort on the Main. Except on Bills drawn at sight, Sundays and holydays not included.	4 days.
Genoa. Abolished by the Code Napoleon.	none.
Hamburg. Same as Altona.	12 days.
Ireland,	3 days.
Leghorn.	none.
Lisbon and Oporto. 15 days on local and 6 on foreign Bills; but, if not previously accepted, must be paid on the day they fall due.	6 days, or 15 days.
Palermo,	none.
Petersburg. Bills drawn after date are entitled to 10 days' grace, those drawn at sight, to only 3 days', and those at any number of days after sight, none whatever. But Bills, received and presented after they are due, are, nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holydays, also the day, when the Bill falls due, on which days they cannot be protested for non-payment, but, on the morning of the last day of grace, payment must be demanded, and, if not complied with, the Bill must be protested before sunset.	10 days, 3, &c.
Rotterdam. Abolished by the Code Napoleon.	none.
Scotland,	3 days.
Spain. Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland Bills; at Cadiz, only 6 days' grace. When Bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor are any Bills, unless accepted prior to maturity.	14 days, but vary.

sory Note is payable.[1] Thus, for example, if the Note is payable in France, where, by the present Code of Commerce, no days of grace are allowed, the Note becomes due at the regular expiration of the time stated on the face of the Note, and no days of grace are allowable.[2] On the other hand, if the Note is payable in England, then the full days of grace are allowed, according to the law of England; and the like rule prevails as to all other countries.[3] Indeed, it may be laid down as a general rule, that the law of the place, where a Note is payable, is to govern, not only as to the time, but as to the mode of presentment for payment.[4]

§ 217. Although the days of grace are different in different commercial countries, and are to be computed according to the law of the place, where the Note is payable;[5] yet, in most, although not in all, of them, the same general rule prevails, that they are to be calculated exclusive of the day, when the Note would other-

Trieste. 3 days on Bills drawn after date, or any term after sight, not less than 7 days, or payable on a particular day; but Bills, presented after maturity, must be paid within 24 hours. Sundays and holydays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the Bill protested, on the first following open day.	3 days.
Venice. 6 days, in which Sundays, holydays, and the days when the bank is shut, are not included.	6 days.
Vienna. Same as Trieste.	3 days.
Wales, ...	3 days."

[1] Bell, Comm. B. 3, ch. 2, § 4, p. 411, (5th edit.); Goddin *v.* Shipley, 7 B. Munroe, R. 597.

[2] Code de Comm. art. 135; Story on Bills, § 155, 177.

[3] Pardessus, Droit Comm. Tom. 5, art. 1489, 1495, 1498; Pothier, De Change, n. 155, 172, 187; Chitty on Bills, ch. 9, p. 409, (8th edit. 1833); Kyd on Bills, ch. 1, p. 9, (3d edit.)

[4] Ibid.

[5] Story on Bills, § 155, 170; Story on Conflict of Laws, § 316, 347, 361; Pothier, de Change, n. 155; Pardessus, Droit Comm. Tom. 5, art. 1495; Chitty on Bills, ch. 9, p. 406 – 409, (8th edit. 1833.)

wise become due.[1] Thus, for example, if a Note is drawn in America or England on the first day of January, payable, in either country, one month after date, the days of grace (which, as we have seen, are three days) will begin on the second day of February, and end on the fourth day of February.[2] On the other hand, if a Note were drawn in America or England on the first day of January, payable, in either country, at thirty days after date, the days of grace would begin on the first day of February, and end on the third day.[3]

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[1] See Kyd on Bills, p. 9, (3d edit.); Beawes, Lex Merc. Bills of Exchange, pl. 260; Ante, § 211.

[2] Ante, § 211, 213; Story on Bills, § 332; Chitty on Bills, ch. 9, p. 403, 404, 406, 409, 412, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 245, 249, 250, (5th edit. 1830); Pothier, De Change, n. 14, 15, 139, 172, 187; Sautayra, Sur Code de Comm. art. 131, 132; Mitchell *v.* Degrand, 1 Mason, R. 176; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411, (5th edit.) Mr. Chitty says; "At Hamburg, the day, on which the Bill falls due, makes one of the days of grace; but it is not so elsewhere." Chitty on Bills, ch. 9, p. 409, (8th edit. 1833); 1 Selwyn, Nisi Prius, p. 351, note, (10th edit. 1842.)

[3] Ante, § 211, 213; Story on Bills, § 177, 333; Pothier, De Change, n. 139, 172; Chitty on Bills, ch. 9, p. 406, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 245-247, 249, 250, (5th edit. 1830); Sautayra, Sur Code de Comm. art. 131, 132.—Mr. Chitty says; "When Bills, &c., are payable at one, two, or more months, after date or sight, the mode of computing the time, when they become due, differs from the mode of computation in other cases. In general, when a deed or Act of Parliament mentions a month, it is construed to mean a lunar month, or twenty-eight days, unless otherwise expressed; but, in the case of Bills and Notes, and other mercantile contracts, the rule is otherwise, and, by custom of trade, when a 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; thus, when a Bill is dated the first of January, and payable at one month after date, the month expires on the 1st of February, and, with the addition of the days of grace, the Bill is payable on the 4th of February, unless that day be a Sunday, and then on the 3d. When one month is longer than the succeeding one, it is said to be a rule not to go, in the computation, into a third month; thus, on a Bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and, in the three latter cases, in leap year

In other words, in each case, the time of running of the Note is calculated exclusive of the day of its date.[1] The same rule would apply to a Note, drawn payable at a certain number of days after sight; for the time would begin to run, only from the presentment thereof, and exclusive of that day, and the days of grace would be allowable accordingly.[2]

§ 218. Pothier states the rule of the old French Law to be the same, as to the calculation of the days of

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on the 29th. When the time is computed by days, the day, on which the event happens, is to be excluded." Chitty on Bills, ch. 9, p. 406, (8th edit. 1833.) Again, Mr. Chitty, p. 412, adds; "From these inquiries into the mode of calculating time and usances, and days of grace, in relation to Bills, the day of the date of the Bill or Note, or, in the case of Bills after sight, the day of acceptance, are always to be excluded, and the usance, or calendar month, or weeks, or days, are to be calculated from, and exclusive of such days; and, with the exception of Hamburg, the days of grace begin the day after the usances or months expire, and, if the last of the days of grace fall on a Sunday, Christmas-day, Good Friday, or legal fast, or thanksgiving-day, the Bill or Note is due, and must be presented on the day before. Thus, if a Bill be dated the 2d of November, 1831, and be payable in England, at two months after date, they expired on the 2d of January, 1832; and, adding the three days of grace, the Bill fell due on the 5th of that month, and must be then presented." Story on Bills, § 143, 144, 330.

[1] Ibid.

[2] Bayley on Bills, ch. 7, § 1, p. 244, 248, 250, (5th edit. 1830); Chitty on Bills, ch. 9, p. 406, 409, (8th edit. 1833); Sturdy *v.* Henderson, 4 Barn. & Ald. 592. Mr. Chitty says; "When a Bill or Note purports to be payable so many days after sight, the days are computed from the day the Bill was accepted, or the Note presented, exclusively thereof, and not from the date of the Bill or Note, or the day the same came to hand, or was presented for acceptance; for the sight must appear in the legal way, which is, either by the parties accepting the Bill, or by protest for non-acceptance. And, in the case of a bank post-bill, which is really a Promissory Note, and, in case of a Note payable after sight, though the maker has sight of the instrument, when he makes it, yet a distinct and subsequent presentment must afterwards be made, and the time of payment is reckoned from the day of presentment, exclusive thereof." Chitty on Bills, ch. 9, p. 406, 407, (8th edit. 1833); Story on Bills, § 330.

grace.[1] We have already seen, that, by the modern Commercial Code of France, the allowance of any days of grace is totally abrogated.[2] But still, in France, the time when a Bill or Note becomes due, if it is payable at a certain number of days after its date or after sight, or at one or more usances, if it is accepted, is (as we have seen[3]) always calculated exclusively of the day of the date, or the sight of the Bill or Note; so that, if the date, or sight, and the acceptance, be on the first day of January, and the Bill be payable in thirty days, it becomes payable on the thirty-first day of January, and not before.[4]

§ 219. In respect to the days of grace, also, another rule, equally important, seems generally, although not universally, to pervade all commercial countries in modern times. It is, that the days of grace are to be all counted consecutively and in direct succession, without any deduction or allowance, on account of there being any Sundays or holydays, or other non-secular days, intermediate between the first and the last day of grace.[5] Thus, if the first day of grace

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1 Pothier, De Change, n. 13, 139, 172.

2 Code de Comm. art. 135; Pardessus, Droit Comm. Tom. 2, art. 401; Ante, § 216.

3 Ante, § 212; Story on Bills, § 332.

4 Sautayra, Comm. Sur Code de Comm. art. 131, 132.

5 Pothier, De Change, n. 139; Bayley on Bills, ch. 7, § 1, p. 245–250, (5th edit. 1830); Chitty on Bills, ch. 9, p. 406, 410–412, (8th edit. 1833); Story on Bills, § 233, 234. Mr. Chitty says; "In Great Britain, Ireland, (and in Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, and Konigsberg, whilst days of grace were allowed in those places,) Sundays and holydays are always included in the days of grace, unless the last; but not so at Venice, Cologne, Breslau, and Nuremberg." Chitty on Bills, ch. 9, p. 411, 412, (8th edit. 1833.) In America, the same rule prevails as in England. In America, the 4th of July is treated as a holyday. Cuyler *v.* Stevens, 4 Wend. R. 566; Ransom *v.* Mack, 2 Hill, N. Y. R. 587, 592; Lewis *v.* Burr, 2 Cain. Cas. in Error, 195.

should be on a Saturday, the last day, under our law, would be on Monday, making no allowance whatsoever for Sundays, which, in some other cases, (as we have seen,) as, with reference to the times of giving notice of the dishonor of a Note, is always excluded from the computation of diligence.[1] The old French Law, in like manner, included Sunday, and other holydays, in the computation of the days of grace.[2]

§ 220. But, although the days of grace are never protracted by the intervention of Sundays, or any other holydays; yet they are, on the other hand, by our law, liable to be contracted and shortened by the last day of grace falling on a Sunday, or other holyday. For, whenever the last day of grace occurs on a Sunday, or other holyday, the Note becomes due and payable, not on the succeeding day, but on the preceding day.[3] In

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[1] Story on Bills, § 233, 234.

[2] Pothier, De Change, n. 139, 152.

[3] Bayley on Bills, ch. 7, § 1, p. 247, 248, (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411, (5th edit.); Chitty on Bills, ch. 9, p. 410–412, (8th edit. 1833); Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Story on Bills, 233; Homes *v.* Smith, 2 Appleton, R. 264. On this subject, Mr. Chitty says; "In this country, at Common Law, if the day, on which a Bill would otherwise be due, falls on a Sunday, or great holyday, as Christmas-day, the Bill falls due on the day before; and, where a third day of grace falls on a Sunday, the Bill must be presented on Saturday, the second day of grace; whereas, otherwise, a presentment on a second day of grace, being premature, would be a nullity. And, by 39 and 40 Geo. III., ch. 42, § 1, where Bills of Exchange and Promissory Notes become due and payable on Good Friday, the same shall, from and after the 1st day of June (1800), be payable on the day before Good Friday; and the holder or holders of such Bills of Exchange, or Promissory Notes, may note and protest the same for non-payment on the day preceding Good Friday, in like manner, as if the same had fallen due and become payable on the day preceding Good Friday; and such noting and protests shall have the same effect and operation at law, as if such Bills and Promissory Notes had fallen due and become payable on the day preceding Good Friday, in the same manner as is usual in cases of Bills and

other words, the latest business day, occurring within the days of grace, is deemed the day, on which the Note is due and payable; and the grace then expires.[1]

Notes coming due on the day before any Lord's day, commonly called Sunday, and before the feast of the Nativity, or birthday of our Lord, commonly called Christmas-day. So, with regard to fast days, it is enacted by 7 and 8 Geo. IV., c. 15, § 2, that, from and after the 10th day of April, 1827, in all cases, where Bills of Exchange or Promissory Notes shall become due and payable on any day appointed by his Majesty's proclamation for a day of solemn fast, or a day of thanksgiving, the same shall be payable on the day next preceding such day of fast or day of thanksgiving; and, in case of non-payment, may be noted and protested on such preceding day; and that, as well in such cases, as in the cases of Bills of Exchange or Promissory Notes, becoming due and payable on the day preceding any such day of fast, or day of thanksgiving." Chitty on Bills, ch. 9, p. 410, 411, (8th edit. 1833); Bussard *v.* Levering, 6 Wheat. 102.

[1] See Howard *v.* Ives, 1 Hill, N. Y. R. 263; Wooley *v.* Clements, 11 Alabama R. 220. It is said, that a different rule prevails, in respect to contracts not negotiable, and contracts, where no days of grace are allowed; and, therefore, if a common contract falls due on Sunday, the party has until the following Monday to perform it. Salter *v.* Burt, 20 Wend. R. 205. In this case, Mr. Justice Bronson, in delivering the opinion of the Court, said; "This check, having been post-dated, was payable on the day of its date, without any days of grace. Mohawk Bank *v.* Broderick, 10 Wendell, 304; 13 Wendell, 133. It fell due on Sunday, and the question is, whether the demand of payment was well made on the previous Saturday; or, whether it should have been made on the following Monday. When days of grace are allowable on a Bill or Note, and the third day falls on Sunday, the Bill or Note is payable on the previous Saturday. The same custom of merchants, which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days, in those cases, where the third is not a day for the transaction of business. But, when there are no days of grace, and the time for payment or performance, specified in the contract, falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very fully considered in Avery *v.* Stewart, 2 Conn. R. 69, which was an action on a Note, not negotiable, which fell due on Sunday; and the Court held, that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time, mentioned in a contract, for the doing of an act, inter-

Thus, if the last day of grace is on Sunday, the Note is due and payable, and the grace expires, on the preceding Saturday. And, if two holydays should succeed each other, as Sunday, on the twenty-fourth of December, and Christmas, on the twenty-fifth of December, the Note would be due and payable on the preceding Saturday, the twenty-third of December.[1]

§ 221. The same rule prevails in France; for, if a Bill or Note become payable at a great *fête*, or a fixed holyday, or Sunday, payment is demandable the day before.[2] Pothier seems to have thought, that the old French Law allowed some distinction in cases of this sort. If the day of the maturity of the Bill or Note should fall on Sunday, he admits, that a demand might be made on the preceding day; and, if payment be then absolutely refused, the holder may protest the Bill or Note. But, if the acceptor or maker should answer, that he would pay the next day, and not refuse absolutely, then the holder is bound to present it again for payment on the day of its maturity, although it is Sunday; and, if payment is then made, it is sufficient. If not then made, a second protest should be made.[3] But of this some doubt has been entertained in France. Heineccius lays down the rule, prevailing in Germany, to be, that in such a case, the demand of payment should be on the next succeeding day. *Si in diem feriatum in-*

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vening Sundays are to be counted; but, when the day for performance falls on Sunday, it is not to be taken into the computation. The check was presented before it became payable, and the demand and notice were consequently insufficient to charge the indorser." 20 Wend. R. 206, 207. But see Kilgour *v.* Miles, 6 Gill & John. R. 268.

[1] Bayley on Bills, ch. 7, § 1, p. 247, 248.

[2] Chitty on Bills, ch. 9, p. 411, (8th edit. 1833); Code de Comm. art. 133, 134.

[3] Pothier, de Change, n. 140.

cidit solutionis dies, nec acceptans invitus solvere tenetur, nec præsentans solutionem urgere, vel protestationem interponere potest, sed expectandus est dies sequens.[1] And he traces this doctrine back to the time of Justinian, by whose Code holydays, and days of public festivals, were prohibited from being days of the transaction of secular business.[2]

§ 222. And respect is paid, not only to the public holydays, and religious fasts and festivals of the country, where the Note is due and payable, as non-secular days, but also to the religious opinions and usages of the particular sect to which the maker belongs. A case may occur in England or America, where a Note may be due and payable, without the allowance of any of the three days of grace. Thus, for example, if the first day of grace should be on Saturday, and Monday should be Christmas-day, and the maker should be a Jew, by whose religious usages abstinence from all secular business is enjoined on Saturdays, the Note would (it is

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[1] Heinnec. de Camb. cap. 4, § 41.

[2] Ibid., note. The passage in the Code is, "Dies festos majestati altissimæ dedicatos, nullis volumus voluptatibus occupari, nec ullis exactionum vexationabus profanari. Dominicum itaque diem ita semper honorabilem decernimus, et venerandum, ut a cunctis executionibus excusetur; nulla quemquam urgeat admonitio; nulla fidejussionis flagitetur exactio; taceat apparitio; advocatio delitescat; sit ille dies a cognitionibus alienus; præconis horrida vox silescat; respirent a controversiis litigantes, et habeant fœderis intervallum; ad sese simul veniant adversarii non timentes, subeat animos vicaria pœnitudo; pacta conferant, transactiones loquantur. Nec hujus tamen religiosi diei otia relaxantes, obscœnis quemquam patimur voluptatibus detineri. Nihil eodem die sibi vindicet scena theatralis, aut Circense certamen, aut ferarum lachrymosa spectacula; et, si in nostrum ortum, aut natalem celebranda solennitas inciderit, differatur. Amissionem militiæ, proscriptionemque patrimonii sustinebit, si quis unquam hoc die festo spectaculis interesse, vel cujuscunque judicis apparitor prætextu negotii publici, seu privati, hæc, quæ hac lege statuta sunt, crediderit temeranda." Lib. 3, tit. 12, l. 11.

presumed) be payable on Friday, without any grace whatsoever. For the Jew maker would not be compelled to do business on Saturday; and the laws or usages of the country would not justify a demand on Sunday or Christmas.[1]

§ 223. The reason of all this doctrine seems to be, that, as the allowance of the days of grace is a mere indulgence to the maker, it shall be granted only in cases where it will not work any extra delay to the holder of the Note; but he shall be entitled to strict payment at the *punctum temporis* of the Note. If any other rule were adopted, the holder would be compelled to lose the use of his money for four days; and thus the period of delay be protracted, to his inconvenience, and, perhaps, injury. Pothier has very justly remarked, that the days of grace are, as the name imports, a mere favor accorded to the acceptor or maker, *humanitatis ratione*, to distinguish them from the time stated on the face and purport of the Bill or Note.[2]

§ 224. Another question often arises, as to the kinds of Notes on which days of grace are allowed. In England, days of grace are allowed on all Notes, whether they are payable at a certain time after date, or after

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[1] Story on Bills, § 233; Bayley on Bills, ch. 7, § 2, p. 571, (5th edit. 1830); Chitty on Bills, ch. 8, p. 360, (8th edit. 1833); Id. ch. 10, p. 488, 520; Lindo *v.* Unsworth, 2 Camp. R. 602; Heinecc. de Camb. cap. 4, § 41.

[2] Pothier, de Change, n. 139; Chitty on Bills, ch. 9, p. 407, 408, (8th edit. 1833); Heinecc. de Camb. cap. 4, § 13, 14. Heineccius says: "Quamvis vero id tempus vocari soleat tempus fatale solutionis; quibusdam tamen locis etiam elapso illo tempore, quod in cambio expressum est, acceptanti dari solent induciæ aliquot dierum, e. gr. trium, quatuor, quinque, sex, qui vocantur Respit-vel Discretions-Tage, nec non Nach-vel Ehren-Tage." Heinecc. de Camb. cap. 2, § 14; Ante, § 215; Story on Bills, § 333, note.

sight, or even at sight.[1] As to the latter (Notes payable at sight,) there has been some diversity of opinion among the profession, as well as among the elementary writers. But the doctrine seems now well established, both in England and America, that days of grace are allowable on Bills and Notes payable at sight.[2] And the same rule has been applied, as, in strict analogy, it should apply to bank post notes, payable after sight; for they differ in nothing from ordinary inland Bills of Exchange.[3] The same rule seems to apply to Bills pay-

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1 Chitty on Bills, ch. 9, p. 407, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 244, 245, (5th edit. 1830); Bank of Washington *v.* Triplett, 1 Peters, R. 30.

2 Chitty on Bills, ch. 9, p. 407, 409, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 249, (5th edit. 1830); 1 Selwyn, Nisi Prius, p. 350, 352, (10th edit. 1842); Dehers *v.* Harriot, 1 Show. R. 163; Coleman *v.* Sayer, 1 Barnard, B. K. R. 303; Story on Bills, § 228, and note.

3 Chitty on Bills, ch. 9, p. 406, 409, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 244, 245, (5th edit. 1830; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 411, (5th edit.); Brown *v.* Lusk, 4 Yerger, R. 210. How would it be on a bank post-note, payable at sight? Mr. Chitty, (p. 409, 410,) on the subject of Bills payable at sight, says: "With respect to a Bill payable at sight, though, from the very language of the instrument, it should seem that payment ought to be made immediately on presentment, this does not appear to be so settled. The decisions and the treatises differ on the question, whether or not days of grace are allowed. In France, Pothier, enumerating the various kinds of Bills, and writing at a time, when days of grace were allowed in France, states, that a Bill, payable at sight, is payable as soon as the bearer presents it to the drawee; but, in another part of his work, it appears that this opinion is founded on the words of a particular French Ordinance, which cannot extend to Bills payable in this country. However, he assigns, as a reason, that it would be inconvenient, if a person who took a Bill at sight, payable in a town, through which he meant to travel, and the payment of which he stands in need of, for the purpose of continuing his journey, should be obliged to wait till the expiration of the days of grace after he presented the Bill; a reason obviously as applicable to the case of a Bill drawn payable at sight in this, as in any other country; and in France, a Bill payable at a fair is due the day before the last day of such fair. In Spain, days of grace are not allowed, when Bills are drawn payable at sight, nor, indeed, on a Bill not previously

able by instalments; and the days of grace are allowed on the falling due of each instalment.[1] But Notes, payable on demand, are immediately payable upon presentment, without allowing any days of grace.[2] And the same rule will apply, where no time of payment is expressed on the face of the Note; for then, in contemplation of law, it is payable on demand.[3]

§ 225. In France, under the old law, (for, by the modern Code, as we have seen, no days of grace are allowed,)[4] no days of grace were allowed on Bills payable at sight; and Pothier has given strong reasons in

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accepted. Beawes, in his Lex Mercatoria, says, that Bills made payable here at sight, have no days of grace allowed, although it would be otherwise in the case of a Bill made payable one day after sight. Kyd, in his Treatise, expresses the same opinion. But it appears now to be considered as settled, that days of grace are to be allowed. In Dehers *v.* Harriot, 1 Show. R. 163, it was taken for granted, that days of grace were allowable on a Bill payable at sight. The same doctrine was entertained in Coleman *v.* Sayer, 1 Barnard. B. K. R. 303. And in another case, where the question was, whether a Bill, payable at sight, was included under an exception in the Stamp Act, 23 Geo. III., c. 49, § 4, in favor of Bills payable on demand, the Court held, that it was not; and Buller J., mentioned a case before Willes, C. J., in London, in which a jury of merchants were of opinion, that the usual days of grace were to be allowed on Bills payable at sight. And in Forbes on Bills (p. 142), the same practice is said to prevail. And Mr. Selwyn, in his Nisi Prius, (p. 339, 4th edit.) observes, that the weight of authority is in favor of such allowance. And they were allowed on such Bills at Amsterdam." It seems, that in Louisiana, if a Bill be payable on a fixed day (as on the first day of March), it is payable on presentment, and no days of grace are allowed. Durnford *v.* Patterson, 7 Martin, R. 460. This seems to be a peculiar usage, growing out of the law of Spain.

1 Bridge *v.* Sherborne, The English Jurist, May 13, 1843, p. 402; S.C. 11 Mees. & Wels. 374.

2 Bayley on Bills, ch. 7, § 1, p. 233-242, (5th edit. 1830); Chitty on Bills, ch. 9, p. 407-410, (8th edit. 1833); Story on Bills, § 231.

3 Chitty on Bills. ch. 9, p. 410, (8th edit. 1833.) See Sutton *v.* Toomer, 7 Barn. & Cressw. 416.

4 Ante, § 216; Story on Bills, § 334, 336; Code de Comm. art. 135.

support of this construction of the language.[1] But upon all other Bills, to wit: those payable at a usance, or at a certain number of days after sight or date, the days of grace were allowable.[2] The like rule prevails in Spain; and, probably, also, in most of the countries of continental Europe.[3]

§ 226. Having thus ascertained the time when a Promissory Note becomes due and payable, whether payable at or after sight, or after date, whether with or without the allowance of days of grace, and whether payable after a fixed number of days, or months, or one or more usances, let us now pass to the consideration of the time and mode in which payment is to be demanded on the day of the maturity of the Note. And, in the first place, within what hours of the day the presentment for payment is proper and allowable. The general answer to be given to such an inquiry, is, that it

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1 Pothier, De Change, n. 12, 172, 198; Code de Comm. art. 130; Chitty on Bills, ch. 9, p. 409, (8th edit. 1833); Story on Bills, § 228, and note.

2 Pothier, De Change, n. 13, 139, 172.

3 Chitty on Bills, ch. 9, p. 407, 409, 410, (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411, (5th edit.); Heinecc. de Camb. cap. 2, § 13-15. Mr. Chitty (p. 407) says; "In most countries, when a Bill is payable at one or more usances, or a Bill or Note is payable at a certain time after date, or after sight, or after demand, it is not payable at the precise time mentioned in the Bill or Note, but days of grace are allowed. The days of grace (at Hamburgh called respite days) which are allowed to the drawee, are so called, because they were formerly mere gratuitous, and not to be claimed as a right by the person on whom it was incumbent to pay the Bill, and were dependent on the inclination of the holder. They still retain the name of grace, though the custom of merchants, recognized by law, has long reduced them to a certainty, and established a right in the acceptor to claim them, in most cases of foreign or inland Bills, or Notes payable at usance, or after date, or after sight, or after a certain event, or even when expressly made payable on a particular day, or even at sight; but not, when expressly made payable on demand." Ante, § 224, note.

must be within reasonable hours during the day. What are such reasonable hours, must depend partly upon the place, either of the business or domicil of the maker, and partly upon the custom or usage of trade in the town or city where the Note is payable, and the presentment is to be made.[1] If there is a known custom or usage of trade in the town or city, that will furnish the proper rule to govern the holder; for then the presentment must be within the hours limited by such custom or usage.[2] Thus, for example, the general usage of banks and bankers is, to limit their business transactions to certain hours, called business hours. If, then, a Note is payable at a bank or a banker's, it should be presented at the bank or banker's place of business during those hours.[3] On the other hand, if a Note is payable generally, and without any designation of place, in such a case, (as we shall presently see,) it may be presented at the usual place of business, or counting-house, or dwelling-house of the maker for payment. If presented at his place of business, or counting-house, then it must be presented within the hours, within which such place of business, or counting-house, is usually kept open, according to the custom or usage of the town or city; or, if there be no such custom or usage, then within the reasonable hours for transacting business

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1 Story on Bills, § 349.

2 Story on Bills, § 236, 349; Bayley on Bills, ch. 7, § 1, p. 224, (5th edit.); Chitty on Bills, ch. 7, p. 303, (8th edit.); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 411, 412, (5th edit.)

3 Parker *v.* Gordon, 7 East, R. 385; Elford *v.* Teed, 1 Maule & Selw. 28; Bayley on Bills, ch. 7, § 1, p. 224, 225, (5th edit.); Chitty on Bills, ch. 7, p. 305, (8th edit.); Id. ch. 9, p. 421, 422; Story on Bills, § 349; Barclay *v.* Bailey, 2 Camp. R. 527; Jameson *v.* Swinton, 2 Taunt. R. 224; S. C. 2 Camp. R. 373; Garnet *v.* Woodcock, 6 Maule & Selw. 44; Whitaker *v.* Bank of England, 6 Car. & Payne, 700; 1 Comp. Mees. &

there by the maker.[1] If presented at the dwelling-house or domicil of the maker, then it must be within such reasonable hours, as that the family are up, and the maker may be presumed to be ready to transact business there.[2] If, in any of these cases, the holder omits to perform his proper duty; if the presentment is made at unseasonable hours, either too early or too late, at a bank or banker's, or at the counting-house, or at the dwelling-house of the maker, and there is no person there authorized to act, or ready to act for the maker; if the presentment is made before the counting-house is open, or after it is shut, or after the family at the house have retired to rest, or before they have risen; in these, and the like cases, the presentment will be deemed a mere nullity, and without any legal effect, and the holder must bear all the consequences of his want of diligence. These ordinarily are, (as has been already

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Rosc. 774; Church *v.* Clark, 21 Pick. R. 310. It has been suggested, that where a Note is payable at a bank, no action lies upon it, even against the maker, until after the close of the usual bank hours, although a demand may have been made at an earlier hour after the bank is open, and payment is refused. See Church *v.* Clark, 21 Pick. 310. But quære; for the case did not involve any such point; and if the Note had been payable generally, a demand at any reasonable time during that day would have entitled the holder, if payment was refused, immediately to commence an action, without waiting until the close of the day. Staples *v.* Franklin Bank, 1 Metc. R. 43; Church *v.* Clark, 21 Pick. R. 310; Whitwell *v.* Brigham, 19 Pick. R. 117. Why should not the like rule apply to a refusal to pay at the bank, upon presentment within bank hours?

1 Ibid.

2 Chitty on Bills, ch. 7, p. 305, (8th edit.); Id. ch. 9, p. 421, 422; Bayley on Bills, ch. 7, § 1, p. 224-226, (5th edit.); Story on Bills, § 349; Barclay *v.* Bailey, 2 Camp. R. 527; Wilkins *v.* Jadis, 2 Barn. & Adolp. 188; Jameson *v.* Swinton, 2 Taunt. R. 224; S. C. 2 Camp. R. 374; Bancroft *v.* Hall, Holt, N. P. R. 476; Morgan *v.* Davison, 1 Stark. R. 114; Triggs *v.* Newnham, 10 Moore, R. 249; Dana *v.* Sawyer, 22 Maine R. 244, (9 Shepley.)

suggested,) that the indorsers are discharged from all liability on the Note, although the maker still remains liable therefor.[1]

§ 227. In the second place, as to the particular place, at which presentment for payment of a Promissory Note is to be made. According to the commercial law of England, if a Promissory Note is made payable at any particular place, as, for example, at a bank, or a banker's, a presentment should be there made for payment.[2] Before the statute of 1 and 2 Geo. 4, ch. 78, a Bill of Exchange, as well as a Promissory Note, payable at a bank or banker's, was required to be presented at the bank or banker's for payment, before the acceptor or maker was bound to pay the same.[3] That statute changed the antecedent responsibility of the acceptor of a Bill of Exchange, by providing that an acceptance payable at a banker's, or other specified place, without adding the words, "and not otherwise or elsewhere," should be deemed a general acceptance of the Bill to all intents and purposes, so that no presentment or demand of payment at such banker's, or other specified place, was thereafter necessary to be made, in order to charge the acceptor.[4] But the statute did not touch the

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1 Story on Bills, § 236, 349; Thomson on Bills, ch. 6, § 1, p. 420, 424, (2d edit.)

2 Story on Bills, § 239, and note; Id. § 355; Chitty on Bills, ch. 7, p. 321, 322, (8th edit.); Id. ch. 9, p. 391, 392; Bayley on Bills, ch. 1, § 9, p. 29, 30, (5th edit.); Id. ch. 9, § 1, p. 199, 200; Id. ch. 7, § 1, p. 219-222; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 412, 413, (5th edit.); Gibb v. Mather, 2 Cromp. & Jerv. 254; S. C. 8 Bing. R. 214.

3 Ibid.

4 Ibid.; Chitty on Bills, ch. 5, p. 172-174, (8th edit.); Id. ch. 7, p. 321-323; Id. ch. 9, p. 391, 393, 396, 397; Bayley on Bills, ch. 1, § 9, p. 29, (5th edit.); Id. ch. 6, § 1, p. 199-201; Gibb v. Mather, 2 Cromp. & Jerv. 254; S. C. 8 Bing. R. 214; Fayle v. Bird, 6 Barn. &

rights of the drawers or indorsers of any such Bill, but left them to be governed by the antecedent general law. Hence, so far as the drawer and indorsers are concerned, a due presentment and demand of payment is still necessary to be made at the banker's, or other specified place, in order to found any right of action against them.[1]

Cressw. 531; 3 Kent, Comm. Lect. 44, p. 97, and note (*e*,) and Id. p. 99, note (*b*,) (5th edit.); Story on Bills, § 355; Thomson on Bills, ch. 6, § 2, p. 420 – 428, (2d edit.)

[1] Gibb *v*. Mather, 2 Cromp. & Jerv. 254; S. C. 8 Bing. R. 214; Ambrose *v*. Hopwood, 2 Taunt. R. 61. This whole subject was very much discussed in the House of Lords in the case of Rowe *v*. Young, 2 Brod. & Bing. R. 165; S. C. 2 Bligh, R. 391. The original action was upon a Bill of Exchange, by an indorsee against the acceptor of the Bill. The Bill was dated 20th of December, 1815, drawn by one James Meagher, at Gosport, upon the acceptor, at Torpoint, requiring him two months after date to pay to the order of Meagher, £300 value in account; and the Bill was accepted "payable at Sir John Perring & Co.'s, bankers, London"; and, at the time when it became due, was dishonored and unpaid. The original plaintiff recovered judgment; and in the House of Lords the error assigned was, that in one count in the declaration it was not averred that the Bill was ever presented for payment at Sir John Perring & Co.'s. The opinions of the Judges on this, among other questions, was required of the House of Lords, and the Judges differing in opinion, delivered their opinions seriatim. In the House of Lords, the judgment was reversed. Lord Eldon, in delivering his opinion upon that occasion said: "My Lords, the writ of error in this case brings before your Lordships the question, whether it was or was not necessary, in the first count of the declaration, to allege or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the Bill had been presented and shown to the plaintiff, either when it became due and payable, or, before that time, or since the time, at Sir John Perring & Co.'s, bankers, London; and that question may be stated in another way, namely, whether this acceptance, as stated in the first count of the declaration, is to be taken to be a general acceptance, making the party accepting liable to pay everywhere; or, whether there is (what in some cases is called an expansion of the undertaking, and in other cases is called an engagement or direction in addition to the general unqualified acceptance to pay) a direction and engagement to pay at Sir John Perring & Co.'s, thrown in for the convenience of both parties, but which the holder of the Bill is not bound to attend to unless he chooses, or, on the other hand, whether this,

The statute does not comprehend Promissory Notes payable at a banker's, or other specified place; and there-

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upon looking at the terms of the declaration, is what is in law called a qualified acceptance. And, my Lords, undoubtedly, it is very fit this question should be brought before your Lordships; because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it in any way, than to permit so controversial a state to exist any longer. It has been stated at the bar, and there can be no doubt that it has been there correctly stated, that the Court of King's Bench has been, of late years, in the habit of holding such an acceptance as this to be a general acceptance, with what the Judges of that Court call an expansion, or a direction, or an engagement, which introduces, not a qualified promise, but a sort of courtesy, a kind of accommodation between the parties, in addition to the effect of the general acceptance; to which accommodation or courtesy, however, they hold, that the holder of the Bill is not at all bound to attend. On the other hand, it has been stated to your Lordships, and there can be no doubt of the fact, that the Court of Common Pleas is in the habit of holding, that such an acceptance as this is a qualified acceptance and that the contract of the party is to pay at the banker's; and of holding it as matter of pleading, that presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment. It has been further represented, that, although in the present state of the law, the principles of law, as applied to Promissory Notes and Bills of Exchange, are simple enough in common cases, the Court of King's Bench has held, that if a man promise to pay at a particular place by a Promissory Note, (at the Workington Bank, for instance,) the presentment, which is, in point of law, a demand, must be made there, because the place stands in the body of the Note, and, being in the body of the Note, it is part of the written contract, which must be declared upon, as it exists, and proved as declared; but that, in the case of Bills of Exchange, the same Court has held, that the place at which by its acceptance a Bill is made payable is not in the body of the Bill; and, not being in the body of the Bill, the Court has taken it for granted, that it is not to be considered as being in the body of the acceptance, a conclusion, which it is extremely difficult, I think, to adopt; because it seems hard to say, that combinations of various kinds may be infused into the acceptance, (for example, qualification as to time, as to mode of payment, as to contingencies, upon which the acceptor will pay, and various other qualifications which will be found in the cases,) which they unquestionably may be, notwithstanding the generality of the Bill as drawn, but that, if the acceptance contain a qualification clearly and sufficiently expressed as to place, that qualification ought not to be introduced into the fore it is indispensable, in order to charge the maker or indorsers of a Promissory Note, that a due presentment

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acceptance. In addition to being told that the decisions of the Court of King's Bench upon Bills of Exchange cannot be reconciled with the decision of that Court upon Promissory Notes, your Lordships are told, that the decisions of that Court upon Bills of Exchange are not all consistent with each other. It is a little difficult to say, that they are; but, undoubtedly, it may be represented as the opinion of that Court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding. The Court of Common Pleas being of a different opinion, it is impossible, my Lords, for any man to feel that he has incumbent upon him the duty of giving the best opinion which he can form upon a question, on which so many men of high professional character, and great professional learning have differed, without giving that opinion with a good deal of diffidence; but he must remember, that it his duty to give his opinion, whatever it may be. The first question is, whether this is a qualified acceptance. Upon that question, the twelve judges have given your Lordships their opinion, and a great majority of them are of opinion that it is a qualified acceptance. Some of the Judges have given your Lordships their opinion, that it is a general acceptance, with an expansion, direction, or engagement for the convenience of one or other of the parties, which, one does not very well know; and that the acceptance meant, that if the holder chose to go to Sir John Perring & Co.'s, he would probably there get payment of the Bill. Then, another question is this, supposing this to be a qualified acceptance, was it necessary to aver the presentment in the declaration, and to support that averment by proof? A great majority of the learned Judges (including some of those who thought this a qualified acceptance) say, that it is not necessary to notice it as such in the declaration, or to prove presentment: but, that it must be considered, as matter of defence, and that the defendant must state himself as ready to pay at the place, and to bring the money into court, and so bar the action, by proving the truth of that defence. Some of the Judges, to whom I am alluding, (having been most eminent in special pleading,) deny this proposition, and say, that the plaintiff must declare upon the contract as it is, that he must make out his right to sue according to that contract; and, if that contract engage for payment at Sir John Perring & Co.'s, he must state in the declaration that he has demanded payment at Sir John Perring & Co.'s; in short, their opinion is, that the plaintiff has no cause of action, unless he have performed his part of the contract. I think, my Lords, I may venture to state, upon the cases which I have taken a great deal of pains to search, (for I hope I have read every case upon the subject,) that a person may, undoubtedly, draw a Bill of Exchange, as we are in the habit of making and demand of payment should be made at the banker's, or other specified place. If a due presentment is not

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a Promissory Note, payable at a particular place; the effect is, that the acceptor of such a Bill has promised to pay at that particular place, and that the drawer, on default of the acceptor, has promised to pay at that particular place; but there seems a great objection made to the doctrine, that, if a drawer has drawn generally, the acceptor can accept specially. The question appears to me to be, whether the acceptor has accepted specially; and I cannot imagine, if the contract of A. (he being the drawer) be general, how it is from thence to be reasoned, that I, the acceptor, need not come under any engagement, unless I choose to come under the engagement proposed by A., and that I cannot qualify my acceptance, and say to the holder of the Bill, it is very true the drawer has drawn upon me and expects me to make myself liable generally: but that is not what I choose to do; if you will not take an acceptance from me, by which I can consult my own convenience, by telling you that I will pay you at a given place and time, you shall have none at all. Cannot an acceptor accept in a qualified way? That he can is clearly established by cases which extend to almost every species of qualification; and, unquestionably, if the qualification as to place cannot be adopted by the acceptor, it must be on account of some circumstance which belongs to the place, and does not belong to the time or the mode of payment, or any other species of qualification whatever. My Lords, I am ready to express my full assent to the doctrine, that, where a Bill is drawn generally, (considering that as an address to the person who is to accept it generally, because it is drawn generally,) it lies upon the acceptor, who says, that he has accepted specially, to accept in such terms, that the nature of his contract may be seen from the terms he has used, and that that may clearly appear to be a qualified acceptance, which he insists is not a general acceptance. The first question, then, here, will be upon the words, whether this is or is not a qualified acceptance. Now, my Lords, I really do not know how it is possible to say, that this is not a qualified acceptance; I mean independent of the cases which have been decided; because, if a man draw upon me, who am living in London, and I say, I accept according to the usage and custom of merchants, payable at my bankers', Child and Co.'s, London, I only desire to ask, (putting the usages of merchants, and putting the effect of these cases out of the question for a moment,) whether any man could read an acceptance of mine in these terms, and say that it was, not only an acceptance of mine, payable at Child's, where those funds would be which were to pay it, but that it was an acceptance by virtue of which (as is admitted by those who have argued about the convenience and inconvenience, and who have looked at the argumentum ab inconvenienti) the holder of that Bill might arrest me, and hold me to bail in any part of the world.

so made, the indorsers are discharged from all liability.[1] The maker, indeed, is not so discharged; but he is in

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My Lords, after revolving this question again and again in my mind, with the full consideration of what has been stated about the practice and contrary decisions, I cannot say that it was not the intention of the party, who thus accepted, to come under an engagement, which may be represented as an acceptance, to pay the Bill at Sir John Perring & Co.'s, London. Then, it is said, that the word 'accepted' forms the general engagement, and that the words 'payable at Sir John Perring & Co.'s,' cannot qualify and cut down the general engagement; and cases are then cited which maintain a distinction between words of qualification in the body of a Note, and words of qualification in the margin or at the foot of a Note; and there are cases maintaining the distinction, that if such words be in the body of the Note, they form part of the contract; but, if they be at the foot, or in the margin, they form only a memorandum. I do not mean to disturb these cases at all, but I do not understand how it is, that from these cases it is to be inferred, that when I write the words 'accepted, payable at a given house,' the word 'accepted' is to be taken to express the whole of my contract, and that, though the sentence is not complete till I write the whole, the latter part of it is not to be taken as part of the contract, but as a direction, or expansion, of the engagement. Your Lordships have heard a great deal of this argumentum ab inconvenienti, but I cannot help thinking, that this is a mode of reasoning, which is not quite analogous to our usual modes of reasoning in the courts below on the question of what men are likely to do or not to do. The case is put in this way: Supposing Bills were drawn on each of the twelve Judges of England, just before they left town on the circuit, and they had accepted the Bills, payable at their respective bankers', if it be law that such an acceptance renders them liable to pay any where, the holders of those Bills might undoubtedly, if they pleased, arrest the Judges at their respective circuit towns, a little to the inconvenience of the administration of justice. It is said, no man would think of arresting the Judges. My Lords, I hope nobody would think of arresting the Judges; but I can feel for mercantile men, just as well as I can feel for Judges, and I can feel for men exposed to the inconvenience of demands upon them, which are to be regulated not

[1] Bayley on Bills, ch. 7, § 1, p. 219–222, (5th edit.); Chitty on Bills, ch. 9, p. 396, 397, (8th edit.); Sanderson *v.* Bowes, 14 East, R. 500; Roche *v.* Campbell, 3 Camp. R. 247; Gibb *v.* Mather, 2 Cromp. & Jerv. 254; S. C. 8 Bing. R. 214; Dickinson *v.* Bowes, 16 East, R. 110; Howe *v.* Bowes, 16 East, R. 112; S. C. in Error, 5 Taunt. R. 30; Trecothick *v.* Edwin, 1 Stark. R. 468; Emblen *v.* Dartnell, 12 Mees. & Wels. R. 830.

no default, and is under no obligation to pay the Note, until presentment and demand has been actually made

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by their contracts, but by a construction being given to their contracts, which they meant should be never given to them. My Lords, in this very case, (and it seems not to have been very much considered,) the acceptor is at Torpoint; and, having his money in London, where it is usually demanded of him, he says, If you make your demand upon me, here, I cannot pay you; but I have at Child's or Drummond's shop money to pay you, and you will be sure to find it there. Is it no matter of inconvenience that such a man may, from caprice, if you please, (and we have heard of such things as men through caprice, refusing a tender of Bank of England notes, and so forth,) be obliged to bring money from London? or is he to keep money in London and at Torpoint too, to answer the exigency of the demand, as it may happen to be made at the one place or the other? My Lords, there is another consideration, which does not appear to me to have been so much attended to as it might have been, namely, that, if I promise to pay at my banker's in London, and a man calls upon me to pay in Northumberland, it is not the same thing; for, looking at the demand as likely to be made at Child's shop, I send the money there, but if I am to pay in Northumberland, there must be the exchange, and remittance, and so on, backwards and forwards. But take the case of a gentleman leaving Calcutta, and coming to reside in London, who gives a Bill of Exchange in Calcutta, to be paid there six months after he departs; he arrives in London, not bringing a shilling home to pay that Bill; he finds that Bill sent home by another ship, and he is arrested the moment he lands. Is the sum, which he is obliged to pay here, the same with that which he would have paid there, and for paying which he had made preparation? Certainly not. It appears to me, therefore, that even with respect to the value of what is to be paid, there is a most essential difference in the contract. Then, it is said, this will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be in that part of the case, that I took the liberty, with your Lordship's permission, to put the third and fourth questions to the Judges. It is said this may vary the right of the holder, in respect of the drawer, unless he, the holder, give notice, and so forth, to keep his liability alive. My Lords, the answer to that, as it seems to me, is this, that if you once admit that a man may accept specially, it is the consequence of the law, that these difficulties arise; if you will say, that no man shall accept specially a Bill which is drawn generally, that settles the question; but, if you say that the law is, though a man draw generally, the drawee may accept specially, it is the consequence of the law which imposes duties upon the holder to give notice to the drawer, to keep alive the drawer's liability, and that inconvenience certainly is not quite so large as if the acceptor refused to at the banker's, or other specified place;[1] and if he has suffered any loss or injury by the want of a due pre-

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accept at all. Then, it is said, that this will impose great difficulty to the indorsee, that a person sometimes becomes an indorsee before, and sometimes after acceptance; if he become an indorsee before, he may find a special acceptance when he expected to have a general acceptance; but then, when the Bill is indorsed to him unaccepted, he does not know whether it will ever be accepted; and, if he do not know that it will be ever accepted, he cannot tell whether it be accepted specially. He knows, therefore, at the time of taking that Bill by indorsement, that he is to look out for such an acceptor as he can find. What is there inconsistent with the rule of law or convenience in this? I cannot see any thing. It would be a very unnecessary fatigue to your Lordships to go through the whole of this case from the beginning to the end. It does appear to me, that no one can say, the case is settled in law; you must therefore go back to principle. If you go back to principle, and admit that a man may give a qualified acceptance, the question is, whether this is a qualified acceptance, ay or no. If it be a qualified acceptance, — if it be an acceptance where the contract of the party is to pay at Sir John Perring & Co.'s, — then I state it to be in pleading settled matter, that you must declare according to the contract, and that you must aver all that the nature of that contract makes necessary. If that be so, if it be a special contract, and if it be necessary for you to aver all which the contract contains, how can it be said, that it is not to be shown in the nature of the demand, but that it must be left to be shown in the defence? It appears to me, that this position cannot be maintained. My Lords, with respect to the cases of bonds which have been cited, they differ, altogether, from a contract of this nature. You bring your action upon a bond for the penalty; it must, therefore, be matter of defence to say, that the bond would have been paid at a particular place; for that will be in the condition of the bond; when you pray oyer of the bond, you defend yourself by saying, that you have performed that condition, and that, therefore, you are to be excused from the payment of the debt. These cases, therefore, have no application to the case before your Lordships. There is another set of cases, in which it is said, that, if there be an antecedent debt, the acceptance must be taken to be general. Between the acceptor and holder there is seldom an antecedent debt; there may be an antecedent debt between the drawer and acceptor of the Bill; I wish that there had been an antecedent debt in all cases, for accommodation Bills have been the ruin of many; but, with respect to the acceptor, it is not true, that he must be antecedently the debtor; and all the cases

[1] Chitty on Bills, ch. 5, p. 174, (8th edit.); Turner *v.* Hayden, 4 Barn. & Cressw. 1.

sentment, to the extent of that loss or injury he will be discharged as against the holder.[1]

§ 228. In America, a doctrine somewhat different prevails, if not universally, at least to a great extent. It was probably in the first instance adopted from the supposed tendency of the English authorities to the same result; and there certainly was much conflict in the authorities, until the doctrine was put at rest by the final decision in the House of Lords, a decision, which

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with respect to qualified acceptance show that; for a man may accept to pay half the bill in money, and half in goods; he may accept to pay out of the produce of a cargo consigned to him when that cargo comes to this country. When your Lordships look to the situation of a consignee, you will find that his acceptance is always qualified. A ship's cargo comes from the West Indies, and the Bill with it; the acceptance of such Bill will be, of course, an acceptance to pay in London. In every view of this case, I take the liberty to state to your Lordships as my opinion, (certainly stating it with infinite diffidence, as I ought, recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do,) that this is a contract to pay at Sir John Perring and Co.'s, which is not the contract stated in the first count of the declaration; for that count wants that averment; and the consequence is, that the judgment of the Court of King's Bench must be reversed. I do not think that it will be of the least consequence to the commercial world; for it will be so easy to adopt forms of words which leave no doubt as to what is meant, that I am perfectly sure, if there were any inconvenience arising from the decision, if your Lordships think proper to make it, that those who do not wish to have the inconvenience have nothing to do but to use two or three words, which will guard them from it. But the question is, What is the law of this day upon this contract, as set forth in this first count of this declaration? I have already stated to your Lordships in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law; although, when I state that I do believe it to be so founded, I cannot but recollect, (and I do that with infinite respect,) that I am differing in opinion with those, whose opinion is infinitely superior to mine. But my duty is not to state their opinion, but to express my own." See, also Gibb *v.* Mather, 2 Cromp. & Jerv. 254; S. C. Bing. R. 214. In Indiana the English doctrine is adopted; Palmer *v.* Hughes, 1 Black. R. 329.

1 Rhodes *v.* Gent, 5 Barn. & Ald. 244; Turner *v.* Hayden, 4 Barn. & Cressw. 1.

seems founded upon the most solid principles, and to be supported by the most enlarged public policy, as to the rights and duties of parties. The received doctrine in America seems to be this, that as to the acceptor of a Bill of Exchange, and the maker of a Promissory Note, payable at a bank, or other specified place, the same rule applies, that is, that no presentment or demand of payment need be made at the specified place, on the day when the Bill or Note becomes due, or afterwards, in order to maintain a suit against the acceptor, or maker; and of course, that there need be no averment in the declaration in any suit brought thereon, or any proof at the trial, of any such presentment or demand. But that the omission or neglect is a matter of defence on the part of the acceptor or maker. If the acceptor or maker had funds at the appointed place, at the time, to pay the Bill or Note, and it was not duly presented, he will, in the suit, be exonerated, not, indeed, from the payment of the principal sum, but from the payment of all damages and costs in that suit. If, by such omission or neglect of presentment and demand, he has sustained any loss or injury, as if the Bill or Note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then, and in such case, the acceptor or maker will be exonerated from liability to the extent of the loss or injury so sustained.[1]

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[1] The doctrine maintained in the American Courts is fully expounded in the case of Wallace *v.* M'Connell, 13 Peters, Sup. Ct. R. 36. Mr. Justice Thompson, on that occasion, in delivering the opinion of the Supreme Court of the United States, after stating the facts, (the action being brought on a Promissory Note against the maker, by the payee, the Note being payable at the Bank of the United States, at Nashville, and the declaration containing no allegation of any presentment or demand at the

§ 229. The ground, upon which the American doctrine is placed, is, that the acceptor or maker is the

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Bank,) said: "The question raised, as to the sufficiency of the declaration in a case where the suit is by the payee against the maker of a Promissory Note, never has received the direct decision of this Court. In the case of the Bank of the United States *v.* Smith, 11 Wheat. 172, the Note upon which the action was founded was made payable at the office of discount and deposite of the Bank of the United States, in the city of Washington; and the suit was against the indorser, and the question turned upon the sufficiency of the averment in the declaration of a demand of payment of the maker. And the Court said, when, in the body of a Note, the place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the Note; and has a right to require the holder to apply at such place for payment. In the opinion delivered in that case, the question now presented in the case before us is stated; and it is said, whether, where the suit is against the maker of a Promissory Note, or the acceptor of a Bill of Exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial to prove such demand, is a question upon which conflicting opinions have been entertained in the Courts in Westminster Hall. But that the question in such case may, perhaps, be considered at rest in England, by the decision of the late case of Rowe *v.* Young, 2 Brod. & Bing. 165, in the House of Lords; where it was held, that if a Bill of Exchange be accepted, payable at a particular place, the declaration on such Bill against the acceptor, must aver presentment at that place, and the averment must be proved. But it is there said, a contrary opinion has been entertained by Courts in this country; that a demand on the maker of a Note, or the acceptor of a Bill, payable at a specified place, need not be averred in the declaration, or proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed; if it is believed, that funds have been there placed to meet the Note or Bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment, at the place appointed, it is matter of defence to set up by plea and proof. But it is added, as this question does not necessarily arise in this case, we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that as against the maker of a Note, or the acceptor of a Bill, no everment or proof of a demand of payment at the place designated would be necessary. The question now before the Court cannot, certainly, be considered as decided by the case of the Bank of the United States *v.* Smith. But it cannot be viewed as the mere obiter opinion of the judge who delivered the judgment of the Court. The attention of the Court was promissory debtor, and the debt is not as to him discharged by the omission or neglect to demand payment

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drawn to the question now before the Court; and the remarks made upon it, and the authorities referred to, show that this Court was fully apprized of the conflicting opinions of the English Courts on the question; and that opinions contrary to that of the House of Lords, in the case of Rowe *v.* Young, had been entertained by some of the Courts in this country; and under this view of the question, the Court say, they are strongly inclined to adopt the American decisions. As the precise question is now presented by this record, it becomes necessary to dispose of it. It is not deemed necessary to go into a critical examination of the English authorities upon this point; a reference to the case in the House of Lords, which was decided in the year 1820, shows the great diversity of opinion entertained by the English judges upon this question. It was, however, decided, that if a Bill of Exchange is accepted, payable at a particular place, the declaration, in an action on such Bill against the acceptor, must aver presentment at that place, and the averment must be proved. The Lord Chancellor, in stating the question, said this was a very fit question to be brought before the House of Lords, because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it in any way than to permit so controversial a state to exist any longer. That the Court of King's Bench has been of late years in the habit of holding, that such an acceptance as this is a general acceptance; and that it is not necessary to notice it as such in the declaration, or to prove presentment, but that it must be considered as matter of defence; and that the defendant must state himself ready to pay at the place, and bring the money into court, and so bar the action by proving the truth of that defence. On the contrary, the Court of Common Pleas was in the habit of holding, that an acceptance like this was a qualified acceptance, and that the contract of the acceptor was to pay at the place; and that, as matter of pleading, a presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment; and that the holder of the Bill has no cause of action unless such demand has been made. In that case, the opinion of the twelve judges was taken and laid before the House of Lords, and will be found reported in an appendix in the report of the case of Rowe *v.* Young, 2 Brod. & Bing. 180. In which opinions all the cases are referred to in which the question had been drawn into discussion; and the result appears to have been, that eight judges out of the twelve sustained the doctrine of the King's Bench on this question; notwithstanding which, the judgment was reversed. It is fairly to be inferred from an act of parliament passed immediately thereafter, 1 and 2 Geo. 4, ch. 78, that this decision was not satisfactory. By that act it is declared, that 'after the 1st of August, when the debt became due, at the place where it was payable. Assuming this to be true, it by no means fol-

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1821, if any person shall accept a Bill of Exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such Bill. But if the acceptor shall, in his acceptance, express, that he accepts the Bill payable at a banker's house, or other place only, and not otherwise, or elsewhere, such acceptance shall be a qualified acceptance of such Bill; and the acceptor shall not be liable to pay the Bill, except in default of payment, when such payment shall have been first duly demanded, at such banker's house or other place.' Bayley on Bills, 200, note. In most of the cases which have arisen in the English Courts, the suit has been against the acceptor of the Bill; and in some cases a distinction would seem to be made between such a case, and that of a Note, when the action is against the maker, and the designated place is in the body of the Note. But there can be no solid grounds upon which such a distinction can rest. The acceptor of a Bill stands in the same relation to the holder, as the maker of a Note does to the payee; and the acceptor is the principal debtor, in the case of a Bill, precisely like the maker of a Note. The liability of the acceptor grows out of, and is to be governed by the terms of his acceptance, and the liability of the maker of a Note grows out of, and is to be governed by the terms of his Note; and the place of payment can be of no more importance in the one case than in the other. And in some of the cases where the point was made, the action was against the maker of a Promissory Note, and the place of payment designated in the body of the Note. The case of Nicholls *v.* Bowes, 2 Camp. 498, was one of that description, decided in the year 1810; and it was contended, on the trial, that the plaintiff was bound to show that the Note was presented at the banking-house where it was made payable. But Lord Ellenborough, before whom the cause was tried, not only decided, that no such proof was necessary, but would not suffer such evidence to be given; although the counsel for the plaintiff said he had a witness in court, to prove the Note was presented at the banker's the day it became due; his Lordship alleging, that he was afraid to admit such evidence, lest doubts should arise as to its necessity. And in the case of Wild *v.* Rennards, 1 Camp. 425, note, Mr. Justice Bayley, in the year 1809, ruled, that if a Promissory Note is made payable at a particular place, in an action against the maker, there is no necessity for proving, that it was presented there for payment. The case of Sanderson *v.* Bowes, 14 East, 500, decided in the King's Bench in the year 1811, is sometimes referred to as containing a different rule of construction of the same words when used in the body of a Promissory Note, from that which is given to them when used in the acceptance of a Bill of Exchange. But lows, that the acceptor or maker is in default, until a demand of payment has been made at the place of pay-

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it may be well questioned, whether this use warrants any such conclusion. That was an action on a Promissory Note by the bearer against the maker. The Note, as set out in the declaration, was a promise to pay on demand at a specified place, and there was no averment that a demand of payment had been made at the place designated. To which declaration the defendant demurred; and the counsel in support of the demurrer referred to cases where the rule had been applied to acceptances on Bills of Exchange; but contended, that the rule did not apply to a Promissory Note, when the place is designated in the body of the Note. Lord Ellenborough, in the course of the argument, in answer to some cases referred to by counsel, observed; those are cases where money is to be paid, or something to be done at a particular time as well as place, therefore the party (defendant) may readily make an averment, that he was ready at the time and place to pay and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the Note. It is true, Lord Ellenborough did not seem to place his opinion, in the ultimate decision of the cause, upon this ground. But the other judges did not allude to the distinction taken at the bar, between that case and the acceptance of a Bill in like terms; but place their opinions upon the terms of the Note itself, being a promise to pay on demand at a particular place. And there is certainly a manifest distinction between a promise to pay on demand at a given place, and a promise to pay at a fixed time at such place. And it is hardly to be presumed, that Lord Ellenborough intended to rest his judgment upon a distinction between a Promissory Note and a Bill of Exchange, as both he and Mr. Justice Bayley had, a very short time before, in the cases of Nicholls *v.* Bowes, and Wild *v.* Rennards, above referred to, applied the same rule of construction to Promissory Notes, where the promise was contained in the body of the Note. Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made; and the maker of the Note cannot discharge himself by an offer of payment, the Note not being due until demanded. Thus we see that until the late decision in the House of Lords, in the case of Rowe *v.* Young, and the act of parliament passed soon thereafter, this question was in a very unsettled state in the English Courts; and without undertaking to decide between those conflicting opinions, it may be well to look at the light in which this question has been viewed in the Courts in this country. This question came before the Supreme Court of the State of New York, in the year 1809, in the case of Foden and Slater *v.* Sharp, 4 Johns. R. 183; and the Court said, the holder of a Bill of Exchange need not show a demand of payment of the acceptor, any more than of the maker of a Note. It is the business of the acceptor to show that he was ready at the ment; for the terms of his contract import an express condition, that he will pay upon due presentment, at

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day and place appointed, but that no one came to receive the money ; and that he was always ready afterwards to pay. This case shows that the acceptor of a Bill, and the maker of a Note, were considered as standing on the same footing with respect to a demand of payment at the place designated. And in the case of Wolcott *v.* Van Santvoord, 17 Johns. R. 248, which came before the same court in the year 1819, the same question arose. The action was against the acceptor of a Bill, payable five months after date at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica; and upon a demurrer to the declaration, the Court gave judgment for the plaintiff. Chief Justice Spencer, in delivering the opinion of the Court, observed that the question had been already decided in the case of Foden *v.* Sharp ; but considering the great diversity of opinion among the judges in the English Courts on the question, he took occasion critically to review the cases which had come before those Courts, and shows very satisfactorily, that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled; and the law in that State for the last thirty years has been considered as settled upon this point. And although the action was against the acceptor of a Bill of Exchange, it is very evident that this circumstance had no influence upon the decision ; for the Court say, that, in this respect the acceptor stands in the same relation to the payee, as the maker of a Note does to the indorsee. He is the principal, and not a collateral debtor. And in the case of Caldwell *v.* Cassidy, 8 Cowen, 271, decided in the same Court in the year 1828, the suit was upon a Promissory Note, payable sixty days after date at the Franklin Bank in New York; and the Note had not been presented or payment demanded at the bank ; the Court said, this case has been already decided by this Court in the case of Wolcott *v.* Van Santvoord. And after noticing some of the cases in the English Courts, and alluding to the confusion that seemed to exist there upon the question, they add : that whatever be the rule in other Courts, the rule in this Court must be considered settled, that where a Promissory Note is made payable at a particular place on a day certain, the holder of the Note is not bound to make a demand at the time and place by way of a condition precedent to the bringing an action against the maker. But, if the maker was ready to pay at the time and place, he may plead it, as he would plead a tender in bar of damages and costs, by bringing the money into court. It is not deemed necessary to notice very much at length the various cases that have arisen in the American Courts upon this question ; but barely to refer to such as have fallen under the observation of the Court, and we briefly state the point and decision thereupon, and the result will show a uniform course of adjudication, that in actions on Promissory that place, and not that he will pay upon demand elsewhere; and the omission or neglect of duty, on the part

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Notes against the maker, or on Bills of Exchange, where the suit is against the maker in the one case, and acceptor in the other, and the Note or Bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made in order to maintain the action. But, that, if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part. The case of Watkins *v.* Crouch & Co., in the Court of Appeals of Virginia, 5 Leigh, 522, was a suit against the maker and indorser, jointly, as is the course in that State upon a Promissory Note like the one in suit. The Note was made payable at a specified time, at the Farmers' Bank, at Richmond, and the Court of Appeals, in the year 1834, decided, that it was not necessary to aver and prove a presentation at the bank, and demand of payment, in order to entitle the plaintiff to recover against the maker; but that it was necessary in order to entitle him to recover against the indorser; and the President of the Court went into a very elaborate consideration of the decisions of the English Courts upon the question; and to show, that, upon common law principles, applicable to bonds, Notes, and other contracts for the payment of money, no previous demand was necessary in order to sustain the action, but that a tender and readiness to pay must come by way of defence from the defendant; and that looking upon the Note as commercial paper, the principles of the Common Law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise where the place, but not the time, was specified; a demand in such case ought to be made; and he examined the case of Sanderson *v.* Bowes, to show that it turned upon that distinction, the Note being payable on demand at a specified place. The same doctrine was held by the Court of Appeals of Maryland, in the case of Bowie *v.* Duvall, 1 Gill & Johnson, 175; and the New York cases, as well as that of the Bank of the United States *v.* Smith, 11 Wheat. 171, are cited with approbation, and fully adopted; and the Court put the case upon the broad ground, that when the suit is against the maker of a Promissory Note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that it is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it. That it is matter of defence on the part of the defendant to show that he was in attendance to pay, but that the plaintiff was not there to receive it; which defence generally will be in bar of damages only, and not in bar of the debt. The case of Ruggles *v.* Patten, 8 Mass. R.

of the holder, to make presentment at that place, ought not to change the nature or character of the obligations

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480, sanctions the same rule of construction. The action was on a Promissory Note for the payment of money, at a day and place specified; and the defendant pleaded, that he was present at the time and place, and ready and willing to pay according to the tenor of his promises, in the second count of the declaration mentioned, and avers, that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff in his declaration had alleged; the Court said this was an immaterial issue, and no bar to an action or promise to pay money. So, also, in the State of New Jersey the same rule is adopted. In the case of Weed *v.* Houten, 4 Halst. N. J. R. 189, the Chief Justice says: 'The question is, whether in an action by the payee of a Promissory Note, payable at a particular place and not on demand, but at time, it is necessary to aver a presentment of the Note and demand of payment by the holder at that place, at the maturity of the Note. And upon this question he says, I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion; that a special averment of presentment at the place is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy more or less directly to the subject.' The same rule has been fully established by the Supreme Court of Tennessee, in the cases of M'Nairy *v.* Bell, 1 Yerger, R. 502, and Mulherrin *v.* Hannum, 2 Yerger, R. 81, and the rule sustained and enforced upon the same principles and course of reasoning upon which the other cases referred to have been placed. And no case, in an American Court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases which have arisen in this country, where this question has been drawn into discussion, were upon Promissory Notes, where the place of payment was, of course, in the body of the Note. After such a uniform course of decisions for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established might be questionable; which, however, we do not mean to intimate. It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties. The place of payment in a Promissory Note, or in an acceptance of a Bill of Exchange, is always matter of arrangement between the parties for their mutual accommodation of the acceptor or maker. Now the right to bring an action presupposes a default on the part of the acceptor

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and may be stipulated in any manner, that may best suit their convenience. And when a Note or Bill is made payable at a bank, as is generally the case, it is well known, that, according to the usual course of business, the Note or Bill is lodged at the bank for collection; and, if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business is closed. But should he not find his Note or Bill at the Bank, he can deposit his money to meet the Note when presented, and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or should the Note or Bill be made payable at some place other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place would protect him against interest and costs, on bringing the money into court; so, that no practical inconvenience or hazard can result from the establishment of this rule, to the maker or acceptor. But, on the other hand, if a presentment of the Note and demand of payment at the time and place are indispensable to the right of action, the holder might hazard the entire loss of his whole debt." See also, Hart *v.* Green, 8 Verm. R. 191, S. P. It is by no means a legitimate consequence of the English doctrine, (as suggested by the learned Judge,) that, unless presentment is made at the time and place, the holder would hazard the entire loss of his whole debt; for the English doctrine does not require that he should demand payment at the place, on the very day on which the Note is due, to charge the maker. It will be sufficient, if at any future time he makes a demand at the place, to charge the maker, unless, indeed, the maker has, by such neglect of the holder, suffered any loss, and, if he has, in all reason and justice the holder ought to bear it. It may not be improper for me to add, that being a Judge of the Supreme Court of the United States, when both the case of United States Bank *v.* Smith, 11 Wheat. R. 172, and the case of Wallace *v.* M'Connell, 13 Peters, R. 136, were decided, I was not present at the argument of the former; and in the latter case, I dissented from the opinion of the Court, although my dissent was not expressed in open court. See also, the learned note of Mr. Chancellor Kent, in his Commentaries, (3 Kent, Comm. Lect. 44, p. 97, note, *e*,) 5th edit.); Id. p. 99, note *b*,) where the principal American authorities on each side of the question are cited. The learned commentator holds the English rule to be the true one, and adds: "This is the plain sense of the contract, and the words 'accepted, payable at a given place,' are equivalent to an exclusion of a demand elsewhere." Story on Bills, § 356. In Louisiana it is the settled rule, that presentment at the place where a Note is payable, is indispensable to charge the maker, and *a for-*

or maker; and it may, after all, make a great difference to him, not only in point of convenience, but in point of loss by exchange, as well as of expense, whether, if he agrees to pay the money in Mobile, or in New Orleans, he may be required, without any default on his own part, notwithstanding he has funds there, to pay the same money in New York or in Boston.[1] He may well say: *Non in hæc fœdera veni.*

§ 230. But, although the English and American authorities are not in harmony with each other on the question, whether a presentment and demand of payment should be made at the bank, or other place, where a Promissory Note or Bill of Exchange is made payable, before an action can be brought thereon against the maker or acceptor; yet they are entirely in coincidence with each other on the point that it is indispensable, in order to charge the indorser or the drawer, that a presentment for payment should be made, not only at the place, but also on the very day of the maturity of the Note or Bill, otherwise the indorser or drawer will be absolutely discharged.[2] The reason is, that the under-

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tiori to charge the indorser. Hart *v.* Long, 1 Rob. Louis. R. 83; Stillwell *v.* Robb, 1 Rob. Louis. R. 311; Wood *v.* Mullen, 3 Rob. Louis. R. 395. In Armistead *v.* Armistead, 10 Leigh, R. 512, the Court of Appeals of Virginia disapproved of the English doctrine and sustained the American. [See also, Woodbury, J. in Brown *v.* Noyes, 2 Woodbury & Minot, R. 84.] See also, North Bank *v.* Abbott, 13 Pick. R. 465; Payson *v.* Whitcomb, 15 Pick. R. 212; Church *v.* Clark, 21 Pick. R. 310; Carley *v.* Vance, 17 Mass. R. 389; Ruggles *v.* Patten, 8 Mass. R. 480; Mellon *v.* Croghan, 15 Martin, R. 423; Smith *v.* Robinson, 2 Miller, Louis. R. 405; Palmer *v.* Hughes, 1 Black. Ind. R. 328; Gale *v.* Kemper, 10 Louis. R. 208; Warren *v.* Allnutt, 12 Louis. R. 454; Thompson *v.* Cook, 2 McLean, R. 125; Ogden *v.* Dobbin, 2 Hall, N. Y. R. 112; Picquet *v.* Curtis, 1 Sumner, R. 478.

[1] Ibid. See Lord Eldon's judgment in Rowe *v.* Young, 2 Brod. & Bing. R. 165; S. C. 2 Bligh, R. 391.

[2] Chitty on Bills, ch. 5, p. 172, 173, (8th edit.); Id. ch. 7, p. 321–323;

taking of the indorser and drawer is conditional, and consequently, unless there be a strict compliance with the condition, no right can attach against the indorser, or the drawer.[1] Thus, a different rule is applied as to the obligations of the holder to make presentment and demand of payment in respect to the drawer or indorser from that which applies to the maker or acceptor. And yet it would seem that the contract on the part of the maker and acceptor naturally imported that he would pay at the place agreed on, and not elsewhere, and therefore to make it the duty of the holder first to apply there for payment, before he could charge the maker or acceptor with any default. But the time of payment seems in this respect susceptible, as to the maker and acceptor, of a different interpretation from the place of payment. The money is treated as primarily the debt of the maker or acceptor; and yet he cannot be called upon to pay it before the day when it becomes due; and there seems no reason to say, that an omission to demand payment of the debt on that very day absolves him from all obligation to pay the money at any future time, any more than it would absolve him from the payment of any other debt.[2] It is, indeed, by the Common

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Id. ch. 9, p. 391–400; Bayley on Bills, ch. 1, § 9, p. 29, 80, (5th edit.); Id. ch. 7, § 1, p. 219–223; Gibb *v.* Mather, 2 Cromp. & Jerv. R. 254; S. C. 8 Bing. R. 214; United States Bank *v.* Smith, 11 Wheat. R. 171; Wallace *v.* M'Connell, 13 Peters, R. 136; Woodbridge *v.* Brigham, 13 Mass. R. 556; Thomson on Bills, ch. 6, § 2, p. 420–424, (2d edit.); Shaw *v.* Reed, 12 Pick. R. 132; North Bank *v.* Abbot, 13 Pick. R. 465.

[1] Ibid.

[2] Chitty on Bills, ch. 9, p. 391, 392, (8th edit.) Mr. Chitty here says: "It is a general rule of law, that where there is a precedent debt or duty, the creditor need not allege or prove any demand of payment before the action brought, it being the duty of the debtor to find out his creditor, and tender him the money, and, as it is technically said, the bringing of the

Law, generally the duty of the debtor to seek the creditor, and pay his debt, when it becomes due, unless it is otherwise agreed between them; but it is otherwise agreed between them, when a specific place is named, where it is to be paid; for then it imports not to be payable elsewhere.[1]

§ 231. If a Promissory Note be made payable at either of two specified places, as, for example, at Tunbridge, or at London, the holder has a right to present it at either place for payment at his election, and is not bound to present it at both, although, if presented at one place, it would have been paid, and it has been dishonored at the other.[2] The reason of this doctrine is,

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action is a sufficient request. It might not, perhaps, be unreasonable, if the law in all cases required presentment to the acceptor of a Bill, or maker of a Note, before an action be commenced against him, because otherwise, he might, on account of the negotiable quality of the instrument, and the consequent difficulty to find out the holder of it, on the day of payment, in order to make a tender to him, be subjected to an action without any default whatever; and the engagement of the acceptor of a Bill or maker of a Note, is to pay the money when due to the holder, who shall for that purpose make presentment. And one reason why a party cannot recover at law on a lost Bill or Note, is, that the acceptor of the one, and maker of the other, has a right to insist on having it delivered up to him on his paying it. It seems, however, that, in general, the acceptor or maker of a Note cannot resist an action on account of neglect to present the instrument at the precise time when due, or of an indulgence to any of the other parties. And on the above-mentioned principle, that an action is of itself a sufficient demand of payment, it has been decided, that the acceptor or maker of a Note cannot set up as a defence, the want of a presentment to him, even before the commencement of the action, and although the instrument be payable on demand. But in such a case, upon an early application, the Court would stay proceedings without costs." See, also, Thompson on Bills, ch. 5, § 3, p. 383, 384, (2d edit.)

[1] See 3 Kent. Comm. Lect. 44, p. 99, and note, (5th edit.); Thomson, on Bills, ch. 6, § 1, p. 420, (2d edit.)

[2] Chitty on Bills, ch. 9, p. 400, (8th edit.); Bayley on Bills, ch. 7, § 1, p. 244, (5th edit.); Beeching *v.* Gower, Holt, N. P. R. 313; Story on Bills, § 354.

that the alternative is presumed to be introduced for the benefit of the holder, and not for that of the maker. And such presentment at either place will not only be sufficient to charge the maker, but to charge the indorsers also.[1] If a Promissory Note is made payable in a large city, as, for example, in London, and no particular place of presentment is named, and the maker does not reside there, and has no place of business there, it seems, that if, upon reasonable inquiry there, the maker cannot be found, nor any person ready to pay it, the Note may be treated as dishonored by the maker, and the presentment in London by the holder held to be sufficient to charge the indorsers, as well as the maker.[2]

§ 232. Sometimes, a Promissory Note is made payable at any or either of the banks in a particular city, and in such a case the question may arise, at what bank the holder should present it for payment. The true answer would seem to be, that he may present it for payment at any one bank in the city at his election; and if, upon presentment there, payment be refused, it will be sufficient to charge the indorsers, as well as the maker.[3] Sometimes, all the parties to a Note, the maker, the indorsers, and the payee, or other holder, by parol agree, that a Note, payable by its terms generally, shall be presented for payment at a particular place; in that case, a presentment at the place agreed on will bind all the parties, and no personal demand need be made upon the maker, to charge the indorser.[4]

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1 Story on Bills, § 354.

2 Story on Bills, § 353; Boot *v.* Franklin, 3 John. R. 208. See Mason *v.* Franklin, 3 John. R. 202; 3 Kent, Comm. Lect. 44, p. 95, 96, (5th edit.)

3 See North Bank *v.* Abbot, 13 Pick. R. 465, 469.

4 State Bank *v.* Hurd, 12 Mass. R. 172; Whitwell *v.* Johnson, 17

§ 233. There does not seem to be any provision in the French Law, which requires, that Promissory Notes should specify any particular place of payment.[1] Nor, indeed, is this required in cases of Bills of Exchange, except where they are made payable at some other place than the residence of the acceptor; and where Bills are so payable, the acceptance must state the house or domicil, where payment thereof is to be made.[2] It is therefore probable, that Promissory Notes are not usually in France made payable at any particular banking-house, or other place, although there does not seem any reason, why they may not be. The common forms given in the text-books contain no such designations of place; but only the name of the town or city, where the Note is made.[3]

§ 234. From what has been already said, it may be inferred, and, indeed, it is a clearly established doctrine, that where a Promissory Note is made payable at a particular place, as, for example, at a bank or banker's, in every such case it will be sufficient for the holder to present the same for payment at the specified place, and he is under no obligation whatsoever, in case of its dishonor at that place, to present it for payment elsewhere, or personally to the maker.[4] The reason is, that, by

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Mass. R. 449; Brent's Ex'rs. *v.* Bank of Metropolis, 1 Peters, Sup. Ct. R. 89; Bank of America *v.* Woodworth, 18 John. R. 315; S. C. in Err. 19 John. R. 391.

1 Code de Commerce, art. 188.

2 Code de Comm. art. 123; Pardessus, Droit Comm. Tom. 2, § 369; Id. § 393; Story on Bills, § 359.

3 Ante, § 3, note; Dupuy de la Serra, L'Art des Lettres de Change, ch. 19, p. 192, 193, (edit. 1789); Nouguier, Des Lettres de Change, Tom. 1, Liv. 4, § 1, p. 496, 497.

4 Chitty on Bills, ch. 9, p. 399, 400, (8th edit.); Bayley on Bills, ch. 7, § 1, p. 219, (5th edit.); Saunderson *v.* Judge, 2 H. Black. 509; Stedman

making it payable at that particular place, the maker impliedly dispenses with the necessity of making any demand upon him, either personally, or elsewhere. And this doctrine applies as well to the case of the indorsers, as of the maker of such a Promissory Note; for the indorsers equally with the maker in such a case impliedly agree, that presentment at the place shall be sufficient to bind all the parties.

§ 235. Having thus considered the doctrine of presentment for payment applicable to cases, where Promissory Notes are originally made payable at a particular place, let us, in the next place, pass to the consideration of the doctrine applicable to Promissory Notes payable generally, and without reference to any particular place. This naturally involves the consideration of the mode of presentment in ordinary cases. And, here, the general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house, or place of business.[1] It seems, that a pre-

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v. Gooch, 1 Esp. R. 4; De Bergareche *v.* Pillin, 3 Bing. R. 476; Berkshire Bank *v.* Jones, 6 Mass. R. 524, 526; Gale *v.* Kemper's Heirs, 10 Miller, Louis. R. 208; State Bank *v.* Hurd, 12 Mass. R. 172; Fullerton *v.* Bank of United States, 1 Peters, Sup. Ct. R. 604; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543; Ogden *v.* Dobbin, 2 Hall, R. 112; Gillett *v.* Averill, 5 Denio, R. 85.

[1] Mr. Chancellor Kent, in his Commentaries (Vol. 3, Lect. 44, p. 95–97, 5th edit.) says; "If the Bill has been accepted, demand of payment must be made when the Bill falls due; and it must be made by the holder or his agent upon the acceptor, at the place appointed for payment, or at his house or residence, or upon him personally, if no particular place be appointed, and it cannot be made by letter through the post-office. But there is a great deal of perplexity and confusion in the cases on this subject, arising from refined distinctions and discordant opinions; and it becomes very difficult to know what is precisely the law of the land, as to the sufficiency of the demand upon the maker of the Note, or the acceptor of the

sentment for payment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicil, or at his place of business.[1] But it is by no means indispensable, in any case, to make a personal presentment to the maker, if he has a dwelling-house, or a place of business. A presentment at the former, whether he be in the house or not, if it be within reasonable hours, will be a due and

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Bill. If there be no particular and certain place identified and appointed, other than a city at large, and the party has no residence there, the Bill may be protested in the city on the day without inquiry, for that would be an idle attempt. The general principle is, that due diligence must be used to find out the party, and make the demand; and the inquiry will always be, whether, under the circumstances of the case, due diligence has been used. The agent of the holder, in one case, used the utmost diligence, for several weeks, to find the residence of the indorser, in order to give him notice of the dishonor of the Bill, and then took a day to consult his principal before he gave the notice, and it was held sufficient. If the party has absconded, that will, as a general rule, excuse the demand. If he has changed his residence to some other place, within the same state or jurisdiction, the holder must make endeavors to find it, and make the demand there; though if he has removed out of the state, subsequent to the making of the Note or accepting the Bill, it is sufficient to present the same at his former place of residence. If there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of date; and the presumption is, that the maker resides where the Note is dated, and that he contemplated paying at that place. But it is presumption only; and if the maker resides elsewhere within the state when the Note falls due, and that be known to the holder, demand must be made at the maker's place of residence."

[1] See Chitty on Bills, § 9, p. 398–400, (8th edit.); Bayley on Bills, ch. 7, § 1, p. 219–223, (5th edit.); Fayle *v.* Bird, 6 Barn. & Cressw. 531; Selby *v.* Eden, 3 Bing. R. 611; Shed *v.* Brett, 1 Pick. R. 413; Turner *v.* Hayden, 4 Barn. & Cressw. 1, 3; Roscoe on Bills, 147, 148, (edit. 1829.) See Pothier, De Change, n. 129; Thomson on Bills, ch. 6, § 1, p. 420, 421, (2d edit.); McGruder *v.* Bank of Washington, 9 Wheat. R. 598, 600; Story on Bills, § 325, 351; Louis. State Ins. Co. *v.* Shamburg, 14 Martin, R. 511; Bellievre *v.* Bird, 16 Martin, R. 186; Oakley *v.* Beauvais, 11 Louis. R. 489. But see King *v.* Holmes, 1 Jones, Penn. R. 456.

sufficient presentment to charge the other parties to the Note; and if made at his place of business, it will be sufficient, if made within the usual hours of business, although he be absent therefrom; for, in both instances, he is bound to have a suitable person there to answer inquiries and pay his Notes, if there demanded.[1] Where the dwelling-house and place of business are in the same town or city, the presentment for payment may be made at either, and need not be at both, under the like qualification, that it be within reasonable hours.[2] The like rule applies, where the dwelling-house is in one town or city, and the place of business is in another.[3]

§ 236. It sometimes occurs, that the maker of a Promissory Note changes his place of domicil or business in the intermediate period between the time, when the

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[1] Chitty on Bills, ch. 9, p. 398–400, (8th edit.); Bayley on Bills, ch. 7, p. 219–226, (5th edit.); Shed *v.* Brett, 1 Pick. R. 413; State Bank *v.* Hurd, 12 Mass. R. 172; Brent's Ex'rs *v.* Bank of Metropolis, 1 Peters, Sup. Ct. R. 89; Saunderson *v.* Judge, 2 H. Black. 509; Fenton *v.* Goundry, 13 East, R. 465; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578; Story on Bills, § 351; Marius on Bills, 182, (2d edit.); Id. p. 33, (8th edit. 1794); Elford *v.* Teed, 1 Maule & Selw. 28; Miller *v.* Hennen, 15 Martin, R. 587; State Bank *v.* Hennen, 16 Martin, R. 423; Oakey *v.* Beauvais, 11 Louis. R. 489; Burrows *v.* Hannegan, 1 McLean, R. 309.

[2] Ibid.; Story on Bills, § 235, 351; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582.

[3] Ibid. See Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578. Heineccius states a very curious ancient custom, existing in some parts of Germany; that, if a Bill of Exchange be payable by a Christian to a Jew, the presentment should be made, and payment be demanded, at the house of the Christian; but, if a Bill is payable by a Jew to a Christian, the payment is to be made by the Jew at the house of the Christian. But, if a Bill be payable by a Jew to a Jew, then the Jew holder must demand payment at the house of the acceptor. Heinecc. de Camb. cap. 4, § 42 and note; Story on Bills, § 358.

Note was made, and when it becomes due. In such a case, it is indispensable to make a presentment and demand of payment at the new domicil, or place of business, if it is known, or can by reasonable diligence and inquiries be found, and it be within the same state, in order to charge the indorsers; and a presentment and demand at the old domicil or place of business would be insufficient and improper.[1] If the maker has removed his domicil, or place of business, to another state or country,[2] or, if, having removed his domicil and place of business to some other part of the same state, the new domicil or place of business cannot, upon diligent inquiry, be ascertained,[3] then the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the indorsers, as if there had been a due presentment. It seems, also, that if the maker of a Promissory Note resides, and has his domicil, in one state, and actually dates, and makes, and delivers a Promissory Note in another state, it will be sufficient for the holder to demand payment thereof at the place, where it is dated, if the maker cannot per-

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1 Chitty on Bills, ch. 7, p. 307, (8th edit.); Id. ch. 9, p. 400, 401; Bayley on Bills, ch. 7, § 1, p. 218, 219, (5th edit.); Collins *v.* Butler, 2 Str. R. 1087; McGruder *v.* Bank of Washington, 9 Wheat. R. 598; Anderson *v.* Drake, 14 John. R. 114; 3 Kent, Comm. Lect. 44, p. 96, 97, (5th edit.); Story on Bills, § 235, 351, 352; Reid *v.* Morrison, 2 Watts & Serg. 401; Carroll *v.* Upton, 2 Sandford, Sup. Ct. N. Y. R. 172. See Wheeler *v.* Field, 6 Metc. R. 290.

2 McGruder *v.* Bank of Washington, 9 Wheat. R. 598, 601, 602; Story on Bills, § 351 and note; Id. § 235; Id. § 252, 305, 308; Anderson *v.* Drake, 14 John. R. 114; Louis. State Ins. Co. *v.* Shamburg, 14 Martin, R. 511; Wheeler *v.* Field, 6 Metc. R. 290.

3 Chitty on Bills, ch. 9, p. 400, (8th edit.); 3 Kent, Comm. Lect. 44, p. 96, 97, (5th edit.); Bayley on Bills, ch. 7, § 1, p. 218, (5th edit.); Hepburn *v.* Toledano, 10 Miller, Louis. R. 643; Blakely *v.* Grant, 6 Mass. R. 386.

sonally, upon reasonable inquiries, be found within the state, and has no known place of business there.[1]

§ 237. If the maker has absconded and cannot be found, or, if, at the time of the maturity of the Note, he has no known residence or place, where a presentment can be made, then the holder will, in like manner, be excused from any presentment.[2] But, if the maker has gone abroad, and has temporarily left the country, or he is absent upon a journey, that will not be a sufficient excuse for the want of a due presentment of the Note for payment, if he has left his family behind at his house, or it remains open, or if he has left his counting-house, or place of business, open and accessible, or if he has a known agent to transact his business at the place of his domicil during his absence; for, in all such cases, a presentment should be made at his dwelling-house, or place of business, or a demand made upon such agent; as, in either case, it is obvious that funds may have been provided to meet the exigency.[3]

§ 238. If, at the time and place of presentment for payment within reasonable hours, the holder finds, that the dwelling-house or place of business of the maker of

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[1] Hepburn *v.* Toledano, 10 Miller, Louis. R. 643. But see Spies *v.* Gilmore, 1 Comstock, R. 321; Taylor *v.* Snyder, 3 Denio, R. 264. Post, § 264.

[2] Story on Bills, § 327, 351; Chitty on Bills, ch. 7, p. 307, (8th edit.); Id. ch. 8, p. 360; Id. ch. 10, p. 485, 524; Bayley on Bills, ch. 7, § 1, p. 218, (5th edit.); Anon. Ld. Raym. 743; Whittier *v.* Graffam, 3 Greenl. R. 82; Putnam *v.* Sullivan, 4 Mass. R. 45; Widgery *v.* Munroe, 6 Mass. R. 449; Hale *v.* Burr, 12 Mass. R. 86; Duncan *v.* McCullough, 4 Serg. & Rawle, 480; Lehman *v.* Jones, 1 Watts & Serg. 126; Wolfe *v.* Jewett, 10 Miller, Louis. R. 390; Taylor *v.* Snyder, 3 Denio, R. 146; Belmont Bank *v.* Patterson, 17 Ohio R. 78.

[3] Story on Bills, § 351. See Philips *v.* Astling, 2 Taunt. R. 206; Chitty on Bills, ch. 7, p. 307, (8th edit.)

a Promissory Note is shut up, and the holder cannot, upon reasonable inquiries, ascertain, where he is gone, or where he is to be found, or that he has acquired a new domicil, that will constitute a sufficient ground for the non-presentment of the Note.[1] But it may not, in many cases, and certainly will not in all, excuse farther inquiries on the part of the maker, in order to make due presentment for payment, that the dwelling-house or the counting-house of the maker is shut up; because it may be ascertained, upon farther inquiries, that the maker has removed elsewhere, or is to be found personally at lodgings at another place in the town or city, or is absent only for a few moments from his domicil, and about to return immediately.[2]

§ 239. Where a Promissory Note is payable by a partnership, it will be sufficient to make a presentment for payment to either of the partners, either personally, or at his domicil, or at the place of business of the firm, or at his own separate place of business, if he has any; and it is not necessary to make a presentment to all the partners;[3] for, in such a case, each partner acts not

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[1] Chitty on Bills, ch. 7, p. 307, (8th edit.); Id. ch. 9, p. 386, 387; Bayley on Bills, ch. 7, § 1, p. 218, (5th edit.); Collins *v.* Butler, 2 Str. 1087; Story on Bills, § 352. See, also, Howe *v.* Bowes, 16 East, 112; S. C. in error, 5 Taunt. 30; Hine *v.* Allely, 4 Barn. & Adolp. 624; Williams *v.* Bank of U. States, 2 Peters, R. 96; Shed *v.* Brett, 1 Pick. R. 413; Franklin *v.* Verbois, 6 Miller, Louis. R. 730. [A notary having a bill for the purpose of demanding payment of an acceptor, who had a short time before been a boarder at a public hotel in Cincinnati, was held to be under no obligation, when informed at the hotel that the acceptor had gone down the river to be absent some days, to present the bill or make demand of payment of any one there, in order to fix the liability of an indorser. Belmont Bank *v.* Patterson, 17 Ohio R. 78.]

[2] Ibid.; Collins *v.* Butler, 2 Str. R. 1087. See Lanusse *v.* Massicot, 3 Martin, R. 261; Granite Bank *v.* Ayers, 16 Pick. R. 392.

[3] Chitty on Bills, ch. 8, p. 355, 369, 370, (8th edit.); Story on Bills, § 362.

only for himself, but he represents the partnership. But a different rule may apply in the case of joint makers, who are not partners; for, in such a case, a presentment to one cannot be deemed a presentment to both, nor a dishonor by one a dishonor by both; and in respect to the indorsers, it may be said, that they contract to pay only upon due presentment to all the joint makers, and a dishonor by each.[1]

§ 240. What will be due and reasonable diligence, on the part of the holder, in making inquiries to ascertain the actual residence or place of business of the maker, either originally, or upon a change of his domicil, is a

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[1] After some researches, I have not been able to find a single English authority exactly in point on this question. The case of Porthouse *v.* Parker, 1 Camp. R. 82, seems to have been a case of partners; and is so treated by Mr. Justice Bayley, and by Mr. Chitty. See Bayley on Bills, ch. 7, § 2, p. 285, (5th edit.); Chitty on Bills, ch. 8, p. 370, (8th edit.); Id. ch. 8, p. 530, 531; Id. p. 618. The case of Shed *v.* Brett, 1 Pick. R. 401, was obviously a case of a demand upon a partnership. See, also, the case of Shed *v.* Brett, 1 Pick. R. 413, which was between the same parties. The nearest approach by analogy is that of joint indorsers, not partners, to whom, in case of dishonor of the Note at its maturity, notice, it should seem, ought to be severally given, if they are not partners. See Story on Bills, § 299, 362. But, upon this point, also, there is no strict English authority. In Ohio it has been decided, that in cases of a joint and several Note, the promisors are to be deemed quo ad hoc as partners, and notice and a demand upon one is a demand on all. Harris *v.* Clark, 10 Ohio R. 5. In Connecticut, on the other hand, it has been held, that each joint indorser is entitled to a several notice of the dishonor of the Note, at its maturity. Shepard *v.* Hawley, 1 Conn. R. 368. Mr. Chancellor Kent, in his Commentaries, (3 Kent, Comm. Lect. 44, p. 105, note *b*, 5th edit.) inclines to the last opinion; which strikes me to be the correct one. See, also, Bank of Chenango *v.* Root, 4 Cowen, R. 126. In cases of Notes payable to joint payees, not partners, all must indorse to transfer the Note. Carvick *v.* Vickery, Doug. R. 653; Jones *v.* Radford, 1 Camp. R. 83, note; Chitty on Bills, ch. 2, p. 66, (8th edit.) This shows, that one is not competent to act for the other, as to making a transfer. In what respect does this differ from that of acting for the other, in cases of presentment for payment, or of notice of dishonor? Post, § 255.

matter susceptible of no definite rule, and must essentially depend upon the circumstances of each particular case; and will be governed by the same general considerations, as those, which regulate the place and mode of notice to parties.[1]

§ 241. So peremptory is this duty of the holder to demand payment on the very day of the maturity of the Bill, that (as we have already seen[2]) even the bankruptcy, or insolvency, or death of the maker before or at the time of its falling due will not excuse or justify the omission.[3] The same rule equally applies to making a presentment and demand at the proper place, where it should be made; and the omission to do so will not be excused by the bankruptcy, insolvency, or death of the maker. In the former cases, the demand may, and should be made upon the bankrupt or insolvent personally, or at his domicil, or place of business, in the same way and manner, as if he were not bankrupt or insolvent.[4] If his house, or place of business, is shut up, it

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[1] See Chitty on Bills, ch. 10, p. 524, 525, (8th edit.); Story on Bills, § 299, and note; Id. § 352, and note; 3 Kent, Comm. Lect. 44, p. 96, 97, (5th edit.)

[2] Ante, § 203; Story on Bills, § 346.

[3] Story on Bills, § 279, 306, 326; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413, (5th edit.); Chitty on Bills, ch. 9, p. 386-389, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 251, (5th edit. 1830); Id. § 2, p. 302; Russel *v.* Langstaffe, Doug. R. 497, 515; Esdaile *v.* Sowerby, 11 East, R. 114; Story on Bills, § 230, 279; Crossen *v.* Hutchinson, 9 Mass. R. 205; Garland *v.* The Salem Bank, 9 Mass. R. 408; Jackson *v.* Richards, 2 Caines, R. 343; Barton *v.* Baker, 1 Serg. & Rawle, R. 334; Sandford *v.* Dillaway, 10 Mass. R. 52; Farnum *v.* Fowle, 12 Mass. R. 89; Groton *v.* Dallheim, 6 Greenl. R. 476; Shaw *v.* Reed, 12 Pick. R. 132; Lawrence *v.* Langley, 14 N. Hamp. R. 44; Robson *v.* Oliver, 10 Adolph. & Ellis, N. S. 704; Hunt *v.* Wadleigh, 26 Maine, R. 271.

[4] Chitty on Bills, ch. 9, p. 386-388, (8th edit. 1833); Collins *v.* Butler, 2 Str. R. 1087; Howe *v.* Bowes, 16 East, 112; 1 Maule & Selw. 555; Groton *v.* Dallheim, 6 Greenl. R. 466; Shaw *v.* Reed, 12 Pick. 132.

may not always be sufficient to make a demand there; and the holder ought to make inquiries, where he may be found; and if, upon reasonable inquiries, the fact can be ascertained of the place, where he may be found, presentment should be made there.[1] In case of the death of the maker, the holder should make presentment for payment to the executor or administrator of the deceased, if one has been appointed, and he, or his residence, can be ascertained upon reasonable inquiries; and, if there be no executor or administrator, or he or his place of residence cannot be found, then presentment for payment should be made at the house, or other domicil, of the deceased.[2] If the Note be by a firm, and one partner dies before the maturity of the Bill, the presentment should be made to the survivors, and not to the personal representative of the deceased.[3] We shall hereafter have occasion to notice other considerations applicable to this part of the subject.[4]

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1 Chitty on Bills, ch. 9, p. 386, 387, (8th edit. 1833); Molloy, B. 2, ch. 10, § 34; Story on Bills, § 246.

2 Chitty on Bills, ch. 9, p. 389, 401, (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 218, 219, (5th edit. 1830); Id. § 2, p. 286; Molloy, B. 2, ch. 10, § 34; Magruder *v.* Union Bank of Georgetown, 3 Peters, R. 87; Juniata Bank *v.* Hale, 16 Serg. & Rawle, 157; Story on Bills, § 235; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413, (5th edit.)

3 Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. R. 635.

4 Story on Bills, § 346. This doctrine is strongly illustrated by the cases applicable to bankers' Notes, where the failure or bankruptcy of the bankers will constitute no ground for non-presentment for payment. On this subject, Mr. Chitty says; "In general, in the case of country bankers' Notes, payable on demand, although the bank has stopped payment and been shut up, and has declared, that they will not pay any Notes, yet a due and regular presentment of such Notes, with respect to time, must be formally made at the banker's, or to one or more of the makers, unless dispensed with by the parties to be resorted to by the holder, and due and immediate notice of the dishonor must be given to all the parties who are known to have transferred the same, or they will be discharged from all

§ 242. In the third place, as to the mode of presentment and the demand of payment. If it be personal, or verbal, it should be absolute, and for present actual payment, and not with any offer or agreement for any farther credit.[1] If it be in writing, as may in some cases be proper, where a personal or verbal notice is impracticable, or, under the circumstances, not indispensable, the writing should expressly or by implication, be equally

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liability, as well to pay the Note as the debt, in respect of which it was transferred. Hence, it is expedient for any holder of a Note payable on demand to present it for payment as soon as possible, and immediately on being apprized of the insolvency of the banker, or other party, who ought primarily to pay the same, formally to tender the same and demand payment at the banking-house, and also of the partners of the firm, if practicable ; and, as soon as possible afterwards, to give notice of the non-payment, to all the parties on whom he can possibly have any claim. Nor is there any distinction in this respect, whether the Note payable on demand has been circulated by a party after the maker has stopped payment or was insolvent, unless the former knew the fact at the time. If he did not, then he may insist on a due presentment of the Note, or at least on having due notice of the dishonor within the time usually applicable to such Notes. Therefore, where it appeared, that a Note of a country bank was given in payment while the bank continued open, but before the time allowed by the Law Merchant for presentment had expired, the bank failed ; yet it was held, that the holder was bound to present the Note for payment in due time, and that he, by neglecting to do so, made it his own. So, where, on the 10th of December, at three o'clock in the afternoon, the defendant at York, forty miles from Huddersfield, delivered to the plaintiff four five-pound Notes, payable to bearer on demand, of the bank of Dobson & Co., at Huddersfield, in payment for goods sold, and at eleven o'clock on that day, those bankers had stopped payment, but neither the plaintiffs nor the defendant knew of it ; and the plaintiff did not circulate or transfer the Notes, nor present them for payment, and on the 17th of December required the defendant to take them back, and he refusing, the plaintiff sued him for the price of the goods, the Court held, that the defendant was discharged from liability, and that the plaintiff should either have negotiated the Notes, or forwarded them for payment on the day after he received them, and have given due notice of non-payment."

[1] Chitty on Bills, ch. 9, p. 401, 402, (8th edit. 1833) ; Bayley on Bills, ch. 9, p. 337, 338, (5th edit. 1830) ; Gillard *v.* Wise, 5 Barn. & Cressw. 134 ; Lockwood *v.* Crawford, 18 Conn. R. 361.

absolute and direct. Nor should any payment be accepted, which is not an immediate payment in money; and payment by a check or other draft upon a bank or on bankers should be declined.[1]

§ 243. The mode of presentment of a Promissory negotiable Note for payment may be farther illustrated by considering the acts required of the holder, when he is in possession of the Note, and when the Note has been lost or mislaid. If the Note is payable generally, without any specification of place, the holder must have the Note in possession, ready to be delivered up to the maker, when the presentment for payment is made; for, ordinarily, a presentment by a person not in possession of the Note will not be deemed a just or regular presentment, or binding the maker to immediate payment.[2] If the Note is payable at a bank, or banker's, or at any other specified place, the holder, whether the bank, or banker, or other person, has lodged it there, or has possession of it there at the time of its maturity, it will be

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[1] Chitty on Bills, ch. 9, p. 401, 402, (8th edit. 1833.) Mr. Chitty says; "The Bill or Note should not be left in the hands of the drawee, or maker, without immediate actual payment in money; at least, if it be, the presentment is not considered as made, until the money is called for; and, although it has been decided, that neither a holder, nor a banker, acting as agent, is guilty of neglect, by giving up a Bill to the acceptor, upon his delivering to them his check on another banker, that doctrine may now be questionable; and most of the London bankers, on presenting a Bill for payment in the morning, leave a ticket, where it lies due, and declaring, that, 'in consequence of great injury having arisen from the non-payment of drafts taken for Bills, no drafts can, in future, be received for Bills, but that the parties may address them for payment to their bankers, or attach a draft to the Bill when presented.'" Story on Bills, § 348, 364.

[2] Ante, § 106-110; Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Freeman *v.* Boynton, 7 Mass. R. 483, 486; Whitwell *v.* Johnson, 17 Mass. R. 449, 452; Gilbert *v.* Dennis, 3 Metc. R. 495-497. But see Fales *v.* Russell, 16 Pick. R. 315, 316; Baker *v.* Wheaton, 5 Mass. R. 509, 512; Jones *v.* Fales, 5 Mass. R. 101.

the duty of the maker to make payment thereof at that very place, and no special demand need be made upon the maker. If held by a bank, or banker, upon a discount thereof, or for the purpose of collection for the owner, it will be sufficient to establish a due presentment and dishonor of the Note against all the parties thereto, that no funds are there lodged or possessed by the maker, within the usual hours of business, for the payment thereof.[1] But, in order to make such the legal result, the Note must be actually on the day of its maturity, at the bank, or the banker's, ready to be delivered up on payment thereof; for, in general, it is necessary for a person, demanding payment of a negotiable Note, to have it with him, when he makes the demand;[2] and, although the presumption is, that a Note payable at a bank, will, if it is the property of the bank, be found there at its maturity, that presumption may be rebutted by countervailing proof.[3]

§ 244. In respect to cases, where a negotiable Promissory Note has been lost, mislaid, or destroyed, we have already seen, that in England no remedy ordinarily exists for the holder at law, but his remedy is in

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[1] Chitty on Bills, ch. 9, p. 399, 400, (8th edit.); Bayley on Bills, ch. 7, § 1, p. 219, (5th edit.); Gilbert *v.* Dennis, 3 Metc. R. 495–497; Berkshire Bank *v.* Jones, 6 Mass. R. 524; Folger *v.* Chase, 18 Pick. R. 63; North Bank *v.* Abbot, 13 Pick. R. 465; Fullerton *v.* Bank of U. States, 1 Peters, Sup. Ct. R. 604; Bank of U. States *v.* Carneal, 2 Peters, Sup. Ct. R. 543; Ogden *v.* Dobbin, 2 Hall, R. 112; Nicholls *v.* Goldsmith, 7 Wend. R. 160.

[2] Freeman *v.* Boynton, 7 Mass. R. 483, 486; Woodbridge *v.* Brigham, 13 Mass. R. 556; Whitwell *v.* Johnson, 17 Mass. R. 449, 452; Gilbert *v.* Dennis, 3 Metc. R. 495; Shed *v.* Brett, 1 Pick. R. 401; Shaw *v.* Reed, 12 Pick. R. 132; Ante, § 106–110; Haddock *v.* Murray, 1 New Hamp. R. 140.

[3] Folger *v.* Chase, 18 Pick. R. 63; Berkshire Bank *v.* Jones, 6 Mass. R. 524, 525.

equity;[1] and that in America, there is a conflict in the authorities, some being in the affirmative, some in the negative, and some adopting an intermediate doctrine.[2] But, whichever of these conflicting doctrines be the true one, it seems clear, that the loss, mislaying, or destruction of the Note, will not dispense with a regular presentment for payment on the part of the holder; and, if it be not made, the indorsers will be discharged from their responsibility.[3] The reason is, that it is by no means to be taken for granted, that the mislaying, loss, or destruction of the Note would have been insisted on, even in states and countries, where by the *Lex loci* it is a good objection; for the maker might still be willing to pay upon an indemnity being offered and given to him, or even without an indemnity, where he had a firm personal confidence in the integrity and high commercial solvency of the holder.[4] The case is far stronger than that of the bankruptcy, or insolvency, of the maker at the maturity of the Note, which (we have seen[5]) constitutes no excuse, either in law or in equity, for non-presentment of the Note for payment.

§ 245. The law of France is the same. That law re-requires a protest to be made upon the dishonor of a Promissory Note by the maker, as well as upon the dishonor of a Bill of Exchange by the acceptor; and it has

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1 Ante, § 106 – 112; Post, § 445 - 450.

2 Ante, § 107 – 111; Posey *v.* Decatur Bank, 12 Alabama R. 801; Thayer *v.* King, 15 Ohio R. 242.

3 Chitty on Bills, ch. 6, p. 280, 286, 288, 289, (8th edit.); Id. 291, 297; Thackray *v.* Blackett, 3 Camp. R. 164; Marius on Bills, p. 19, (edit. 1794); Bayley on Bills, ch. 7, p. 302, (5th edit.); Id. ch. 9, p. 336; Id. p. 369, 371 – 373; Story on Bills, § 348; Beawes, Lex Merc. by Chitty, Vol. 1, p. 589, pl. 182, 185.

4 Ibid.; Smith *v.* Rockwell, 2 Hill, N. Y. R. 482.

5 Ante, § 203, 241.

been said that inasmuch as every protest must include in it a copy or transcript of the Note or Bill, it is impossible to include one, when the Note or Bill is lost or destroyed; and that the rule of law is, *Lex neminem cogit ad vana seu inutilia, sui impossibilia peragenda*;[1] or, as the Roman Law more succinctly expresses it, *Impossibilium nulla obligatio est.*[2] But Pothier has with great truth and acuteness remarked, that this may be a very good reason why a copy or transcript should not be put in the protest, and the formality be dispensed with; but that it furnishes no ground why a demand of payment and protest for non-payment should not be made, since neither of them is impossible in such a case.[3]

§ 246. In the fourth place, as to the person, by whom a Promissory Note is, upon its maturity, to be presented for payment. And here the general answer to be given to the inquiry, who is the proper person to make the presentment, is, that, if the holder is living, it should be made by him personally, or by his authorized agent.[4] Who is an authorized agent, competent to make the presentment, may, in some cases, admit of some nicety of doctrine under peculiar circumstances. It is clear, that it is not necessary that the authority to an agent for this purpose should be in writing; and a parol authority will be sufficient.[5] If the Note belong to a

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[1] Branch's Maxims, p. 98; 5 Co. R. 21; Wingate's Maxims, 600.

[2] Dig. Lib. 50, tit. 17, l. 185.

[3] Pothier, De Change, n. 145; Ante, § 110; Code de Comm. art. 150–152; Nouguier, Des Lettres de Change, Tom. 1, ch. 8, § 4, p. 335–341; et Appendica, p. 342; Story on Bills, § 279 and note.

[4] Chitty on Bills, ch. 9, p. 398, 428, 429, (8th edit.); Coore *v.* Callaway, 1 Esp. R. 115.

[5] Shed *v.* Brett, 1 Pick. 401; Freeman *v.* Boynton, 7 Mass. R. 483; Hartford Bank *v.* Barry, 17 Mass. R. 94; Seaver *v.* Lincoln, 21 Pick. R. 267.

partnership, as holders, either of the partners or their agent may demand payment. In general, it may also be stated, that if the Note is indorsed in blank, and is in possession of a party, he will be deemed *prima facie* entitled to demand payment thereof, whether he be the actual owner thereof, or be only an agent for the owner, or for any other party interested therein and entitled to the benefit thereof.[1] If a Note has been indorsed by the payee to a third person, and yet is found in his possession, that will be sufficient evidence, *primâ facie*, that he has become lawfully possessed thereof, and entitled to demand payment thereof, as owner or agent.[2] If a Note belong to a bank, the cashier thereof is deemed *virtute officii* to make demand of payment, and to authorize the demand by a sub-agent.[3] And in all cases, where a Note is in possession of the agent of the owner, whether by a blank indorsement, or otherwise, it is competent for the owner himself at all times to demand payment thereof personally and in his own name.[4]

§ 247. The cases which we have hitherto been consi-

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[1] Ante, § 243; Chitty on Bills, ch. 9, p. 398, 428, 429, (8th edit.); Story on Bills, § 360, 415, 416; Owen *v.* Barrow, 4 Bos. & Pull. 103; Clerk *v.* Pigot, 12 Mod. R. 193; Little *v.* Obrien, 9 Mass. R. 423; Sterling *v.* Marietta and Susq. Trading Co. 11 Serg. & Rawle, 179; Mauran *v.* Lamb, 7 Cowen, R. 174; Gorgerat *v.* McCarty, 2 Dall. R. 146; 1 Yeates, R. 98; Bachellor *v.* Priest, 12 Pick. R. 399; Sherwood *v.* Roys, 14 Pick. R. 172; Banks *v.* Eastin, 15 Martin, R. 291; Shaw *v.* Thompson, 15 Martin, R. 392; Adams *v.* Oakes, 6 Carr. & Payne, 70. See Thatcher *v.* Winslow, 5 Mason, R. 58.

[2] Bachellor *v.* Priest, 12 Pick. R. 399; Dugan *v.* the United States, 3 Wheat. R. 172; Jones *v.* Fort, 9 Barn. & Cressw. 764; Bank of U. States *v.* United States, 2 How. Sup. Ct. R. 711.

[3] Hartford Bank *v.* Barry, 17 Mass. R. 94. See Church *v.* Barlow, 9 Pick. R. 547; Fleckner *v.* Bank of the United States, 8 Wheat. R. 338.

[4] Pothier De Change, n. 164; Mottram *v.* Mills, 1 Sandford, Sup. Ct. R. 37; Dolefus *v.* Frovel, 1 Denio, R. 367; Post, § 452; Story on Bills, § 209.

dering, are those, where the Promissory Note is negotiable, and indorsed in blank, or found in the possession of a holder, who is clearly seen, upon the instrument, to be the apparent owner thereof, or entitled to deal with it as owner, or as agent of the owner. But a different rule may apply, and, indeed, would seem properly to apply to cases where a Note is not originally made negotiable, or if originally negotiable, has been indorsed to a particular person only, and where, of course, in either case, the holder in possession is not the payee, or the special indorsee thereof.[1] Under such circumstances, the mere production of the Note by the holder is not ordinarily deemed a sufficient title or authority to demand payment, because his possession is no proof of his title or authority to hold the same; and if it is refused on that account, it may be doubtful, if any recourse can be had against the indorsers on account of the dishonor, at least unless a positive authority or title is clearly made out by positive and unexceptionable evidence.[2]

§ 248. The French Law recognizes the same principle. Pothier, in speaking upon the subject, says, that payment, and of course presentment for payment, can be properly made only to the party, who, at the time of the maturity of the Note, is the lawful proprietor thereof or to his authorized agent.[3] If the Note is not negotiable, but has been assigned to another person by an indorsement thereon, then the assignee may lawfully

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[1] But see Chitty on Bills, ch. 9, p. 389; Marius on Bills, p. 33, 34, (edit. 1794).

[2] See Freeman *v.* Boynton, 7 Mass. R. 483; Bank of Utica *v.* Smith, 18 John. R. 230; Shed *v.* Brett, 1 Pick. R. 401, 404; Chitty on Bills, ch. 9, p. 398, (8th edit.); Id. 428, 429; Marius on Bills, p. 33, 34, (edit. 1794); Pothier, De Change, n. 165, 168, 169; Scaccia, Tract. de Comm. § 9, Glos. 5, n. 340, p. 571.

[3] Pothier, De Change, n. 164.

require payment.[1] But, if the assignment in such a case be on a separate paper, notice thereof to the maker is indispensable to charge him with payment to the assignee; and if, before such notice, he should pay the same to the payee, or to any person, to whom the payee had indorsed the Note, on its production, the payment would be good.[2]

§ 249. It follows, of course, from what has been already said,[3] that the holder, at the maturity of the Note must be a competent person to make the presentment and demand payment, or the agent of a competent person; for, if he be not, the payment will not be good when made to him; and the money may be recovered back from the maker by the proper person entitled thereto. Independent of the cases of persons, who are disabled by being under guardianship, or coverture, from demanding payment to be made to them, as *sui juris*, there are others which may require our consideration, as, for example, cases where the holder has become bankrupt, or is dead before or at the maturity of the Note. In the case of the bankruptcy of the holder, if assignees have been appointed, the presentment should be made by them, or by some person authorized by them.[4] Even if the bankrupt were but a mere agent, a demand of payment by the assignees would be good and sufficient, and inure for the benefit of the owner;[5] although, under the circumstances, a demand by the bankrupt himself might not be equally good, as being made by an agent, whose authority is revoked by operation of law, or upon the presumed intention of the

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[1] Ibid. 164, 165, 168, 169.

[2] Ibid. 165.

[3] Ante, § 246.

[4] Chitty on Bills, ch. 9, p. 398, (8th edit.)

[5] Jones v. Fort, 9 Barn. & Cressw. 764.

principal.[1] If no assignees have been appointed, and the act of bankruptcy is unknown to the maker, a presentment by the bankrupt may be (it should seem) good, and the maker may safely pay the Note to the bankrupt. But, if the act of bankruptcy be known, the presentment to, or payment by, the bankrupt would not be good, unless ratified by the assignees.[2]

§ 250. In the case of the death of the holder, the legal right to demand payment of the Note rests in his executor or administrator.[3] If there be no administrator or executor duly appointed, and capable of acting at the time of the maturity of the Note, that would seem to furnish a sufficient excuse for the non-presentment of the Note for payment until an executor or administrator is appointed and duly qualified to act.[4] But of this more will be said hereafter. If the holder is a woman, and she marries before or at the maturity of the Bill, the presentment should be made by her husband, and a presentment by her, after the marriage, without his consent or authority, will not be sufficient to discharge the maker, or justify a payment by him.[5] If the Note belong to a partnership, as holders, the presentment should be by the surviving partner, upon the death of the other.

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[1] Story on Agency, § 486; Hudson *v.* Granger, 5 Barn. & Ald. 27, 31, 32; Pothier, De Mandat. n. 120.

[2] See Chitty on Bills, ch. 9, p. 428 - 430, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 284, (5th edit.); Ex parte Moline, 19 Ves. 216; Jones *v.* Fort, 9 Barn. & Cressw. 764. I have not seen any case directly in point; but it would seem a just result, from analogous provisions in bankruptcy, and the decisions thereon. In Ex parte Moline, 19 Ves. 216, Lord Eldon, upon the question of the sufficiency of the notice of the dishonor of a Bill, given to the bankrupt before the appointment of assignees, said, "The bankrupt represents his estate until assignees are chosen."

[3] Chitty on Bills, ch. 6, p. 225, 226, (8th edit.)

[4] Ibid. ch. 9, p. 360, (8th edit.); Id. ch. 10, p. 485, 486, 524.

[5] Story on Bills, § 90 - 93, 360; Chitty on Bills, ch. 2, p. 26, (8th edit.)

§ 251. In the fifth place, as to the person to whom presentment of the Note for payment is to be made. In general, it should be made to the maker, either personally, or at his dwelling-house or place of business, unless the Note be payable at a particular place, as, for example, at a bank or banking-house, in which case, it should be there presented for payment.[1] A presentment may also be made to the duly authorized agent of the maker, if he has one, and then the presentment will ordinarily be of the same avail, as it would be, if made to the maker himself.[2]

§ 252. In case of the bankruptcy or insolvency of the maker, a presentment should still be made to the bankrupt or insolvent for payment, and it will be no excuse to the holder, that he has omitted in such a case to perform the duty.[3] The same rule prevails in the French Law, and has been expressly recognized by Savary and Pothier.[4]

253. In case of the death of the maker, at the time of the maturity of the Note, presentment for payment should be to his executor or administrator, if any one be appointed and qualified to act, and the place of residence of the executor or administrator can, upon reasonable inquiries, be ascertained.[5] If there be no executor or administrator appointed and qualified to act, then a

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[1] Ante, § 226 – 232; Chitty on Bills, ch. 9, p. 399 – 401, (8th edit.)

[2] Story on Bills, § 229, 362; Chitty on Bills, ch. 7, p. 301, 307, (8th edit.); Id. ch. 9, p. 389, 398 – 401. See Phillips *v.* Astling, 2 Taunt. R. 206.

[3] Ante, § 203, 204; Bayley on Bills, ch. 7, § 1, p. 251, 252, (5th edit.); Chitty on Bills, ch. 8, p. 386, (8th edit.); Esdaile *v.* Sowerby, 11 East, R. 114; Story on Bills, § 326, 346; Boultbee *v.* Stubbs, 18 Ves. 21.

[4] Story on Bills, § 347; Ante, § 203; Pothier, De Change, n. 147; Savary, Le Parfait Négociant, Tom. 2, Parère 45, p. 360.

[5] Chitty on Bills, ch. 8, p. 389, (8th edit.); Ante, § 241.

presentment should be made, and payment demanded, at the dwelling-house of the deceased;[1] unless, indeed, the Note were originally made payable at some particular place, for then it will be sufficient, that presentment is made at that place.[2] In either case, the omission will generally be fatal to the claims of the holder against the indorser.[3] The American authorities are not, indeed, uniform upon this point; but the law of England, which is asserted in the text, is that which generally prevails in a great majority of the American States.[4]

§ 254. The French Law is precisely coincident with the law of England upon the necessity of a due presentment, and demand of payment, in case of the death of the maker; for, in such a case, the protest for non-

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[1] Chitty on Bills, ch. 7, p. 307, (8th edit.); Id. ch. 8, p. 360; Id. ch. 9, p. 401; Ante, § 241.

[2] Ante, § 226 - 232; Chitty on Bills, ch. 9, p. 401, (8th edit.); Story on Bills, § 362; Philpott *v.* Bryant, 1 Mood. & Roll. 754; 3 Carr. & Payne, 244; 4 Bing. R. 717; Price *v.* Young, 1 Nott & McCord, 438; Story on Bills, § 305, 326, 362; Molloy, B. 2, ch. 10, § 34; Thomson on Bills, ch. 6, § 4, p. 501, (2d edit.)

[3] Ibid.

[4] In Massachusetts, in the case of Hale *v.* Burr, 12 Mass. R. 86, the Court held, that if, at the maturity of a Note, the maker was dead, no demand need be made upon the executor or administrator of the deceased for payment, if the maturity of the Note was after the appointment and qualifying of the executor or administrator, but before the expiration of the year from the appointment; because, if made within the year, the executor or administrator was not by the laws of Massachusetts bound to pay the Note. But quære, if this be a satisfactory reason. In the first place, the executor or administrator might, if he had ample assets, pay the Note to avoid the running of interest; and, in the next place, the contract of the indorser is conditional, that he will pay the Note, if duly presented and not paid at its maturity. The fact that it may not, or will not be paid by the maker at its maturity, does not in other cases dispense with the obligation implied by law on the part of the holder to make due presentment. Why should it in the case of the death of the party? The French Law, as we shall immediately see, is against the Massachusetts decision. Pothier, De Change, n. 146; Ante, § 241; Post, § 254.

payment (which is equally required by the French Law in cases of Notes and of Bills) must still be made, and the answer of the widow and heirs of the deceased, declining payment, be inserted in the protest, and then it will be equivalent to a refusal by the maker, and bind the indorsers.[1] If the deceased has not left at his domicil any widow or heirs, still the holder must make the protest, and state in it, that he has made a presentment at the domicil.[2]

§ 255. In the case of a partnership Note, (as we have already seen,[3]) it will be sufficient to make a presentment and demand upon either of the partners, either personally, or at the place of business of the firm, or at the dwelling-house of either partner; for each represents the firm. It is, or at least it may be otherwise, (as has been already suggested,[4]) in cases of joint makers, who are not partners; for then a presentment and demand may be required to be made of each separately, since a dishonor by one is not in such case necessarily a dishonor by both, and neither is presumed to have authority to act for the other. If it be said, that the makers may reside at a distance from each other, and therefore it may be impracticable to make a demand on each on the day of the maturity of the Note; it may be answered that if impossible to make a demand on the same day on each, that may excuse punctuality as to the time of the demand; and the indorser, by indorsing a joint Note, submits to meet and abide by that difficulty, if a pre-

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1 Pothier, De Change, n. 146.

2 Pothier, De Change, n. 144.

3 Ante, § 239, and note; Bayley on Bills, ch. 7, § 285, 286, (5th edit.); Story on Bills, § 305, 326, 362.

4 Ante, § 239; Per Nelson, C. J., in Willis *v.* Green, 5 Hill, N. Y. R. 232; Shepard *v.* Hawley, 1 Connect. R. 367.

sentment is made as soon, as it reasonable can be, as he does in many other cases, where a due presentment is impossible.[1] But as the indorser, by his indorsement of a joint Note, has a right to rely upon the joint responsibility of both, and therefore may reasonably be supposed to insist upon a dishonor by both before he is called upon for payment, there would seem to be strong ground to insist, that a joint dishonor should be established before the indorser should be liable.[2]

§ 256. In the case of the death of one partner of a firm, before a Promissory Note of the firm has arrived at maturity, presentment and demand of payment should be made of the surviving partners of the firm, and not of the executor or administrator of the deceased;

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[1] Story on Bills, § 233, 234, 308, 326, 365; Chitty on Bills, ch. 9, p. 389, 422, 423, (5th edit.); Id. ch. 10, p. 485-488, 522; Freeman *v.* Boynton, 7 Mass. R. 483.

[2] Ante, § 239. The case of Harris *v.* Clark, 10 Ohio R. 5, was a case where the Note was joint and several, and, of course, where the holder was at liberty to treat as the several Note of each maker, and so a demand upon one of the makers and dishonor would properly bind the indorsers. But the reasoning of the Court went beyond the case, and treated all joint promisors as partners pro hac vice. This is certainly not true in relation to joint payees, for neither can indorse for the other, as one partner may for all. The case of Shepard *v.* Hawley, 1 Connect. R. 368, shows that a notice of dishonor to one of two joint indorsers of a Note does not bind the other. See, also, 3 Kent. Comm. Lect. 44, p. 105, note *b*; Bank of Chenango *v.* Root, 4 Cowen, R, 126. In Willis *v.* Green, 5 Hill, N. Y. R. 232, 234, Mr. Chief Justice Nelson said; "I do not see but the case of joint indorsers, not partners, stands on the same footing, as that of joint makers of a Note who are not partners; and in respect to them it is settled, that presentment must be made to each, in order to charge the indorser. The argument is about as strong, both upon reason and analogy, in favor of giving effect to a demand upon one of the co-makers, as it is in favor of giving effect to a notice to one of the co-indorsers. The question has been very fully and satisfactorily examined by the Supreme Court of Errors in Connecticut, and a decision made in conformity with these views. Shepard *v.* Hawley, 1 Connect. R. 367." [So also in Pennsylvania, Sayre *v.* Frick, 7 Watts & Sergeant, R. 383.]

for the surviving partners alone are in such cases liable at law for the payment of the Note; and, of course, as the duty devolves on them, the holder should apply to them therefor.[1] The same rule will apply to joint makers, where one of them dies before the maturity of the note; and the presentment should, under such circumstances, be made to the surviving maker or makers thereof; for then the debt is at law the debt of the survivors only. It may be different in this last case, where the Note is the several, as well as the joint Note of the makers; for then the holder is at liberty to elect, upon whom he will make the demand and presentment.

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[1] Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. R. 635; Story on Part. § 361, 362; Story on Bills, § 362.

CHAPTER VII.

EXCUSES FOR NON-PRESENTMENT OF PROMISSORY NOTES.

§ 257. In the sixth place, as to what will constitute a sufficient excuse for non-presentment and demand at the time and place, when and where the Promissory Note is due and payable. We have already had occasion to allude to this subject in another connection;[1] but it requires to be more fully and exactly stated in this place. The excuses may be general and applicable to all persons, who are indorsers; or, they may be special and applicable to a particular indorser only. Among the general excuses, the following are commonly stated as causes, which will excuse the want of due presentment; (1.) Inevitable accident, or overwhelming calamity; (2.) The prevalence of a malignant disease, which suspends the ordinary operations of business; (3.) The presence of political circumstances, amounting to a virtual interruption and obstruction of the ordinary negotiations of trade, called the *vis major;* (4.) The breaking out of war between the country of the maker and that of the holder; (5.) The occupation of the country, where the parties live, or where the Note is payable, by a public enemy, which suspends commercial intercourse; (6.) Public and positive interdictions and prohibitions of the state, which obstruct or suspend commerce and

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[1] Ante, § 205, 206.

intercourse; (7.) The utter impracticability of finding the maker, or ascertaining his place of residence. Among the special excuses may be enumerated the following: (1.) The receiving the Note by the holder from the payee, or other antecedent party, too late to make due presentment; (2.) The Note being an accommodation Note of the maker, for the benefit of a particular indorser; (3.) Special agreements between the holder, and an antecedent indorser, waiving the presentment and demand; (4.) The receiving of security by an indorser to indemnify himself against loss, or to enable him to take up the Note at its maturity; (5.) The receiving of the Note by the holder from an indorser, as collateral security for another debt; (6.) A promise by an indorser to pay the Note, after a full knowledge, that it has not been duly presented for payment by the holder.

§ 258. Of each of these cases, a few brief illustrations may suffice. In the first place, as to inevitable accident or overwhelming calamity. In this category may be placed the cases, where all intercourse is stopped between the places, where the holder and the maker live; as, for example, by running ice, by freshets, or the carrying away of bridges, when they live in towns on the opposite banks of a river; or by violent snow storms, obstructing and rendering impassable the roads to and from the towns, where they dwell; by tornadoes, or earthquakes, prostrating, for a short time, all the ordinary means of communication.[1] It has been truly observed by a learned author, that there is no positive

[1] Story on Bills, § 308; Chitty on Bills, ch. 9, p. 422, (8th edit.); Id. ch. 10, p. 485, 486; Thomson on Bills, ch. 6, § 1, p. 415, (2d edit.) See Schofield *v.* Bayard, 3 Wend. R. 488; Ante, § 205.

authority in our law, which establishes any such inevitable accident, or overwhelming calamity, to be a sufficient excuse for the want of a due presentment.[1] But it seems justly and naturally to flow from the general principle, which regulates all matters of presentment and notice in cases of negotiable paper. The object in all such cases is, to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world,

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1 Chitty on Bills, ch. 10, p. 485, note (*f*), (8th edit.) ; Story on Bills, § 308, 327, 365. Mr. Chitty in this note says ; "There is no reported case, deciding, whether accident will excuse a delay in giving notice of non-acceptance or non-payment. In Hilton *v.* Shepard, 6 East, R. 16, in notes, Garrow and Russell contended, that, whether due notice has been given in reasonable time must, from the necessity of the thing, be a question of fact for the consideration of the jury ; that it depended upon a thousand combinations of circumstances, which could not be reduced to rule ; if the party were taken ill, if he lost his senses, if he were under duress, &c., how could laches be imputed to him? Suppose he were prevented from giving notice, within the time named, by a physical impossibility. Such a rule of law must depend upon the distance, upon the course of the post, upon the state of the roads, upon accidents, all of which it is absurd to imagine. Lord Kenyon, C. J. ; 'I cannot conceive how this can be a matter of law. I can understand, that the law should require, that due diligence shall be used, but that it should be laid down, that the notice must be given that day or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived, that, whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances of the accident, necessity, and the like. This, however, is a question very fit to be considered, and when it goes down for trial again, I shall advise the jury to find a special verdict. I find invincible objections, in my own mind, to consider, that the rule of law, requiring due diligence, is tied down to the next day.' In Darbishire *v.* Parker, 6 East, 3, it was held, that reasonable time is a matter of law for the Court." It is observable, that he is here speaking of notice of the dishonor of a Note or Bill. In a prior page (p. 422), he applies the same rule to cases of non-presentment, and, therefore, it is apparent, that he supposes no distinction to exist between the rule applicable to the one and to the other. The case of Patience *v.* Townley, 2 Smith, R. 223, 224, seems to me fully to sustain the doctrine. Ante, § 205.

and the practicability of accomplishing the end required by ordinary skill, caution, and effort. Due presentment must be interpreted (as Lord Ellenborough said) to mean presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents, which must prevent the party from doing it within regular time.[1]

§ 259. Upon such a subject, we listen to the doctrines of Foreign Law with almost implicit confidence, not only because it is from that law, that we derive the primative principles, which regulate it; but because the inquiry is one, which concerns the interests of all commercial nations, and is not, and ought not to be, bounded by the rules arising under the mere municipal jurisprudence of the Common Law.[2] Pothier speaks upon this subject in the most direct terms. In treating of the necessity of a due presentment and protest of Bills and Notes, (for a protest is required by the French Law in both cases,) he says, that if, by any superior and unforeseen force, (the common phrase of the civilians to indicate inevitable accidents, and irresistible power,) the protest cannot be made upon the day, when it ought, the omission of making it on that day will not deprive the holder of his right of recourse or guaranty over against the other parties; for the holder is never bound to im-

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[1] Patience *v.* Townley, 2 Smith, R. 223, 224.

[2] It is well known, that by the strict principles of the Common Law, if a contract becomes incapable of being performed by any inevitable accident or casualty, that constitutes, in many cases, no excuse for the non-performance thereof. Paradine *v.* Jane, Aleyn, R. 26, 27, is an illustration of the general principle. See, also, the authorities cited in Story on Bailm. § 36; 1 Story on Eq. Jurisp. § 101, 102; 2 Story on Eq. Jurisp. § 1303; Cutter *v.* Powell, 6 Term R. 320; Atkinson *v.* Ritchie, 10 East, R. 530; Barker *v.* Hodson, 3 Maule & Selw. 267.

possibilities; and that it will be sufficient if he does make it within such time afterwards, as the Judge shall deem reasonable.[1] He illustrates the doctrine by stating the case of the holder, transmitting a Bill of Exchange to a correspondent at a distant city for presentment and payment, who dies suddenly upon the eve of the time, when the Bill ought to be paid or protested for dishonor; and he holds that, in such a case, it will be sufficient if the Bill is afterwards presented for payment within a reasonable time after the holder is informed of the accident, and is enabled to give orders to receive the money.[2] Pothier puts the case of the sudden illness of the holder, or of his agent, which prevents a due presentment of the Bill, upon the same broad and general foundation; and says that it will be sufficient, if done within a reasonable time afterwards.[3] Pardessus affirms the modern law in France to be the same.[4] It is also the law of Scotland.[5]

§ 260. In the next place, as to the prevalence of a malignant disease. The same principle would seem here to apply, as in the case of inevitable accident and casualty, if the disease be so extensively prevalent or so malignant as to suspend all commercial business and intercourse; such as, for example, the prevalence of the plague, or of the yellow fever, or of the Asiatic cholera, to such an extent as make it immediately hazardous to life to enter into the infected district.[6] But here, again,

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1 Pothier, De Change, n. 144.

2 Ibid.

3 Ibid.

4 Pardessus, Droit Comm. Tom. 2, art. 422, 426, 434.

5 Thomson on Bills, ch. 6, § 2, p. 452, note, (2d edit.); Id. § 1, p. 414, 415.

6 See Tonno *v.* Lague, 2 John. Cas. 1. Contra, Roosevelt *v.* Woodhull, Anthon, Nisi Prius R. 35. See, also, Barker *v.* Hodgson, 3 Maule & Selw. 267.

the Common Law authorities do not appear to speak directly and conclusively on the point.[1]

§ 261. In the next place, the presence of political circumstances, amounting to a virtual interpretation of the ordinary negotiations of trade. This is governed by the same rule as the preceding cases, and is equally supported by the foreign authorities, and treated as falling within the predicament of the *vis major*.[2] Upon this ground, founded upon a close analogy to the *vis major*, it has been accordingly held, that if the due presentment of a Bill or Note is rendered impossible or imminently dangerous by the political circumstances and perils of the town or city, where and when it is payable, that constitutes of itself a sufficient excuse; as, for example, if the place be blockaded, or in danger of immediate invasion or occupation by the enemy, or the scene of a battle, *flagrante bello*.[3]

§ 262. In the next place, the existence of open war between the country where the holder is domiciled, and the country where the Note is payable, or the maker is domiciled, and, as falling within the like predicament, the occupation of the latter country by the enemy. This constitutes a clear and admitted exception; for war between the two countries, (and if one is in the temporary occupation of the enemy, it is during that period deemed an enemy's country,) all commercial intercourse and trade and business between the subjects is suspended, and indeed prohibited, during the war, or hostile occu-

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[1] See Thomson on Bills, ch. 6, § 1, p. 414, 415, (2d edit.); Id. § 2, p. 452; Pothier, De Change, n. 144.

[2] Pothier, De Change, n. 144; Pardessus, Droit Comm. Tom. 2, art. 422, 424.

[3] Patience *v.* Townley, 2 Smith, R. 223, 224.

pation.[1] This is now the universally recognized doctrine; and, consequently, it constitutes a sufficient justification of the omission to make due presentment of the Note during the period of the suspension, or the prohibition of such intercourse.

§ 263. In the next place, the public interdiction and prohibition of commerce between the country of the holder and that of the maker. This is governed by the same principles as the preceding, and requires no particular illustration, since it is plain that no subject of any country can be compellable to do any act, which violates the law of that country, in order to protect rights which he is not otherwise at liberty to seek or to enforce.

§ 264. In the next place, the utter impracticability of finding the maker, or ascertaining his place of residence. This, of course, constitutes a sufficient ground to excuse a due presentment of the Note for payment at its maturity; for the plain reason, that due diligence only is, or can be, required of the holder, to make such presentment. If, therefore, the maker has absconded, or is concealed, or cannot, after due inquiries, be found; or if he has removed his place of domicil to another state or country, since the Note was given, the holder is dispensed from the necessity of any other efforts to make a presentment, since the law does not require him to do vain acts, or to pursue the maker into foreign countries.[2] [But, where a Note, specifying no place of

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[1] 1 Kent, Comm. Lect. 3, p. 66–71, (5th edit.); Potts *v.* Bell, 8 Term R. 548; The Rapid, 8 Cranch, R. 155; Willison *v.* Patterson, 7 Taunt. R. 439; Griswold *v.* Waddington, 15 John. R. 57; S. C. 16 John. R. 438; Scholefield *v.* Eichelberger, 7 Peters, R. 586; Patience *v.* Townley, 2 Smith, R. 223, 224; Hopkirk *v.* Page, 2 Brock. R. 20.

[2] Ante, § 205, 236, 238, 241; Story on Bills, § 327, 346; Stewart *v.*

payment, was made and indorsed in the State of New York, and the maker and indorser resided in a foreign country, and continued to reside there when the Note fell due, their place of residence being known to the payee and holder, both when the Note was given and when it matured, it was held, by the Court of Appeals of New York, that presentment of the Note to the maker, demand of payment from him, and notice to the indorser, were necessary to charge the latter.[1]]

§ 265. Passing from these, let us now glance at the other class of excuses, those of a special character. And in the first place, the receiving of the Note so near the time of its maturity, as that it becomes impracticable to present it in due season. It is obvious that this excuse can properly apply only as between the immediate parties, who have transferred and received the note within such a brief period. For, as to other antecedent parties, who transferred it long enough to have a due presentment made, they have a right, as to all subsequent holders, to stand upon the very terms of their original contract; and it is the folly of such holders to take the Note so late, as that they cannot fulfil the obligations imposed by law upon them.[2] But, as between the last

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Eden, 2 Caines, R. 121; Galpin *v.* Hard, 3 McCord, R. 394; McGruder *v.* Bank of Washington, 9 Wheat. R. 598.

[1] Spies *v.* Gilmore, 1 Comstock, R. 321; Taylor *v.* Snyder, 3 Denio, R. 151.

[2] See Ante, § 201; Story on Bills, § 325, 344; Chitty on Bills, ch. 9, p. 402, 421, 423, (8th edit.); Id. ch. 10, p. 465, 467; Bayley on Bills, ch. 7, § 1, p. 243, 247, (5th edit.); Lenox *v.* Roberts, 2 Wheat. R. 373; Mills *v.* Bank of United States, 11 Wheat. R. 431; Robinson *v.* Blen, 2 Appleton, R. 109. Upon this subject, Mr. Chitty says; "But the circumstance of the holder having received a Bill very near the time of its becoming due constitutes no excuse for a neglect to present it for payment at maturity, for he might renounce it if he did not choose to undertake

holder and his immediate indorser, it is obvious that, as each knows the impracticability of a due presentment, each must, under such circumstances, be presumed to agree, that a strict compliance shall be waived, and that it shall be sufficient for the holder to make a presentment within a reasonable time. Any other doctrine would enable the holder of a Note to prolong, at his pleasure, the responsibility of the antecedent indorsers beyond the maturity of the Note. Thus, for example, if the payee of a Note, payable sixty days after date, should, on the day of its date, transfer the note by indorsement to a person, who should live at a great distance from the domicil of the maker, or the place of payment, and the latter should retain it in his possession until the eve of its maturity, and should then transfer it to another indorser at such a distance from the place or domicil, that a due presentment was impossible, as between these parties a reasonable future time for presentment would be naturally implied, as a part of the negotiation.[1] But the same implication would not exist

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that duty, and send the Bill back to the party from whom he received it; but if he keep it he is bound to use all reasonable and due diligence in presenting it. And, therefore, where the plaintiff, in Yorkshire, on the 26th of December, received a Bill of Exchange, payable in London, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his banker's in Lincoln, who duly forwarded it to London for presentment, and the Bill was dishonored, it was held, that the plaintiff had by his laches lost his remedy against the drawer and indorsers. But it has been considered in France, that if an indorser himself transfer a Bill so late to the holder as to render it impracticable to present it precisely at maturity, he cannot take advantage of a delay in presentment so occasioned by himself, though the prior indorsers and the drawer may." Chitty on Bills, ch. 9, p. 423, (8th edit.) See, also, Anderton *v.* Beck, 16 East, R. 248, cited Bayley on Bills, ch. 7, § 1, p. 213, (5th edit.)

[1] See Anderton *v.* Beck, 16 East, R. 248.

as to the payee; for, as to him, it was the duty of his immediate indorsee, and of all subsequent holders, to present the Note for payment at its maturity; otherwise, the payee would be discharged.[1]

§ 266. The rules which have been applied to Notes, payable on demand, and to banker's Notes, and other circulating negotiable securities of the like nature, sufficiently establish the same principle. Each successive holder of such Notes is bound to present the same within a reasonable time after he receives the same for payment; and each successive transferrer thereof, ordinarily, by indorsement or delivery, undertakes to pay only, if upon presentment within a reasonable time, after he has parted with the same, his immediate holder, or any subsequent party claiming under him, presents the same within such reasonable time, as the immediate holder ought to present the same.[2]

§ 267. The same doctrine, as to the duty of the holder, and the responsibility of antecedent indorsers, where the Note is received so near its maturity, as not to be capable of being duly presented at that time for payment, is laid down by Pardessus as the clear result of the French Law. He says, that it may so happen, that a Bill of Exchange (and the same rule applies to a Note) is transmitted so late, that he who receives it has

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[1] A doctrine far more broad was entertained by the Court, in Freeman *v.* Boynton, 7 Mass. R. 483, 485, where the Court seemed to think that if the holder of the Note lived at a considerable distance from the place of domicil of the maker, a reasonable time should be allowed to him to transmit the Note to the place, where payment should be demanded after the Note became due. But this expression of opinion was not called for by the circumstances of the case; and, upon general principles, it seems not maintainable.

[2] Chitty on Bills, ch. 9, p. 413, 414, 421, (8th edit.) See Ante, § 229, note.

not sufficient time, even employing the greatest diligence, to present or protest it in due season. In this event, as between him and his indorser, the holder is entitled to consider this as an exception in his favor, as to diligence, as to which the proper tribunal will judge under all the proofs and circumstances. But this will in no respect interfere with the rights of the other parties in interest, to avail themselves of the legal effect of the neglect.[1] And the same rule is equally applicable to the case of a Bill, indorsed after it has fallen due.[2] Pothier adopts and maintains the same doctrine;[3] and he adds, that in such cases the drawer and precedent indorsers of the Bill may insist upon the neglect to make a due presentment and protest, since it is not in the power of any subsequent indorser to deprive them by such indorsement of this ground of defence.[4]

§ 268. In the next place, that the Note is an accommodation Note by the maker, for the benefit of a particular indorser. In such a case, this is a sufficient excuse for the want of a due presentment to the maker, so far as respects the particular indorser, for whose benefit it is made; since, in truth, as between him and the maker, he is the proper party and primary debtor to pay the Note.[5] But as to all other indorsers the omis-

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1 Pardessus, Droit Comm. Tom. 2, art. 426.

2 Ibid.

3 Pothier, De Change, n. 141.

4 Ibid.

5 See Bayley on Bills, ch. 7, § 1, p. 217, (5th edit.); Id. ch. 9, p. 343; Chitty on Bills, ch. 10, p. 468-471, (8th edit.); Walton *v.* Watson, 13 Martin, R. 347; Sharp *v.* Bailey, 9 Barn. & Cressw. 44; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Agan *v.* McManus, 11 John. R. 180; Chandler *v.* Mason, 2 Verm. R. 193; Story on Bills, § 370; Terry *v.* Parker, 6 Adolph. & Ellis, 502.

sion will be fatal.[1] The reason is, that the accommodated indorser, in such a case, can suffer no injury or loss by reason of the want of a due presentment; since, if it had been dishonored, and he had been obliged to pay it, he could have no recourse over against the maker, any more than a drawer of a Bill of Exchange would have against his accommodation acceptor, in case of a dishonor by the latter.[2] We have seen that the indorser of a Note stands generally in the same relation to the maker, as the drawer of a Bill does to the acceptor. The same rule, indeed, applies in these cases, as does apply to cases, where notice is omitted to be given to the indorser, or drawer, under the like circumstances; of which we shall treat hereafter.[3]

§ 269. It will be at once perceived, that the doctrine, which governs in all these cases of accommodation mak-

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[1] Ibid.; Cory *v.* Scott, 3 Barn. & Ald. 619; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Warder *v.* Tucker, 7 Mass. R. 449; Agan *v.* McManus, 11 John. R. 180.

[2] Ibid.

[3] Mr. Chitty, on this subject, says; "But if the Bill was accepted for the accommodation of the drawer, and he expressly or impliedly engaged to pay it, or if the drawer of a Bill, from the time of making it to the time when it was due, had no effects or property whatever in the hands of the drawee or acceptor, and had no right, upon any other ground, to expect, that the Bill would be paid by him, or any other party to the Bill, he is primâ facie not entitled to notice of the dishonor of the Bill; nor can he object, in such case, that a foreign Bill has not been protested. In this case, the drawer, being himself the real debtor, acquires no right of action against the acceptor by paying the Bill, and suffers no injury from want of notice of non-acceptance or non-payment, and, therefore, the laches of the holder affords him no defence. And therefore, where the drawer had supplied the drawee with goods on credit, which did not elapse until after the Bill would fall due, and the drawer had no right to draw the Bill, it was held, that he was not discharged by the want of notice of non-payment." Chitty on Bills, ch. 10, p. 468, 469, (8th edit.); Id. p. 470, 471, 481.

ers, is, therefore, precisely the same which regulates accommodation acceptances. Each supposes that the party, for whose benefit the Bill or Note is accepted or made, has no funds in the hands of the acceptor or maker; and therefore the same common excuse for non-presentment applies, that no funds exist which are appropriated to the payment thereof.[1] Still, however, in common cases of accommodation acceptances and Notes it may be open for the drawer or indorser, to show, if he can, that he has, in point of fact, sustained damage or loss from the want of due presentment or notice, and to the extent thereof it would seem that he ought to be exonerated.[2]

§ 270. In the modern French Law a similar doctrine prevails (as, indeed, it did in the old law,) in relation to

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1 Story on Bills, § 367 and note, 369, 370 ; Chitty on Bills, ch. 9, p. 389, (8th edit.); Id. ch. 10, p. 467 – 482 ; Bayley on Bills, ch. 7, § 2, p. 294 – 300, (5th edit.)

2 Fitzgerald *v.* Williams, 6 Bing. New Cas. 68; Chitty on Bills, ch. 10, p. 481, 484, 485, (8th edit.) Mr. Chitty (p. 481) says ; " The proof that the drawer had no effects in the hands of the drawee, only affords a primâ facie excuse for the want of due notice of the dishonor, and it may be rebutted by its appearing, that the drawer, on taking up the Bill, would be entitled to some remedy over against some other party, as a right to sue the acceptor or any other party, or by showing, that he has been actually prejudiced by the want of notice ; as, if the Bill were drawn for the accommodation of the acceptor, or payee, or indorser. And there is a distinction as to the necessity for notice to the drawer of a dishonored Bill, when accepted for the accommodation of the drawer in a single transaction, and a case of various dealings, the excess for the accommodation of the drawer or acceptor ; in the latter case, notice is equally necessary, without actual effects. So, where W. drew a Bill upon a person to whom he had been sending goods for sale, and who accepted the Bill, neither party knowing the state of accounts between them, and it turned out that W. at the time, was indebted to the drawee, yet the Court held, that this was not to be considered as an accommodation Bill, within the acceptation of that term, and, consequently, that there was no implied contract of indemnity as to costs."

cases where there is an acceptance for the accommodation of the drawer of a Bill, or by the making of a Note for the accommodation of the indorser. In each case, the fact is a sufficient excuse for not making due presentment upon the very ground, that no fund or provision has been made by the drawer or indorser for the due discharge of the Bill.[1] Thus, for example, if the drawer has not furnished funds (*provision*) for the payment of the Bill, or the indorser, for whose benefit the Note was made, has not supplied funds to the maker to discharge it at maturity, that will be a sufficient excuse for the want of due presentment and protest, as well as for the want of due notice.[2]

§ 271. In the next place, as to cases of a special agreement between the holder and a particular indorser, waiving due presentment of the Note. This proceeds upon the well known maxim: *Quilibet potest renunciare juri pro se introducto.*[3] If the agreement is prior to the maturity of the Note, it necessarily amounts to a dispensation from a due presentment of the Note; and it would operate as a fraud upon the holder, if the objection were available afterwards, since he may have regulated his conduct, as to the neglect, in consequence of his confidence in the agreement.[4] In such a case, it would not seem to make any difference, whether the

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[1] Pardessus, Droit Comm. Tom. 2, art. 392, 435; Story on Bills, § 368; Pothier, De Change, n. 156, 157; Story on Bills, § 478 and note; Kemble *v.* Mills, 1 Mann. & Grang. 762, note (*b*).

[2] Ibid.; Code de Comm. art. 117, 169-171.

[3] 2 Inst. 183; Wingate's Maxims, 483; Branch's Maxims, 179; Central Bank *v.* Davis, 19 Pick. R. 373, 375; Taunton Bank *v.* Richardson, 5 Pick. R. 436.

[4] See Lincoln and Kennebec Bank *v.* Page, 9 Mass. R. 155; Fuller *v.* McDonald, 8 Greenl. R. 213; Berkshire Bank *v.* Jones, 6 Mass. R. 524; Backus *v.* Shipherd, 11 Wend. R. 690; Story on Bills, § 371, 373;

agreement were for a valuable consideration or not; since, if it were not held obligatory, it would be a manifest detriment to the holder, occasioned by the fraud or breach of faith of the indorser. But if the agreement were contemporaneous with the origin of the title of the holder, there it might assume the positive form of a valid obligation, operating *ex contractu* upon a sufficient consideration.[1]

§ 272. Agreements of this sort are always construed strictly, and are not extended beyond the fair import of the terms.[2] Thus, for example, an agreement to waive notice of the dishonor of the Note will be no excuse for the want of a due presentment of the Note to the maker for payment.[3] So, an undertaking by an indorser, by a written memorandum, as follows: "I do request, that hereafter any Notes that may fall due at the Union Bank, on which I am or may be indorser, may not be protested, as I will consider myself bound in the same manner as if the same had been legally protested," — has been held to be so ambiguous and doubtful, whether it meant to import a waiver of demand and notice, or not; and that it required other evidence to prove the intention to make such a waiver.[4] [But where an in-

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Johnston *v.* Searey, 4 Yerger, R. 182; Barker *v.* Parker, 6 Pick. R. 80; Thornton *v.* Wynn, 12 Wheat. R. 183; Leffingwell *v.* White, 1 John. Cas. 99; Story on Bills, § 373; Norton *v.* Lewis, 2 Connect. R. 478; Boyd *v.* Cleveland, 4 Pick. R. 525; Coddington *v.* Davis, 3 Denio, R. 19.

[1] Ibid.; Leonard *v.* Gary, 10 Wend. R. 504; Boyd *v.* Cleveland, 4 Pick. R. 525; Leffingwell *v.* White, 1 John. Cas. 99.

[2] Berkshire Bank *v.* Jones, 6 Mass. R. 524; Central Bank *v.* Davis, 19 Pick. R. 373; Union Bank *v.* Hyde, 6 Wheat. R. 572; Creamer *v.* Perry, 17 Pick. R. 332; Backus *v.* Shipherd, 11 Wend. R. 629; Lane *v.* Steward, 2 Appleton, R. 98; Chitty on Bills, ch. 9, p. 390, (8th edit.); May *v.* Coffin, 4 Mass. R. 341; Pardessus, Droit Comm. Tom. 2, art. 433.

[3] Ibid.; Post, § 367.

[4] Union Bank *v.* Hyde, 6 Wheat. R. 572.

dorser of a Note had been preferred in respect to his liability, in an assignment made by the maker for the benefit of his creditors, and had transferred to the holder his interest under the assignment, and afterwards, while the Note was running to maturity, wrote to the holder, saying, "You need not protest T. B. C.'s Note, due, &c. for, &c. and I will waive the necessity of protest thereof," this was held sufficient to dispense with a presentment and notice of non-payment.[1]] In all these cases, however, the agreement will not bind any indorsers, except those who are parties to it, or have sanctioned it.

§ 273. The French Law embodies, substantially, the same doctrine, with the same limitations, at least when the circumstances clearly establish a dispensation with the necessity of a due presentment.[2] If the drawer of a Bill, or the indorser of a Note, at its original formation, adds to his signature or indorsement, that the Bill or Note, upon its dishonor, may be returned without protest, (which is usually expressed in the brief terms *retour sans protêt*, or *sans frais*,) the holder, by such a clause, is dispensed from the necessity of making a formal demand and protest for non-payment thereof.[3] So, if afterwards, and before the maturity of the Note, he dispenses with the necessity of a protest, that will excuse a due presentment. But then the dispensation must be express and clear; for a mere promise to pay before the maturity of the Note is not, of itself, held to amount to a dispensation; but the waiver of the necessity of a protest must be direct.[4]

§ 274. In like manner, in many cases, by our law, a

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[1] Coddington *v.* Davis, 3 Denio, R. 17.
[2] See Pardessus, Droit Comm. Tom. 2, art. 433, 437.
[3] Pardessus, Droit Comm. 2, art. 425.
[4] Pardessus, Droit Comm. Tom. 2, art. 433.

waiver, after the maturity of the Note, of the objection of the want of due presentment and demand, like that of the want of due notice, may also, it seems, be effectual to bind an indorser, who assents to it.[1] Thus, for example, a new promise after such default, with a full knowledge of all the circumstances, will amount to a waiver of the objection, and entitle the holder to recover against the indorser, who has so promised to pay, although it will be inoperative as to other indorsers.[2] In terms, the French Law does not seem to allow a simple new promise after the maturity of the Note, any more than before, to have the effect of such a waiver; but the terms must be express and direct, unless, indeed, the holder is misled thereby to his injury. But a payment of the Note, with such knowledge of the default, could not be recalled.[3]

§ 275. But, in order to make such a waiver binding it must be clearly established, and deliberately made, after a full knowledge of the facts; for, as we shall presently see, it will not be presumed or implied from doubtful circumstances, or sudden acknowledgments, or hasty expressions, made in cases of surprise or unexpected demand.[4] Even when such a waiver is clearly established, it has been thought by some of the Ameri-

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[1] Story on Bills, § 327, 373; Chitty on Bills, ch. 9, p. 390, 8th edit.); Id. ch. 10, p. 533–540; Thornton *v.* Wynn, 12 Wheat. R. 183; Borradaile *v.* Lowe, 4 Taunt. R. 93; Leonard *v.* Gary, 10 Wend. R. 504; Reynolds *v.* Douglass, 12 Peters, Sup. Ct. R. 497, 505; Martin *v.* Winslow, 2 Mason, R. 241; Martin *v.* Ingersoll, 8 Pick. R. 1.

[2] Ibid.; Hopkins *v.* Liswell, 12 Mass. R. 52; Trimble *v.* Thorne, 16 John. R. 152; Jones *v.* Savage, 6 Wend. R. 658; Tibetts *v.* Dowd, 23 Wend. 412; Van Derveer *v.* Wright, 6 Barbour, Sup. Ct. R. 547.

[3] Pardessus, Droit Comm. Tom. 2, art. 433, 435; Post, § 277.

[4] May *v.* Coffin, 4 Mass. R. 341; Leonard *v.* Gary, 10 Wend. R. 504; Martin *v.* Winslow, 2 Mason, R. 241; Jones *v.* Savage, 6 Wend. R. 658;

can Courts, that the indorser, if once discharged, would not be bound, unless there was a new and sufficient consideration for the waiver, although the waiver might afford a sufficient ground of presumption, that there had been a due presentment, where the facts and circumstances were of such an equivocal nature, as left it doubtful, whether a due presentment had been made or not.[1] And there is great force and weight in the objection, that, where the indorser is once discharged, he cannot be made liable, in point of law, upon any new promise to pay the Note, without a new consideration, of which the waiver is merely evidence.[2] But the weight of the American authorities seems the other way.[3]

§ 276. What circumstances will, in our law, amount

Hopkins *v.* Liswell, 12 Mass. R. 52 ; Martin *v.* Ingersoll, 8 Pick. R. 1 ; Miller *v.* Hackley, 5 John. R. 375 ; Griffin *v.* Goff, 12 John. R. 423 ; Richter *v.* Selin, 8 Serg. & Rawle, R. 425 ; Reynolds *v.* Douglass, 12 Peters, Sup. Ct. R. 497, 505; Tower *v.* Durell, 9 Mass. R. 332 ; Garland *v.* Salem Bank, 9 Mass. R. 408 ; Penn *v.* Poumeirat, 14 Martin, R. 541 ; Cayuga County Bank *v.* Dill, 5 Hill, N. Y. R. 403 ; Creamer *v.* Perry, 17 Pick. R. 322.

1 Ibid.

2 Tibetts *v.* Dowd, 23 Wend. 412 ; Van Derveer *v.* Wright, 6 Barbour, Sup. Ct. R. 547.

3 Lawrence *v.* Ralston, 3 Bibb, Ken. R. 102 ; Peabody *v.* Harvey, 4 Connect. R. 119 ; 3 Kent, Comm. Lect. 44, p. 113, (5th edit.) Mr. Chancellor Kent there says ; "If due notice of a non-acceptance or non-payment be not given, or a demand on the maker of a Promissory Note be not made, yet a subsequent promise to pay, by the party entitled to notice, will amount to a waiver of the want of demand or notice, provided the promise was made clearly and unequivocally, and with full knowledge of the fact of a want of due diligence on the part of the holder. The weight of authority is, that this knowledge may be inferred, as a fact, from the promise, under the attending circumstances, without requiring clear and affirmative proof of the knowledge." And he cites Goodall *v.* Dolley, 1 Term R. 712 ; Hopes *v.* Alder, 6 East, R. 16, in notis ; Borradaile *v.* Lowe, 4 Taunt. R. 93 ; Stevens *v.* Lynch, 2 Camp. N. P. 332 ; S. C. 12 East, 38 ; Miller *v.* Hackley, 6 John. R. 375 ; Martin *v.* Winslow,

to the proof of a waiver of the want of due presentment, or of the want of due notice of the dishonor, is some-

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2 Mason, R. 241 ; Fotheringham *v.* Price, 1 Bay, R. 291 ; Thornton *v.* Wynn, 12 Wheat. R. 183 ; Pate *v.* M'Clure, 4 Randolph, 164 ; Otis *v.* Hussey, 3 N. Hamp. R. 346 ; Piersons *v.* Hooker, 3 John. R. 68 ; Hopkins *v.* Liswell, 12 Mass. R. 52 ; Breed *v.* Hillhouse, 7 Connect. R. 523. Contra, Trimble *v.* Thorne, 16 John. R. 152. See, also, Story on Bills, § 320, and cases there cited ; Jones *v.* Savage, 6 Wend. R. 658 ; Boyd *v.* Cleveland, 4 Pick. R. 25 ; Thomson on Bills, ch. 6, § 4, p. 523, 524, 530, (2d edit.) ; Lundie *v.* Robertson, 7 East, R. 231 ; Taylor *v.* Jones, 2 Camp. R. 105 ; Gunson *v.* Metz, 1 Barn. & Cressw. 193. Mr. Chitty (on Bills, ch. 10, p. 533, 8th edit.) says ; "The consequences, however, of a neglect to give notice of non-payment of a Bill or Note, or to protest a foreign Bill, may be waived by the person entitled to take advantage of them. Thus it has been decided, that a payment of a part, or a promise to pay the whole or part, or to 'see it paid,' or an acknowledgment that 'it must be paid,' or a promise, that 'he will set the matter to rights,' or a qualified promise, or a mere unaccepted offer of a composition with other creditors, made by the person insisting on the want of notice (after he was aware of the laches) to the holder of a Bill, amounts to a waiver of the consequences of the laches of the holder, and admits his right of action. And, in some of the cases upon this subject, the effect of such partial payment, or promise to pay, has been carried still further, and been considered not merely as a waiver of the right to object to the laches, but even as an admission, that the Bill or Note had in fact been regularly presented and protested, and that due notice of dishonor had been given ; and this even in cases, where the party who paid or promised afterwards stated, that in fact he had not due notice, &c. ; because it is to be inferred, that the part-payment, or promise to pay, would not have been made, unless all circumstances had concurred to subject the party to liability, and induce him to make such payment or promise. Thus, where an indorsee, three months after a Bill became due, demanded payment of the indorser, who first promised to pay it, if he would call again with the account, and afterwards said that he had not had regular notice, but as the debt was justly due he would pay it; it was held, that the first conversation being an absolute promise to pay the Bill, was primâ facie an admission, that the Bill had been presented to the acceptor for payment in due time, and had been dishonored, and that due notice had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration ; and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonor to the defendant went, which objection he then waived. So, where the drawer of a foreign Bill, upon being applied to for payment, said, 'My affairs are

times a matter of no inconsiderable doubt, and nicety, and difficulty.[1] Slighter circumstances may be sufficient, where the situation of the indorser is such, as fairly to give rise to the presumption, that the Note was made for his accommodation; or, that he had not, or could not have, sustained any prejudice, than would be essential, where no such presumption should arise.[2] Payment of a part of the Note, or a promise to pay the Note, made with a full knowledge of the want of a due presentment, or other default, would be sufficiently evincive, that the indorser could not have sued on the Note; and, consequently, that he could not insist upon the want of due presentment or notice.[3]

§ 277. The French Law, in many cases, proceeds,

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at this moment deranged, but I shall be glad to pay it as soon as my accounts with my agent are cleared,' it was decided, that it was unnecessary to prove the averment of the protest of the Bill. And, in an action by the indorsee against the drawer of a Bill, the plaintiff did not prove any notice of dishonor to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer, after the Bill became due, which recited that the defendant had drawn, amongst others, the Bill in question, that it was overdue, and ought to be in the hands of the prior indorser, and that it was agreed the latter should take the money due to him upon the Bill by instalments; it was held, that this was evidence, that the drawer was at that time liable to pay the Bill, and dispensed with other proof of notice of dishonor. Again, where, in an action against the drawer, in lieu of proof of actual notice, the defendant's letter was proved, stating, 'That he was an accommodation drawer, and that the Bill would be paid before next term,' though not saying 'by defendant,' Lord Ellenborough said, 'The defendant does not rely upon the want of notice, but undertakes, that the Bill will be duly paid before the term, either by himself or the acceptor. I think the evidence sufficient.'" See Story on Bills, § 317; Donnelly *v.* Howie, Hayes & Jones, R. 436.

1 Thomson on Bills, ch. 6, § 4, p. 523 – 526, (2d edit.)

2 Sharp *v.* Bailey, 9 Barn. & Cressw. 44; Bayley on Bills, ch. 7, § 2, p. 294, 295, (5th edit.); Chitty on Bills, ch. 8, p. 356, 357, (8th edit.); Id. ch 9, p. 386; Nicholson *v.* Gouthit, 2 H. Black. 600; Rhett *v.* Poe, 2 How. Sup. Ct. R. 457; Thomson on Bills, ch. 6, § 4, p. 523 – 526, (2d edit.)

3 Bayley on Bills, ch. 7, § 2, p. 291, 293, (5th edit.); Vaughan *v.*

upon a similar principle. Thus, if the indorser should, upon a simple notice, or a notice by the protest, pay the holder the amount of the Bill or Note, he will not be at liberty to insist upon having it repaid to him, if he should subsequently ascertain the nullity of the act of protest, or that there has been undue negligence on the part of the holder; unless, indeed, the payment should have been produced by the fraud of the holder. For it is his own folly to be the victim of his own too great facility, since he ought to have known whether the protest was too late, or was a nullity; and, as it might be deemed a fair debt, it was competent for the indorser to waive or renounce his rights.[1]

§ 278. On the other hand, if there has not been any due presentment or notice of the dishonor of the Note, and the indorser, after the maturity of the Note, supposing himself liable to pay the same, takes security therefor from the maker, that will not alone amount to a waiver of the objection of the want of due presentment, or of due notice; since it cannot justly be inferred, that he means, at all events, to make himself liable for the payment of the Note; but he takes the security merely as a contingent security, in case of his liability.[2] Upon the like reason, the indorser's making exertions, upon the supposition of his liability to pay the Note, to obtain payment from a prior party on the Note;[3] or an

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Fuller, 2 Str. R. 1246; Rogers *v.* Stephens, 2 Term R. 713; Anson *v.* Bailey, Bull. N. P. 276; Wilkes *v.* Jacks, Peake, R. 202; Sharp *v.* Bailey, 9 Barn. & Cressw. 44; Potter *v.* Rayworth, 13 East, R. 417; Thomson on Bills, ch. 6, § 4, p. 527–530, (2d edit.)

[1] Pardessus, Droit Comm. Tom. 2, art. 434.

[2] Tower *v.* Durell, 9 Mass. R. 332; Richter *v.* Selin, 8 Serg. & R. 425; Post, § 281.

[3] Hussey *v.* Freeman, 10 Mass. R. 84.

offer to indorse a new Note of the maker, which is not accepted;[1] or a conditional offer to pay in a certain manner, or in a certain time, which is not accepted;[2] will not amount to a waiver, either of a due presentment or of due notice.

§ 279. In many cases, the promise of an indorser, either prior or subsequent to the maturity of the Note, is relied on as evidence to establish a waiver of due presentment, or due notice of the dishonor of the Note. And all the circumstances of the case must then be taken into consideration, in order to ascertain, whether the promise does, or does not, amount to such a waiver.[3] Thus, where the indorser promised a bank to attend to the renewal of a Note held by the bank, and to take care of it, and also directed the usual notice to the maker when it became due, to be sent to himself, it was held to amount to presumptive evidence of a waiver by him of a regular presentment and notice.[4] So, where the indorsee of a Note, at the time when the Note was indorsed to him, told the indorser, that he had no confidence in the other parties to the Note, and did not know them, and should look wholly to him; and the indorser replied, that he should be in New York, where the indorsee lived, when the Note became due, and would take it up, if not paid by any other party; it was held to warrant the conclusion, that there was a waiver of notice.[5] But where the language or the circumstances are of a more doubtful and uncertain character, no such

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1 Laporte *v.* Landry, 17 Martin, R. 359.

2 Agan *v.* McManus, 11 John. R. 180; Cuming *v.* French, 2 Camp. R. 107, note; Goodall *v.* Dolley, 1 Term R. 712.

3 Post, § 360 – 366.

4 Taunton Bank *v.* Richardson, 5 Pick. R. 436.

5 Boyd *v.* Cleveland, 4 Pick. R. 525.

waiver will (as we shall presently see) be ordinarily inferred.

§ 280. In cases of a promise, made after the maturity of the Note, perhaps stronger circumstances will be required to justify the inference of a waiver of the want of due demand and notice, than in cases of a promise made prior to the maturity thereof.[1] But, at all events, a promise to pay, made after the maturity of the Note, or even a payment of the Note by an indorser, under a mistake of material facts, will not bind the indorser, or amount to a waiver of due presentment, or due notice.[2] Whether a new promise to pay, under a mistake of law, will amount to such a waiver, is a matter upon which great diversity of opinion has been entertained.[3] But

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[1] See Creamer *v.* Perry, 17 Pick. R. 332, 335.

[2] Garland *v.* the Salem Bank, 9 Mass. R. 408 ; Chitty on Bills, ch. 8, p. 372, 373, (8th edit.) ; Id. ch. 9, p. 448 ; Warder *v.* Tucker, 7 Mass. R. 449 ; Freeman *v.* Boynton, 7 Mass. R. 483 ; Martin *v.* Ingersoll, 8 Pick. R. 1 ; Dennis *v.* Morrice, 3 Esp. R. 158 ; Thomson on Bills, ch. 6, § 4, p. 528, 529, (2d edit.)

[3] See 3 Kent, Comm. Lect. 44, p. 113, (5th edit.) ; Thomson on Bills, ch. 6, § 4, p. 530, (2d edit.) ; Bayley on Bills, ch. 9, p. 340, 341, (5th edit.) ; Chitty on Bills, ch. 10, p. 536, (8th edit.) Mr. Chitty here says ; "It seems to have been once considered, that a misapprehension of the legal liability would prevent a subsequent promise to pay from being obligatory, and that even money paid in pursuance of such promise might be recovered back. But from subsequent cases it appears, that such doctrine is not law, and that money paid by one knowing (or having the means of such knowledge in his power) all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again on account of such payment having been made under an ignorance of the law, although the party paying expressly declared, that he paid without prejudice. And as an objection made by a drawer or indorser to pay the Bill, on the ground of the want of notice, is stricti juris, and frequently does not meet the justice of the case, it is to be inferred from the same cases, and it is, indeed, now clearly established, that even a mere promise to pay, made after notice of the facts and laches of the holder, would be binding, though the party making it misapprehended the law. Therefore, where the drawer of a Bill of Exchange, knowing that time had been given

both of these subjects will more properly and fully come before us, when we examine, what will amount to an excuse, or waiver, of the want of notice, to which the authorities are in general most pointedly applied.

§ 281. In the next place, the receiving of a security by the indorser before or at the time of the maturity of the Note, as an indemnity or payment therefor. In such a case, if the security or indemnity be a full security or indemnity for the amount of the Note, it is plain, that the indorser can receive no damage from the want of a due presentment.[1] *A fortiori*, the same doctrine will apply, where the indorser has received money, or property, for the very purpose of taking up the Note at its maturity.[2] This latter doctrine would seem to follow out the doctrine of courts of equity applied in favor of

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by the holder to the acceptor, but apprehending that he was still liable upon the Bill in default of the acceptor, three months after it was due, said, 'I know I am liable, and if the acceptor does not pay it I will,' it was adjudged, that he was bound by such promise; and the Court said, 'That the cases above referred to proceeded on the mistake of the person paying the money under an ignorance or misconception of the facts of the case, but that in the principal case the defendant had made the promise with a full knowledge of the circumstances three months after the Bill had been dishonored, and could not now defend himself upon the ground of his ignorance of law when he made the promise.' And such a promise will dispense with the necessity for a protest of a foreign Bill." But see, contra, Warder *v.* Tucker, 7 Mass. R. 449; May *v.* Coffin, 4 Mass. R. 342; Freeman *v.* Boynton, 7 Mass. R. 483.

[1] Bayley on Bills, ch. 7, § 2, p. 310, (5th edit.); Chitty on Bills, ch. 10, p. 473, (8th edit.); Story on Bills, § 374; Corney *v.* Da Costa, 1 Esp. R. 302, 303; Martell *v.* Tureauds, 18 Martin, R. 118; Mechanics' Bank *v.* Griswold, 7 Wend. R. 165; 3 Kent, Comm. Lect. 44, p. 113, (5th edit.); Mead *v.* Small, 2 Greenl. R. 207; Andrews *v.* Boyd, 3 Metc. R. 434; Bond *v.* Farnham, 5 Mass. R. 170; Prentiss *v.* Danielson, 5 Connect. R. 175; Duvall *v.* Farmers' Bank, 9 Gill & John. R. 47. But see Kramer *v.* Sandford, 4 Watts, R. 328; Pardessus, Droit Comm. Tom. 2, art. 435.

[2] Ibid.

sureties, where securities are held by the creditor for the debt, and in favor of creditors, where the sureties hold the like securities as an indemnity. In the former case, the sureties, on payment of the debt, are entitled to the securities;[1] in the latter, the creditor would seem entitled to a direct remedy against the sureties to have the securities applied to pay his debt.

§ 282. Under particular circumstances, the receiving of security from the maker before the maturity of the Note, less than the amount of the liability of the indorser, may be deemed a waiver of the right to require due presentment and notice. As, for example, if, before the maturity of the Note, the indorser take an assignment of all the maker's property, although inadequate to meet his indorsements, it will amount to such a waiver.[2] But an assignment made by the maker to trus-

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[1] Story on Eq. Jurisp. § 499.

[2] Bond *v.* Farnham, 5 Mass. R. 170, 172. On this occasion, Mr. Chief Justice Parsons said; "The facts agreed are, that on the date the Note was payable, a demand in writing was left with a lad at a store formerly occupied by the maker, but that at that time neither the store was in his occupation, nor the lad in his service; that the maker before that time had stopped payment, was insolvent, and continues so to be, but that he had not absconded; that three days afterwards notice of the non-payment was given to the defendant. Had the case stopped here, the defendant migh have had some reason to complain; for, although a man has stopped payment and is insolvent, yet he may have in his possession effects sufficient to pay part of his debts, which a fortunate indorser on receiving seasonable notice may secure. The case, however, states no damage as having been incurred by the defendant from any neglect of demand or of notice. But it states, that before this Note was payable, the maker had assigned all his property to the defendant, for his security against his indorsements; and that the property was not in fact sufficient to meet his other indorsements, exclusive of this Note. Upon these facts, we are satisfied, that the verdict is right, because, under the circumstances of this case, the defendant had no right to insist on a demand upon the maker. It appears, that he knew such a demand must be fruitless, as he had secured all the property

tees, in trust for the benefit of his creditors, and among them of the indorser, will not amount to a waiver of due demand and notice of the dishonor of the Note; for such a trust may well be deemed a mere indemnity against his legal liabilities, which, being conditional, would become absolute only by due demand and notice.[1]

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the maker had. And as he secured it for the express purpose of meeting this and his other indorsements, he must be considered as having waived the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his Notes. And the nature or terms of the engagement cannot be varied by an eventual deficiency in the property; because he received all that there was. This intent of the parties is further supported by the offer of the defendant to the plaintiffs to take up this Note, if they would receive foreign bank notes in payment. We do not mean to be understood, that when an indorser receives security to meet particular indorsements, it is to be concluded, that he waives a demand or notice as to any other indorsements. That, however, is not this case. But we are of opinion, that if he will apply to the maker, and, representing himself liable for the payment of any particular indorsements, receives a security to meet them, he shall not afterwards insist on a fruitless demand upon the maker, or on a useless notice to himself, to avoid payment of demands, which on receiving security he has undertaken to pay."

[1] Creamer *v.* Perry, 17 Pick. R. 332, 334, 335. On this occasion, Mr. Chief Justice Shaw said; "On the first ground, we think, that the most which could be made of the evidence is, that after this Note was made, but several months before it became due, the promisor made an assignment to trustees, upon trust, among other things, to secure the defendant for all debts due to him from the promisor, and to indemnify him against all his liabilities. Without stopping to consider, whether, after this property was surrendered by the trustees, the defendant could have availed himself of it, we think the effect of this assignment was, to secure and indemnify the defendant against his legal liabilities; and as his liability as indorser on this Note was conditional, and depended upon the contingency of his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency. The second assignment does not affect the question; it does not appear to have been made till several days after the Note became due. And, on the other ground, it is a rule of law, that if an indorser, knowing that there has been no demand and notice, and conversant with all the circumstances, will promise to pay the Note, this is to be deemed a waiver. But these rules in regard to notice and waiver are to be held with some strictness, in order to insure uniformity of practice

We have already seen, that the taking of a security or indemnity by an indorser, after the Note has become due, under the impression that he is legally bound to pay the same, will not bind him, if there has not been a due presentment and notice of the dishonor.[1]

§ 283. The French Law contains similar provisions as to receiving security. If the indorser has received on account, or by way of set-off, or otherwise, funds sufficient to pay the Note, that will be a sufficient excuse for any default of due presentment of the Note for payment to the maker; since it is apparent, that he cannot have suffered any damage thereby.[2] But here, again, the exception is to be understood as applicable only to the indorser, who has received such funds, and not to other indorsers, who are not in that predicament.[3]

§ 284. In the next place, there is a relaxation of the strict rule, as to the necessity of a due presentment of a Note by the holder to the maker for payment at its maturity, where the Note has been received as collateral security for another debt due to the holder, and the debtor, causing it to be made or delivered to the holder, is no party to the Note, or, if a party to it, he has not

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and regularity in their application. Though questions of due diligence and of waiver were originally questions of fact, yet having been reduced to a good degree of certainty by mercantile usage, and a long course of judicial decisions, they assume the character of questions of law, and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community, may be certain, practical, and uniform, as well as reasonable, equitable, and intelligible."

1 Ante, § 278; Richter *v.* Selin, 8 Serg. & Rawle, 425; Tower *v.* Durell, 9 Mass. R. 332.

2 Code de Comm. art. 171; Pardessus, Droit Comm. Tom. 2, art. 435; Story on Bills, § 374.

3 Ibid.

indorsed it, and it is not transferable by delivery.[1] In the former case, the delivery of the Note must be treated as a mere pledge, and the debtor, not being a party to the Note, is not entitled to strict presentment or notice, as if it were an ordinary mercantile negotiation; but merely to the exercise of such diligence on the part of the holder as is required of a bailee for hire, or of a pledgee.[1] In the latter case, as the debtor does not indorse the Note, he does not subject himself to the obligations of the Law Merchant, and of course is not entitled to its advantages.[2] In order, therefore, to en-

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[1] See Swinyard *v.* Bowes, 5 Maule & Selw. 62; Chitty on Bills, ch. 10, p. 467, 474, (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 286 – 290, (5th edit.); Story on Bills, § 372; Lawrence *v.* M'Calmont, 2 How. Sup. Ct. R. 427; Rhett *v.* Powe, 2 How. Sup. Ct. R. 457. See Pardessus, Droit Comm. Tom. 2, art. 435.

[2] Ibid.; Van Wart *v.* Woolley, 3 Barn. & Cressw. 439. In this case a Bill of Exchange had been sent to Van Wart, the agent of Irving & Co. to pay for goods purchased by him for them. The Bill was drawn by Cranston & Co. upon Greg & Lindsay, in London, and payable to the order of Van Wart, the agent. It was not indorsed by Van Wart; but he employed his bankers to present it for acceptance. The drawees refused to accept it; but the bankers did not give notice thereof to Van Wart until the day of payment, when it was again presented and dishonored. Before the Bill was presented for acceptance, the drawers had become bankrupt. Van Wart brought a suit against the bankers for negligence in not giving him notice of the non-acceptance of the Bill. Lord Chief Justice Abbott, in delivering the opinion of the Court, said; "Upon this state of facts, it is evident, that the defendants (who cannot be distinguished from, but are answerable for their London correspondents, Sir John Lubbock & Co.) have been guilty of a neglect of the duty, which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect. He charges a damage in two respects first, by the loss of remedy against Irving, Smith, & Holly, from whom he received the Bill. Secondly, by the loss of remedy against Cranston, the drawer of the Bill. If, as between the plaintiff and Irving & Co., he has made the Bill his own, and cannot call upon them for the amount, his damage will be to the full amount for which the verdict has been taken.

title the debtor, as owner of the collateral security, to resist the payment of the debt, he must establish that

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If he still retains a remedy against them, and has only been delayed in the pursuit of such remedy, as he might have had against the drawer, a bankrupt, the amount of his loss has not been inquired into or ascertained, and is probably much less than the amount of the Bill. We are of opinion, that the plaintiff has not, as between him and Irving & Co., made the Bill his own; that he might, notwithstanding the want of notice of the non-acceptance, have recovered from them the amount of the Bill in an action for money paid; or if he had notice of the dishonor, before he had bought and sent the goods, which they had ordered him to buy, he might have returned the Bill, and have abstained from ordering or buying the goods. It will have been observed, that Irving & Co. sent the Bill to the plaintiff without their indorsement, and payable to his own order. The counsel for the plaintiff was under the necessity of arguing this case, as if he were arguing for Irving & Co. in an action brought against them by the plaintiff; and it was contended, that Irving & Co. were entitled to notice of the non-acceptance in this case, as they would have been by the Law Merchant in the case of a Bill indorsed by them to the plaintiff. But no authority was cited that maintains this proposition. And the case of Swinyard and others *v.* Bowes is an authority the other way. If a person deliver a Bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the Law Merchant; he cannot be sued on the Bill, either by the person to whom he delivers it, or by any other. And, as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the holder of a Bill sell it without his own indorsement, he is, generally speaking, liable to no action in respect of the Bill. If he deliver it without his indorsement, upon any other consideration, antecedent or concomitant, the nature of the transaction, and all circumstances regarding the Bill, must be inquired into, in order to ascertain, whether he is subject to any responsibility. If the Bill be delivered, and received as an absolute discharge, he will not be liable; if otherwise, he may be. The mere fact of receiving such a Bill does not show it was received in discharge. Bishop *v.* Rowe, and Swinyard and others *v.* Bowes, before mentioned. Then what are the facts of this particular case? Irving & Co. residing in America, had employed the plaintiff, residing at Birmingham, to purchase hardware for them in England by commission. By accepting this employment, he became, as between him and them, their agent. They then send him the Bill in question as a further remittance on account of their order for hardware. The Bill is drawn upon persons residing in London; the plaintiff, therefore, could not have been expected to present the Bill himself; it must have been understood, that he was to do this through the medium of some other person. He employed for that purhe has sustained damages by reason of the want of due diligence and due presentment on the part of the cre-

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pose persons in the habit of transacting such business for him and others, and upon whose punctuality he might reasonably rely. In doing this, we think that he did all that was incumbent upon him, as between him and Irving & Co.; that he is personally in no default as to them, and is not answerable to them for the default of the persons whom he employed under such circumstances. In the course of the argument, the situation of Irving & Co. was compared to that of a guarantee. The decisions that have taken place in actions brought against a guarantee warrant the proposition that has been before mentioned, viz. that the nature of the transaction, and the circumstances of the particular case, are to be considered and regarded. Thus, in Warrington and another *v.* Furbor, where a commission of bankrupt had issued against the acceptor before the Bill became due, a presentment for payment to him was held unnecessary to charge the guarantee. Philips *v.* Astling stood upon different grounds; the Bill was not presented for payment when it became due, as it ought to have been; two days afterwards, notice that it remained unpaid was given to the drawers, for whom the defendant was guarantee, but no notice was then given to the defendant. The drawers and acceptor continued solvent for many months after the Bill was dishonored; and it was not until they had become bankrupts, that payment was demanded of the defendant. Under these circumstances, because the necessary steps were not taken to obtain payment from the parties to the Bill, while they continued solvent, the Court of Common Pleas held the guarantee to be discharged. In Holbrow *v.* Wilkins, the acceptors were known to be insolvent before the Bill fell due; and some days after that fact was known, the plaintiffs wrote to the defendant, and desired him to accept a new Bill, which he refused. The Bill was not presented for payment when due, nor any notice of the non-payment given to the defendant. The Bill would not have been paid if presented; and it did not appear, that the defendant sustained any damage by reason of the want of presentment or notice; and this Court held the guarantee not to be discharged. These decisions show, that cases of this kind depend upon the circumstances peculiar to each. In the present case it does not appear that Irving & Co. have sustained any damage by the want of notice of the non-acceptance of the Bill. Cranston, the drawer, was not entitled to such notice; he had no right to draw, and he sustained no prejudice. He had become bankrupt some weeks before notice of the non-acceptance could have reached Irving & Co.; nothing appears to show that they have lost any remedy, that they might have had either against him or his estate, if they could ever have had any; but even this does not appear affirmatively; the circumstances under which they received the Bill not being disclosed; and possibly they may have received it upon the terms of being accountable only in case it should be accepted, and not otherwise."

ditor, and to the extent of such damages he may recover compensation or indemnity, or recoup the amount in any suit for the debt.[1] In cases of this sort, the same rule has been applied as in cases of the guaranty of Notes.[2]

§ 285. The French Law here also applies the same broad principle, which governs it in all cases of the want of due presentment and due notice of the dishonor. It does not, like our law, positively exonerate the indorsers from all responsibility in such cases;[3] but only to the extent, that they have suffered, or may suffer, damage or prejudice by the want of such due presentment, or due notice.[4] Indeed, this would seem to be the general rule prevalent among the commercial states of continental Europe. Casaregis lays it down as a general rule, that where the due presentment or due notice would be of no benefit to the drawer of a Bill, (and the like reason would seem to apply to the indorsers of a Note,) there the omission will not affect the rights of the holder against him;[5] and Baldaseroni adopts the same doctrine.[6]

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1 Ibid.; Story on Bills, § 372.

2 Ibid.

3 See Bayley on Bills, ch. 7, § 2, p. 302, 303, (5th edit.)

4 Pothier, De Change, n. 156, 157; Pardessus, Droit Comm. Tom. 2, art. 435; Story on Bills, § 478, and note; Kemble *v.* Mills, 1 Mann. & Grang. 762, note *b*.

5 Ibid.; Casareg. Disc. de Comm. 54, n. 38, 40, 42, 49. The language of Casaregis is; "Propterea pro regula tradimus, quod ubi in facto appareret nihil omninò fuisse profutura prædicta protesta, vel ob decoctionem scribentis, vel solvere debentis literas, tunc omissio, vel negligentia in illis elevandis, vel transmittendis nullatenus nocebit, quando enim diligentiæ prodesse non possunt, impunè valent omitti per eum, qui illas facere tenebatur. Sed in hoc casu ad omittentem diligentias omininò spectat probare, quod diligentiæ non erant profuturæ, nam sola possibilitas in contrarium aut dubius eventus, an forent, vel non profuturæ, interpretandus, est contra morosum, vel negligentem."

6 Baldasseroni, De Camb. pt. 2, art 10, § 35. Baldasseroni says

§ 286. We have thus far had under consideration most of the cases, which constitute, in point of law, valid excuses for the want of a due presentment of a Note for payment at its maturity. It may be proper in this connection to consider, what have been held not to be sufficient and valid excuses for such default. To some of these we have already incidentally alluded; but it may be proper briefly again to allude to them in this place.[1] In the first place, (as we have seen,[2]) it is by our law, as well as by the French Law,[3] no excuse that the maker is a bankrupt, or is insolvent, at the time when the Note becomes due; and this (as is asserted) for two reasons; first, that is a part of the implied obligations or conditions of the contract of the indorser, that due presentment shall be made in order to bind him to payment upon the dishonor; and secondly, that it is not certain, that, if due presentment had been made, the Note, notwithstanding the failure, might not have been paid, either by the maker, or by some friends for him. Each of these reasons has been promulgated, not only in the Common Law authorities,[4]

(p. 198); "Qualora poi la negligenza del Portatore nel presentare la Lettera, o nel cavare il Protesto non porta alcun danno, o che quel danno, che arriva alla Lettera, sarebbe derivato nonostante, e indipendentemente dalla detta negligenza; in tal caso il Portatore non è tenuto alla refezione di detto danno, come quello, che non è originato dal fatto suo." For this doctrine he relies, among other authorities, upon the passage above cited from Casaregis.

1 Some of the cases cited under this head arose upon non-presentment of the Note at its maturity, and some upon the want of due notice; but they depend upon similar principles, and are so treated by the text writers.

2 Ante, § 203, 204, 241; Nicholson *v.* Gouthit, 2 H. Black. 609; Esdaile *v.* Sowerby, 11 East, R. 114; 3 Kent, Comm. Lect. 44, p. 110, (5th edit.)

3 Pothier, De Change, n. 147; Ante, § 204; 3 Kent, Comm. Lect. 44, p. 110, (5th edit.); Pardessus, Droit Comm. Tom. 2, art. 424.

4 Bayley on Bills, ch. 7, § 2, p. 302, 303, (5th edit.); Nicholson *v.*

but by foreign Jurists of high repute, such as Pothier and Savary.[1]

§ 287. In the next place, as has been already suggested, equivocal acts, or conduct, or language, on the part of the indorser, not intentionally or fraudulently designed to mislead, or knowledge on his part, that the Note, if presented to the maker, will not be paid at the maturity of the Note, will not constitute any excuse for the want of due presentment thereof.[2] The reason of

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Gouthit, 2 H. Black. 609; Boultbee v. Stubbs, 18 Ves. R. 21; Chitty on Bills, ch. 9, p. 386, (8th edit.); Id. ch. 10, p. 469-473, 482, 483; Russell v. Langstaffe, 2 Doug. R. 515; Story on Bills, § 375; Bond v. Farnham, 5 Mass. R. 170, 172; Crossen v. Hutchinson, 9 Mass. R. 205; Sandford v. Dillaway, 10 Mass. R. 52; Farnum v. Fowle, 12 Mass. R. 89; Granite Bank v. Ayers, 16 Pick. R. 392. On this subject, Mr. Chitty, (p. 462, 483, 8th edit.) says; "The death, known bankruptcy, or known insolvency, of the drawee or acceptor, or maker of a Note, or his being in prison, or the notorious stopping payment of a banker, constitute no excuses, either at 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 holders 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 a 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 any thing upon the remedy over was hopeless, — that the person or persons against whom the remedy would apply were insolvent or bankrupts, or had absconded. Parties are entitled to have that chance offered to them; and if they are abridged of it, the law, which is founded upon the usage and custom of merchants, says they are discharged." This is almost verbatim the very language of the authorities; and especially of Russel v. Langstaffe, 2 Doug. R. 515; Nicholson v. Gouthit, 3 H. Black. 609, 612.

[1] Pothier, De Change, n. 147; Savary, Parfait Négociant, Tom. 2, p. 360.

[2] Miller v. Hackley, 5 John. R. 375; Griffin v. Goff, 12 John R. 423; Lee Bank v. Spencer, 6 Metc. R. 308.

the former part of the rule is, that equivocal acts, or conduct, or language, may not be intended by the indorser to dispense with the ordinary requirements of law as to presentment. The reason of the latter is, that knowledge, that the Note will not be paid, is not the same as notice, that it has not been paid;[1] and that due presentment being a part of the implied obligations of the holder to entitle him to charge the indorser, the latter has a right to insist upon a strict fulfilment thereof; and it is no proof, that he dispenses with it, merely to say, that it would be unavailing; for (as we have seen[2]) our law in this respect differs from the law of continental Europe. Therefore, if the maker has, at the time of giving the Note, or afterwards, before its maturity, told the indorser, that he shall not be able to take it up, or to pay at maturity, and that he, the indorser, must pay it, it will be no excuse for non-presentment by the holder.[3] Nor will it make any difference, that, at the same time, the maker has given the indorser some money to make a part payment thereof, when due; for although the money so paid may be recovered by the holder against the indorser, as money had and received to his, the holder's, use, *pro tanto*, in discharge of the

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[1] Caunt *v.* Thompson, 7 Manning, Gr. & Scott, R. 400.

[2] Ante, § 272; Chitty on Bills, ch. 9, p. 386, (8th edit.); Id. ch. 10, p. 470–472.

[3] Bayley on Bills, ch. 7, § 2, p. 303–395, (5th edit.); Baker *v.* Birch, 3 Camp. R. 107; Staples *v.* Okines, 1 Esp. R. 332; Chitty on Bills, ch. 10, p. 483, 484, (8th edit.); Id. p. 527. In Brett *v.* Levett, 13 East, R. 214, it was held, that when the bankrupt drawer of a Bill, after his bankruptcy, and before the maturity of the Bill upon an inquiry from the holder, whether it would be paid or not, acknowledged that it would not, it dispensed with due notice of the dishonor. But Mr. Chitty justly puts a quære as to the point. Chitty on Bills, ch. 10, p. 484, (8th edit.)

Note, yet as to the residue the holder will be held exonerated.[1]

§ 288. It is upon the same ground, that if a payee of a Note lend his name and indorse it merely for the benefit of the maker, and to give credit to the Note, he will still be entitled to have due presentment made of the Note at its maturity, notwithstanding he knows at the time of his indorsement of the Note, that the maker is insolvent, and will not be able to pay it; for still, as upon payment of it, he would be entitled to recover over against the maker, he has a right to insist, that all the prerequisites to charge him shall be complied with, as he has not waived them.[2]

§ 289. So, it is no excuse for non-presentment of a Note in due season, that the indorser told the holder on the day, when it became due, that he hoped it would be paid, and that he would see, what he could do, and endeavor to provide effects; for in such a case the language is at most merely equivocal, and cannot justify the holder in presuming, that the Note will be dishonored, or the presentment be dispensed with.[3] So, if, upon an apprehension, that the Note will not be paid at the maturity, a prior indorser should lodge in the hands of a subsequent indorser funds, conditionally to secure the latter, if he should be obliged to pay the Note, but to be returned, if he should be exonerated; this would be no

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1 Ibid.

2 Ante, § 268, 269; Chitty on Bills, ch. 10, p. 471–473, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 306–308, (5th edit.); Nicholson *v.* Gouthit, 2 H. Black. 609; Smith *v.* Becket, 13 East, R. 187; Brown *v.* Maffey, 15 East. R. 216; Lafitte *v.* Slatter, 6 Bing. R. 623; Warder *v.* Tucker, 7 Mass. R. 449; Price *v.* Whiting, 16 Shepley, R. 183.

3 Bayley on Bills, ch. 7, § 2, p. 305, (5th edit.); Prideaux *v.* Collier, 2 Stark. R. 57.

dispensation with due presentment as to either indorser for the last indorser would hold the funds upon a condition, which had not occurred; and the prior indorser would have done nothing to dispense with the due presentment.[1] Even if the latter had in his hands funds of the maker at the time, not appropriated to the payment of the Note, that would not dispense with the due presentment; because he would have no right to make such appropriation, unless he was chargeable with the payment of the Note.[2]

§ 290. It is no excuse for non-presentment of the Note, that the holder has lost or mislaid it at its maturity, so that he is unable to deliver it up, if required by the maker; for it does not follow, that the maker might not be willing to pay the holder upon a suitable indemnity, or that, if payment were refused, the indorser is to bear the inconvenience occasioned by the fault or misfortune of the holder in losing the Note, since it did not interpose any insuperable obstacle to his making a demand for payment.[3]

§ 291. So, it is no excuse for non-presentment of the Note at its maturity, according to its terms or purport, that there was a parol agreement between the maker and the payee, who subsequently indorsed the same to the holder, that the payment of the Note should not be demanded at its maturity, but at a future time, or upon a future event. The reason commonly given is, that the parol evidence seeks to contradict the terms of the Note.[4]

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[1] Bayley on Bills, ch. 7, § 2, p. 303, 304, (5th edit.); Clegg *v.* Cotton, 3 Bos. & Pull. 239; Chitty on Bills, ch. 10, p. 482, (8th edit.)

[2] Ibid.

[3] Ante, § 106, 112, 244; Thackray *v.* Blackett, 3 Camp. R. 164.

[4] Ante, § 147 and note; Story on Bills, § 317 and note; Price *v.* Whitney, 16 Shepley, R. 183.

But another reason may be given, that is quite as decisive, and that is, that such an agreement is one, of which the holder has no right to avail himself, since he is neither a party nor a privy thereto, and could insist upon payment from the maker according to the terms of the Note.[1] The doctrine, however, seems inapplicable to a case, where the holder takes the Note with a full understanding of the original agreement, and it is expressly adopted between him and the indorser, when the transfer is made, as a modification of their own contract by the indorsement.[2]

§ 292. So, it is no excuse for non-presentment of the

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1 Bayley on Bills, ch. 12, p. 492, (5th edit.); Free *v.* Hawkins, 8 Taunt. R. 92; Chitty on Bills, ch. 10, p. 483, (8th edit.)

2 Ante, § 148; Story on Bills, § 317 and note; Id. § 371. See Taunton Bank *v.* Richardson, 5 Pick. R. 436; Union Bank *v.* Hyde, 6 Wheat. R. 572. But see Free *v.* Hawkins, 8 Taunt. R. 92, which seems contra. The case of Hoare *v.* Graham, 3 Camp. R. 57, seems at variance with the last suggestion in the text. There the suit was by an indorsee against the payee of a Note payable two months after date. Defence, that defendant refused to indorse, unless plaintiffs would agree, that the Note should be renewed when due, and that plaintiff acceded to that condition. Sed per Lord Ellenborough; "I cannot admit this evidence; it is inconsistent with the written instrument; I will receive evidence that the Note was indorsed to plaintiffs as a trust; there may, after a Bill is drawn, be a binding promise for a valuable consideration to renew it; but, if the promise be contemporaneous with the drawing, the law will not enforce it; it would be incorporating with a written contract an incongruous parol agreement." Verdict for plaintiff. See, also, Bayley on Bills, ch. 12, p. 493, (5th edit.) Why was not the contract between the indorser and indorsee a binding contract, as it was a part of the consideration upon which the indorsement was made? Lord Ellenborough seems to have confounded the case of an original agreement between the maker and payee to renew the Note, with a new agreement between the payee and the holder to allow the same to be renewed, when the indorsement was made. The former might be said to contradict the terms of the original Note. But how does it contradict the indorsement, or the agreement upon the indorsement? See Ante, § 147; Brown *v.* Langley, 4 Mann. & Grang. R. 466; S. C. 5 Scott, R. 249.

Note at its maturity, that the indorser has in fact no debt due him from the maker, but the maker and the indorser are both mere accommodation parties for the benefit of a subsequent indorser to the holder; for, in such a case, the indorser would, upon taking up the Bill, be entitled to recover against the maker, and also against such subsequent indorser.[1]

§ 293. So, the want of due presentment of the Note at its maturity is not excused by an order of the indorser to the maker not to pay the Note at its maturity, if presented; although it would be a waiver of notice of the non-presentment.[2] The reason for the difference which is nice, and, perhaps, not very satisfactory, seems to be, that the presentment by the holder is a part of his own contract, which is not waived by the direction not to pay the Note, since it is *res inter alios acta;* but, that the indorser necessarily waives further notice of the dishonor, which he has authorized and caused by his own act, and which may be deemed equivalent to an appropriation of the money to himself against the holder.

§ 294. So, the fact, that the makers of a Note constitute one firm, and the indorsers of the same Note another firm, in each of which the same person is one of the partners, will not constitute a sufficient excuse for non-presentment of the Note at its maturity for payment. For although, in contemplation of law, all the partners are presumed to have knowledge of all the facts, which any one partner knows; yet the firm, who are indorsers,

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[1] Cory *v.* Scott, 3 Barn. & Ald. 619; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Brown *v.* Maffey, 15 East, R. 216; Ante, § 268, 269.

[2] Hill *v.* Heap, Dowl. & Ryl. N. P. R. 57; Chitty on Bills, ch. 10, p. 484, (8th edit.)

are not bound to pay, unless due presentment is made to the other firm, since knowledge of non-presentment is not notice of it, nor is it a waiver of the obligations of the holder to make the presentment.[1]

§ 295. The reason of all these decisions turns upon one and the same general principle. The commercial Law having required a due presentment for payment, and a due notice of dishonor, these acts are to be deemed waived or dispensed with, only when, from the nature or the circumstances of the case, both of them must be unnecessary or immaterial to the indorsers, who may be affected thereby.[2] Such a presentment, and such a notice, are, therefore, to be treated as conditions precedent to the liability of the indorsers, belonging to the leading character of the contract; and it is of no consequence, that the indorsers may not have been actually prejudiced thereby.[3] Of course, nothing short of an express or implied agreement, or a waiver of such presentment and notice, ought to bind the indorsers; and such an agreement, or a waiver, ought never, in derogation of their admitted rights, to be inferred from doubtful or equivocal acts or circumstances, which are capable of different interpretations.[4]

§ 296. We have thus considered the principal excuses for want of due presentment of Promissory Notes for payment at their maturity, which are usually insisted on by the holder in suits against the indorsers, and of which

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1 Dwight *v.* Scovil, 2 Connect. R. 654; Story on Bills, § 376. But see Stevens *v.* West, 1 Howard, Mississippi R. 308.

2 French's Executors *v.* Bank of Columbia, 4 Cranch, R. 141; Caunt *v.* Thompson, 7 Manning, Gr. & Scott, R. 400.

3 Bayley on Bills, ch. 7, § 2, p. 302, 303, (5th edit. 1830); Story on Bills, § 311; Pierce *v.* Whitney, 16 Shepley, R. 188.

4 Story on Bills, § 377.

the validity or invalidity seems proper to be considered in this place. The subject, however, will again occur in another connection, that of the want of due notice to the indorser of the dishonor of the Note, where other and additional illustrations will naturally present themselves for observation and comment. Indeed, these excuses most generally occur in cases of want of due notice; and, as, for the most part, the same principles apply to, and govern each, we may well postpone the further examination of the cases, until we may reach the head of notice.

CHAPTER VIII.

NOTICE AND OTHER PROCEEDINGS ON THE DISHONOR OF PROMISSORY NOTES.

§ 297. Let us now proceed, in the next place, to the consideration of the notice to be given, and the other proceedings to be had by the holder, in cases of due presentment and the dishonor of a Promissory Note. In cases of foreign Bills of Exchange, it is ordinarily indispensable for the holder, upon the dishonor of the Bill, either by non-acceptance or non-payment thereof, to make due protest thereof before a notary, or other public officer authorized to make the demand and protest.[1] This, also, is the rule generally prescribed by the foreign law.[2] But in cases of Promissory Notes, by the English and the American Commercial law, no protest is required to be made upon the dishonor thereof.[3] If there are any exceptions in America, they stand upon the positive requirement of some statute, or of some general usage equally obligatory.[4] The practice, how-

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1 Story on Bills, § 176, 273 – 278 ; 3 Kent, Comm. Lect. 44, p. 93 – 95, (5th edit.) ; 2 Black. Comm. 469, 470 ; Chitty on Bills, ch. 8, p. 361 – 365, 374, (8th edit.) ; Id. p. 489, 490 ; Bayley on Bills, ch. 7, § 2, p. 258 – 266, (5th edit.)

2 Story on Bills, § 274 ; Solarte *v.* Palmer, 7 Bing. R. 530, 533.

3 Burke *v.* McKay, 2 How. Sup. Ct. R. 66 ; Young *v.* Bryan, 6 Wheat. R. 146 ; Solarte *v.* Palmer, 7 Bing. R. 530, 533 ; Coddington *v.* Davis, 1 Comstock, R. 186 ; S. C. 2 Denio, R. 17 ; Smith *v.* Gibbs, 2 Smedes & Marshall, R. 479.

4 3 Kent, Comm. Lect. 44, p. 94, (5th edit.) ; Bayley on Bills, ch. 7,

ever, prevails in several of our commercial cities, to have Promissory Notes presented for payment by notaries public, and, if dishonored, to have them protested.[1] But this is not deemed to be a practice, which changes the general rule of law; it is simply an arrangement made for the convenience of the holder, (and principally when the Note is held by a bank,) by which, in effect, the notary is made a substituted agent for the holder.[2] [It has become so common, that the term *protest*, though strictly inapplicable to a Promissory Note, is understood to mean, when used in a general sense among mer-

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§ 2, p. 265, (5th edit.) ; Chitty on Bills, ch. 10, p. 501, (8th edit.) ; Young *v.* Bryan, 6 Wheat. R. 146 ; Union Bank *v.* Hyde, 6 Wheat. R. 572 ; Nicholls *v.* Webb, 8 Wheat. R. 326 ; Bank of North America *v.* McKnight, 1 Yeates, 145 ; Hubbard *v.* Troy, 2 Iredell, R. 134 ; City Bank *v.* Cutter, 3 Pick. R. 414 ; Rahm *v.* the Philadelphia Bank, 1 Rawle, R. 335 ; Read *v.* Bank of Kentucky, 1 Monroe, R. 91 ; Whiting *v.* Walker, 2 B. Monroe, R. 262 ; Merritt *v.* Benton, 10 Wend. R. 116 ; Kyd on Bills, ch. 7, p. 142, (3d edit.) ; Cunningham on Bills, § 7, p. 40, 41 ; Thomson on Bills, ch. 6, § 2, p. 442, 443, (2d edit.)

[1] Merritt *v.* Benton, 10 Wend. R. 116 ; Bank of Utica *v.* Smith, 18 John. R. 230, 240 ; Burke *v.* McKay, 2 How. Sup. Ct. R. 66.

[2] Nicholls *v.* Webb, 8 Wheat. R. 326, 331. In this case, the Court said ; "It does not appear, that, by the laws of Tennessee, a demand of the payment of Promissory Notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the indorsers. And, by the general Commercial Law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign Bills of Exchange ; and, in strictness of law, it is not an official act. But we all know, that, in point of fact, notaries are very commonly employed in this business ; and in some of the States it is a general usage so to protest all dishonored Notes, which are lodged in, or have been discounted by, the bank. The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men, who, from their habits and character, are likely to perform those important duties with punctuality and accuracy. We may, therefore, safely take it to be true in this case, that the protesting of Notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged."

chants, not merely the act of the notary, but all the steps necessary to be taken to charge an indorser, as demand and notice.[1]] In many cases, the protest even of a Note by a notary may be important to the holder in point of evidence, as, in case of his death, it may be admissible to establish the fact of a due presentment to the maker, and due notice to the indorser.[2]

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1 Coddington *v.* Davis, 3 Denio, R. 17; Seneca Co. Bank *v.* Neass, 5 Denio, R. 330.

2 Nicholls *v.* Webb, 8 Wheat. R. 326, 331. The question as to the admissibility of the books of a notary, after his decease, to establish the fact, that he had made a due demand of the maker of the Note, and given due notice to the indorser, was much considered, and decided in the affirmative, in this case. On this occasion, the Court said; "If he (the notary) had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice. The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence, which trench upon old and established principles. Still, however, it is obvious, that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed, that they must expand according to the exigencies of society. Pritt *v.* Fairclough, 3 Camp. R. 305. The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of Bills of Exchange and Promissory Notes. The rules of law require, that due notice and demand should be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these importnnt facilities to commerce, since few persons would be disposed to risk so much property upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt, that, upon the principles of law, protests of foreign Bills of Exchange are admissible evidence of a demand upon the drawee; and upon

§ 298. By the French Law, and, indeed, by the general law of the commercial nations of continental Europe,

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what foundation does this doctrine rest, but upon the usage of merchants, and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties. The general objection to evidence, of the character of that now before the Court, is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle, also, applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality? Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive. But how stand the authorities upon this subject? Do they as inflexibly lay down the general rule as the objection seems to imply? The written declarations of deceased persons, and entries in their books, have been for a long time admitted as evidence, upon the general ground, that they were made against the interest of the parties. Of this nature are the entries made by receivers of money charging themselves, rentals of parties, and bills of lading signed by masters of vessels. More than a century ago, it was decided, that the entries in the books of a tradesman, made by a deceased shopman, were admissible as evidence of the delivery of the goods, and of other matters there stated within his own knowledge. So, in an action on a tailor's bill, a shop book was allowed as evidence, it being proved, that the servant who wrote the book was dead, and that this was his hand, and he was accustomed to make the entries. In the case of Higham *v.* Ridgeway, 10 East, R. 109, it was held, that the entry of a midwife in his books, in the ordinary course of his business, of the birth of a child, accompanied by another entry in his ledger, of the charge for the service, and a memorandum of payment at a subsequent date, was admissible evidence of the time of the birth. It is true, that Lord Ellenborough, in giving his own opinion, laid stress upon the circumstance, that the entry admitting payment was to the prejudice of the party, and, therefore, like the case of a receiver. But this seems very artificial reasoning, and could not apply to the original entry in the day-book, which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service.

and of Scotland, no distinction is in this respect made between foreign Bills of Exchange and Promissory

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So that, in truth, at the time of the entry, it was not against the party's interest. And Mr. Justice Le Blanc, in the same case, after observing, that he did not mean to give any opinion, as to the mere declarations or entries of a midwife who is dead respecting the time of a person's birth, being made in a matter peculiarly within the knowledge of such a person, as it was not necessary then to determine that question, significantly said; 'I would not be bound at present to say, that they are not evidence.' In the recent case of Hagedorn *v.* Reid, 3 Camp. R. 379, in a suit on a policy of insurance where a license was necessary, the original not being found, it was proved, that it was the invariable practice of the plaintiff's office, (he being a policy broker,) that the clerk, who copies any license, sends it off by post, aud makes a memorandum on the copy of his having done so; and a copy of the license in question was produced from the plaintiff's letter-book, in the handwriting of a deceased clerk, with a memorandum on it, stating, that the original was sent to Doorman; and a witness, acquainted with the plaintiff's mode of transacting business, swore, that he had no doubt the original was sent according to the statement in the memorandum. Lord Ellenborough held this to be sufficient evidence of the license. And in Pritt *v.* Fairclough, 3 Camp. R. 305, the same learned Judge held, that the entry of a copy of a letter in the letter-book of a party, made by a deceased clerk, and sent to the other party, was admissible in evidence, the letter-book being punctually kept, to prove the contents of the letter so sent. And he observed, on that occasion, that, if it were not so, there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. The case of Welsh *v.* Barrett, which has been cited at the bar from the Massachusetts Reports, is still more directly in point. It was there held, that the memorandums of a messenger of a bank, made in the usual course of his employment, of demands on promisors, and notices to indorsers, in respect to Notes left for collection in the bank, were, after his decease, admissible evidence to establish such demands and notices. And the learned Chief Justice of the Court, on that occasion went into an examination of the grounds of the doctrine, and put the very case of a notarial demand and protest of Notes, which had been suggested at the bar as a more correct course, as not distinguishable in principle, and liable to the same objections as the evidence then before the Court. We are entirely satisfied with that decision, and think it is founded in good sense and public convenience. We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is of course liable to be im-

Notes. In each case, a protest for the dishonor, in cases of non-payment on presentment thereof, is equally required, and is equally indispensable.[1]

§ 299. In every case of the dishonor of a Promissory Note, it is the duty of the holder to give due notice thereof to all the prior parties on the Note, who are liable to make payment to him, and to whom he means to look for payment. [And this is equally true if the Note is payable on demand.[2]] If he fails to give due notice to any of the prior parties so liable, then all are discharged from liability to him, and the want of such notice is fatal to his entire claim against them.[3] If he gives due notice to one of the prior parties, and not to the others, then the latter are in law discharged, although the former may be held to payment. Such is the general rule; but there are certain exceptions to its operation, which will presently come under our consideration.

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pugned by other evidence; and to be encountered by any presumptions or facts, which diminish its credibility or certainty. A fortiori we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence." [See also Banvard *v.* Planters Bank, 4 Howard, Mississippi R. 98; Ogden *v.* Glidewell, 5 Ibid. 179; White *v.* Englehard, 21 Smedes & Marshall, 38. It has been decided in New Hampshire, that, where the indorser of a Note lives in one State and the maker in another, the operation of the indorsement is so far similar to the drawing of a Bill of Exchange, that, in an action against the indorser, the dishonor of it may be proved by a protest. Williams *v.* Putnam, 14 N. Hamph. 540. See also, Seneca Co. Bank *v.* Neass, 5 Denio, R. 329.]

[1] Code de Comm. art. 175, 187; Pothier De Change, n. 133, 220; Jousse, Sur L'Ord. 1673, tit. 5, art. 32, p. 131, (edit. 1802); Pardessus, Droit Comm. Tom. 2, art. 479, 480; Thomson on Bills, ch. 6, § 2, p. 442, 443, (2d edit.) See Baldasseroni, Del Cambio, pt. 2, art. 8, § 1-3, 28-50; Heinecc. de Camb. cap. 6, § 4; Story on Bills, § 274, 379.

[2] Lockwood *v.* Crawford, 18 Conn. R. 361.

[3] Bayley on Bills, ch. 7, § 1, p. 217, (5th edit.)

§ 300. Let us, then, in the first place, enter upon the consideration of the various doctrines, applicable to the subject of notice in its general relations; and afterwards we shall be at liberty to examine the exceptions to these doctrines. The subject may be conveniently distributed into the following heads. (1.) First, By whom notice is to be given; (2.) Secondly, to whom notice is to be given; (3.) Thirdly, at what place, and within what time, it is to be given; (4.) Fourthly, In what mode or manner; (5.) Fifthly, The form of the notice; and when it is good or not.

§ 301. In the first place, then, by whom is notice to be given of the dishonor of a Promissory Note? The general rule is, that it is to be given by the holder, or by some agent, or other person duly authorized by him,[1] or, at all events, by some person who is himself liable to pay the Note, and is a party thereto. The reason is not merely, that the indorser may immediately call upon those, who are liable to him for indemnity; but that he may know, that the holder means to stand upon his legal rights and resort to him for payment.[2] If notice be given by a third person, or by a mere stranger not so authorized, it amounts to a mere nullity; for knowledge of the dishonor by the indorser is not notice to him that the holder intends to hold him liable to pay the same, since it is quite competent for the holder to waive his rights; and a third person, or stranger, cannot, by his officious intermeddling, establish any rights of the holder, or defeat any discharge or

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[1] Chitty on Bills, ch. 10, p. 525–532, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 254, (5th edit.); Story on Bills, § 303, 304.

[2] Chitty on Bills, ch. 8, p. 368, (8th edit.); Id. ch. 10, p. 501; Per Buller, J., in Tindal *v.* Brown, 1 Term R. 170.

defence of the indorser.[1] Nor would a subsequent adoption of the notice of a stranger by the holder vary

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[1] Ibid.; Ex parte Barclay, 7 Ves. 597, 598; Steward *v.* Kennett, 2 Camp. R. 177; Bayley on Bills, ch. 7, § 2, p. 254, (5th edit.); Chitty on Bills ch. 10, p. 526, 527, (8th edit.); Chanoine *v.* Fowler, 3 Wend. R. 173; Story on Bills, § 303, n.; 3 Kent, Comm. Lect. 4, p. 108, (5th edit.); Thompson (on Bills, ch. 6, § 4, p. 494 – 496, 2d edit.) says; "By what party notice must be given, to preserve the holder's recourse against the party receiving it, has been much discussed, and is not yet satisfactorily settled. The chief purpose of this notice is, that the party receiving it may secure his relief from the parties liable to him against the claim made upon him under the Bill or Note; and therefore, such notice, if it does not state, must at least afford him reason to believe, that a claim will be made against him. But his belief of this must depend much on the party from whom the notice proceeds. His mere knowledge, that the Bill or Note has not been accepted or paid, affords no ground for such a belief; because it does not thence follow, that the holder will resort to him for payment. Information, therefore, of non-acceptance or non-payment, by a stranger, who has no concern with the Bill or Note, and does not act for any party to it, is not equivalent to notice, as it amounts to no more than the casual knowledge now mentioned. In one case, indeed, in Scotland, private knowledge seems to have been admitted, at least as an element of notice. But in that case, 'there was that sort of intercourse among the parties, which left it to be inferred, that the indorser was aware not merely of the dishonor, but of the holder looking to him for payment; particularly, there was a meeting of the parties, at which the acceptor made a partial payment.' This last circumstance showed that the holder was in cursu of enforcing payment from the acceptor; and, as the defender seems to have been a party to this payment, he must, from it, as from other circumstances, have been convinced, that he would be called on for payment, failing the acceptor. Supposing, therefore, that this case were a fit precedent, which has been doubted, it cannot impeach the rule, that information by a stranger, or in other words, mere casual knowledge, is not equivalent to notice. But if the drawer or indorser gets information, whether from the holder or not, which certiorates him, that the latter intends to claim recourse from him, the purpose of notice, namely, to enable him to take measures for his security, is answered. This is the only principle which appears capable of supporting the decision last cited. The same doctrine may perhaps have been in view in another case, where evidence was admitted to prove, that the drawer had expressed his belief to the holder, that the Bill would be returned unpaid; but such an expression of belief, before the Bill was due, would not probably be held equivalent to a subsequent certainty, either that the Bill was not paid, or that the

the result; for it is not a case, to which the doctrine has been applied, that a subsequent ratification is equivalent to an original authority, and, by relation, goes to the establishment of the act done *ab initio*, upon the footing of the maxim, *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.*

§ 302. But a person, who is a party to the note, is not ordinarily to be treated as a mere stranger, in the sense of the rule. If he be a party to the Note, and at all events, if he be at the time entitled to call for payment, or for reimbursement,[1] notice from him will now be held sufficient, although formerly it seems to have been otherwise held.[2] Hence, a notice from the holder,

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holder claimed recourse. It has been held at Nisi Prius, to be proof of the drawer having got notice, that he intimated to the holder, that he would defend any action on the Bill, as he had been defrauded, but did not then allege want of notice."

[1] Bayley on Bills, ch. 7, § 2, p. 254, (5th edit.)

[2] Chitty on Bills, ch. 10, p. 525 – 527, (8th edit.); 3 Kent. Comm. Lect. 44, p. 108, (5th edit.); Thomson on Bills, ch. 6, § 4, p. 496, 497, (2d edit.); Story on Bills, § 294, 303, 304; Ex parte Barclay, 7 Ves. 597. In Tindal *v.* Brown, 1 Term. R. 167, 170, Mr. Justice Buller said; "With respect to notice, I concur in the opinion which has been given by the Court, and particularly for the reason given by my brother Ashhurst. The purpose of giving notice is not merely that the indorser should know that the Note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must show, that the holder looked to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if, in the present case, the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged; because it would have amounted only to this; 'The Note made by Donaldson and indorsed by you, is not paid, and I have given credit to Donaldson till to-morrow.' Though there is no prescribed form of this kind of notice, yet it must import, that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application; then it becomes his business to take up the Note. But notice of having given credit to the maker, will discharge the indorser. The notice by another

or any other party, will inure to the benefit of every other party, who stands between the person giving the

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person to the indorser, can never be sufficient; but it must proceed from the holder himself." In Ex parte Barclay, 7 Ves. 597, 598, where the point also arose, Lord Eldon said; "The settled doctrine is according to the language of Mr. Justice Buller in Tindal *v.* Brown; and there is great reason in it; for the ground of discharging the drawer is, that the holder gives credit to some person liable as between himself and the drawer. Notice from any other person, that the Bill is not paid, is not notice, that the holder does not give credit to a third person. The doctrine has been acted upon very often since." The contrary doctrine was held in Jameson *v.* Swinton, 2 Camp. R. 373, and Wilson *v.* Swabey, 1 Stark. R. 34. In Chapman *v.* Keane, 3 Adolp. & Ellis, 193, 196, 197, Lord Denman, in delivering the opinion of the Court, said; "On the trial of this action by the indorsee against the drawer of a Bill of Exchange, the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonor. The Bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it, and left it in the hands of the plaintiff's clerk, with instructions to obtain payment, or give notice of dishonor. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the Bill with him. The objection to the plaintiff's recovery was founded on the case of Tindal *v.* Brown, in which all the Judges of this Court, except Lord Mansfield, considered a notice given by one, who was not the holder, as no notice, on the ground, that the drawer was not thereby apprized of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord Eldon, in Ex parte Barclay. Notwithstanding these high authorities, it is clear, from Jameson *v.* Swinton, Wilson *v.* Swabey, and also from the learned treatises on Bills of Exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered, that the party entitled as holder to sue upon the Bill, may avail himself of notice given in due time by any party to it. In the Nisi Prius cases just referred to, no express allusion was made to Tindal *v.* Brown, or Ex parte Barclay, but we can hardly conceive that they were not present to the recollection of Lord Ellenborough and Mr. Justice Lawrence, or the counsel engaged. These learned Judges, indeed, decided them at Nisi Prius, but without question. We are now compelled to determine, whether the case of Tindal *v.* Brown, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter, and every other party to the Bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in notice, and the person to whom it is given.[1] Therefore, a notice from the last indorsee to the first indorser, will

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succession take up the Bill immediately on receiving notice of dishonor, a supposition which cannot be reasonably made. We may add, that this point was not necessary for the decision of the case, as this Court, including Lord Mansfield, granted a new trial on a different ground." It does not appear, that in any of these cases the question directly arose, whether notice, given by an indorser on the Bill, who had no notice himself from any one, which could make him liable to the holder thereon, to any antecedent party on the Note, would be sufficient notice to bind the latter, so that the holder might recover against him, although he had not himself given him any notice whatsoever. Mr. Bayley (as we shall immediately see) lays down the doctrine in very guarded terms. "The notice must come from the holder, or from some party entitled to call for payment, or reimbursement." Bayley on Bills, ch. 7, § 2, p. 254 – 256. Mr. Thomson (on Bills, ch. 6, § 4, p. 496, 497, 2d edit.) seems to consider the law to be now settled, that notice from any party on the Note will inure for the benefit of the holder and all other parties, without any distinction, whether the party is himself bound to pay the Note or not. His language is: "The English Courts seem to have at first too much narrowed the limits of notice. In one case, opinions are expressed, that notice ought to be given in all cases by the holder. But the only point as to notice then before the Court was, whether a request by the grantor of a Note to the defendant to take it up, was equivalent to notice by the holder; and the Court may probably have been thus led to lay it down, that, in that case, notice could proceed only from the holder, without adverting to the other question of the validity of notice by an indorser. The case was decided on another ground. But the opinion now referred to was followed afterwards by an eminent authority, who, after citing the opinion of Mr. Justice Buller, as importing that effectual notice could only come from the holder, and stating that it had been frequently acted on since, decided, on that ground, that notice by the indorser of a Bill could not be available to the holder. But this doctrine seems not to be consistent with the principles which have been since established. 1st. It appears to be settled, that notice by an indorser to the drawer, or a prior indorser of a Bill or note, will inure to the benefit of any intervening party. No intervening party can have a claim against the drawer or prior indorser, without paying to the party who gave notice, and, by doing so, he acquires all his rights,

[1] Bayley on Bills, ch. 7, § 2, p. 255, 256, (5th edit.); Wilson *v.* Swabey, 1 Starkie, R. 34; Chitty on Bills, ch. 10, p. 527, (8th edit.); Story on Bills, § 303, 304, 528, (8th edit.); Chapman *v.* Keane, 3 Adolp. & Ellis, 193; Rogerson *v.* Hare, 1 W. W. & D. 65; S. C. 1 (English) Jurist, 71.

operate as a notice from each of the intermediate indorsers.[1] So, if the holder, or any other party, give no notice but to the person, who is his immediate indorser on the Note; yet, if notice be communicated by the latter, without laches, to the prior parties, the holder may avail himself of such communication of notice, and sue any such prior parties; for it is not, under such circumstances, necessary, that the notice should come immediately from the holder, since it does come from one, who is liable to pay the Note, and is entitled to reimbursement from such prior parties.[2] Under such

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and, among others, the benefit of the notice given by him. As it may not be certain, however, whether the holder has given notice to all the prior parties, it is prudent in any indorser from whom payment is demanded, to give notice, as soon as he gets it, to all the previous parties, in order to secure his recourse against them. For, if he has got notice, it will not afford him any defence, that the holder has not given notice to the previous parties, from whom he himself is entitled to claim recourse. 2d. Although the holder of a Bill or Note should give notice only to his immediate indorser, he may avail himself of notice to any prior party, whether it proceeds from his indorser, or from some earlier indorser to whom the latter has given notice. This rule is conformable with the purpose of giving notice, as the party receiving it is put sufficiently on his guard, if it comes from any person who has a right to exact, and intends to exact, payment, and that, whether payment is exacted by that party under his right of recourse, or by the holder. Accordingly, it has been decided in two cases, where actions were brought by the last indorsee against the drawer, that notice to a drawer or indorser by the plaintiff's indorser was available to the plaintiff, being held sufficient to 'serve all the purposes for which notice is required,' seeing the drawer or indorser was thus enabled 'to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorsers.' In a later case, it was decided by the Court of King's Bench, on a review of all previous decisions, that the holder of a Bill may avail himself of notice given by any person, who is a party to it. The law may, therefore, be now considered as settled."

[1] Ibid.

[2] Bayley on Bills, ch. 7, § 2, p. 256, (5th edit.); Stafford *v.* Yates, 18 John. R. 327. Mr. Bayley (ch. 7, § 2, p. 254–246) has very succinctly stated the doctrine in these words; "The notice must come from the holder, or from some party entitled to call for payment or reimbursement.

circumstances the rule is applicable, that he, who is ultimately bound to pay the money, as a first indorser, may be made directly and immediately liable to pay it to a remote indorsee; since he would be circuitously compellable to pay it.[1]

It has, indeed, been held, that notice from the acceptor to the drawer, that he had not been able to pay it, and that it was then in plaintiff's hands, was sufficient; but that might, perhaps, have been on the ground, that the acceptor wrote for the plaintiff, and as his agent. A notice from the holder, or any other party, will inure to the benefit of every other party, who stands between the person giving the notice and the person to whom it is given. Therefore, a notice from the last indorsee to the drawer will operate as a notice from each indorser. It is, nevertheless, prudent in each party, who receives a notice, to give immediate notice to those parties against whom he may have right to claim; for the holder may have omitted notice to some of them, and that will be no protection; or there may be difficulties in proving such notice. Though a holder, or any other party, give no notice but to the person of whom he took the Bill, yet, if notice be communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties; it is no objection in such case, that there was no notice immediately from the plaintiff to the defendant."

[1] Riddle *v.* Mandeville, 5 Cranch, R. 322. A remote indorsee cannot, according to the local law of Virginia, maintain a suit at law against a remote indorser, on the dishonor of a Promissory Note. And the question in this case was, whether he might in equity maintain such a suit. The Court held, that he might. Mr. Chief Justice Marshal, in delivering the opinion of the Court, after adverting to the fact, that each indorsee might maintain a suit at law against his immediate indorser, and the latter against his immediate indorser, and so, successively, up to the first indorser, proceeded to say; "If there were twenty successive indorsers of a Note, this circuitous course might be pursued, and, by the time the ultimate indorser was reached, the value of the Note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that Court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in Chancery, by a creditor against the legatees of his debtor, is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet it has never been understood, that the creditor is compelled to

§ 303. From the general language used in some of the authorities, and in some of the text-books, it might seem, that notice from any party to the Note, whether he was liable to pay the same, or entitled to reimburse-

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resort to his legal remedy. He may bring the executor and legatees both before a Court of Chancery, which Court will decree immediate payment from those who are ultimately bound. If the executor and his securities should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that Court could not be questioned. If doubts of his right to sue in Chancery could be entertained while the executor was solvent, none can exist after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a Court of Equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible. In the present case, as in that which has been stated, the insolvency of M'Clenachan furnishes strong additional motives for coming into a Court of Chancery. Mandeville and Jameson are ultimately bound for this money, but the remedy at law is defeated by the bankruptcy of an intermediate indorser. It is only a Court of Equity which can afford a remedy. This subject may and ought to be contemplated in still another point of view. It has been repeatedly observed, that the action against the indorser is not given by statute. The contract on which the suit is maintained is not expressed, but is implied from the indorsement itself, unexplained and unaccompanied by any additional testimony. Such a contract must, of necessity, conform to the general understanding of the transaction. General opinion certainly attaches credit to a Note, the maker of which is doubtful, in proportion to the credit of the indorsers, but two or more good indorsers are deemed superior to one. But if the last indorser alone can be made responsible to the holder, then the preceding names are of no importance, and would add nothing to the credit of the Note. But this general opinion is founded on the general understanding of the nature of the contract. The indorser is understood to pass to the indorsee every right founded on the Note, which he himself possesses. Among these is his right against the prior indorser. This right is founded on an implied contract, which is not, by law, assignable. Yet, if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the Note. No reason is perceived, why such an interest should not, as well as an interest in any other chose in action, be transferable in equity. And if it be so transferable, equity will of course afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder as effectually as he could defend himself against his immediate assignee in a suit at law."

ment, or not, would be sufficient to bind the party, to whom notice ought to be given.[1] But, perhaps, this doctrine is too broadly expressed, and it is certainly limited by Mr. J. Bayley to cases, where the party giving the notice is himself liable to pay the same, and is entitled to reimbursement on payment.[2] Suppose, for example, a second indorser should give notice to a first or a third indorser, having received none himself, and, therefore, not being bound to pay the Note, and the holder has not given any notice whatsoever to any of the indorsers, the question in such a case would arise, whether the notice was available in favor of the holder. Suppose the last indorser has received no notice from the holder, and is therefore discharged, would notice by him to the prior indorsers be available for the holder?[3]

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[1] Chitty on Bills, ch. 10, p. 527, (8th edit.); Jameson *v.* Swinton, 2 Camp. R. 373; Wilson *v.* Swabey, 1 Stark. R. 34; Rosher *v.* Kieran, 4 Camp. R. 87; Shaw *v.* Croft, cited in Chitty on Bills, ch. 10, p. 527, (8th edit.), note; Thomson on Bills, ch. 6, § 4, p. 498, 499, (2d edit.)

[2] Bayley on Bills, ch. 7, § 2, p. 254. But see Thomson on Bills, ch. 6, § 4, p. 498, 499, (2d edit.), where a different opinion is intimated. Ante, § 302, note.

[3] Mr. Chitty (on Bills, ch. 10, p. 527, 8th edit.) says; "However, according to the more recent decisions, it is not absolutely necessary, that the notice should come from the person, who holds the Bill, when it has been dishonored, and it suffices if it be given after the Bill was dishonored, by any person, who is a party to the Bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement; and such notice will, in general, inure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference, who gives the information, since the object of the notice is, that the parties may have recourse to the acceptor. And, therefore, it has been held, that if the drawer or indorser of a Bill of Exchange receive due notice of its dishonor from any person, who is a party to it, he is directly liable upon it to a subsequent indorser, from whom he had no notice of the dishonor. And it has been decided, in an action by the indorsee against the drawer, that it is sufficient if the drawer had notice of the dishonor even from the acceptor. It is, however,

The reason in favor of holding the notice good, where it is given by a party liable to pay, or entitled to be re-

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advisable for each party, immediately upon receipt of notice, to give a fresh notice to each of the parties, who would thereupon be liable over to him, and against whom he must prove notice. As already observed, the notice should be given by some agent or servant, who will be competent to prove it, and not by the holder in person, in the absence of a competent witness.'' Shaw *v.* Croft, cor. Lord Kenyon, Sittings after Trin. Term, 1798, MS., and see Selw. N. P. (4th edit.) 320, n. 25, was assumpsit by the holder of a Bill against the drawer. Defence, no regular notice of dishonor; but it being proved, that a message had been left at the drawer's house by the acceptor, stating, that the Bill had been dishonored, Lord Kenyon said ; " That it made no difference, who apprized the drawer, since the object of the notice was, that the drawer might have recourse to the acceptor.'' Jameson *v.* Swinton, 2 Camp. 373, was an action by the second indorsee of a Bill of Exchange, drawn by the defendant, payable to his own order, and indorsed by him to G. Elsom. The Bill became due on Saturday, the 8th of July, when it was in the hands of the plaintiff's bankers. On Monday, the 10th, they returned it dishonored to the plaintiffs, who, in the evening of that day, gave notice of the dishonor to Elsom, their indorser. Elsom, between eight and nine o'clock in the evening of the following day, gave a like notice to the defendant. The plaintiffs and Elsom resided in London, the defendant at Islington. For the defendant, it was insisted, that the plaintiffs were bound to give notice themselves to the drawer, and all the indorsers against whom they meant to have any remedy. They could not avail themselves of a notice given by a third person. Per Lawrence, J. ; " I do not remember to have heard the first point made before, but I am of opinion, that the drawer or indorser is liable to all subsequent indorsees, if he had due notice of the dishonor of the Bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed, that the Bill is dishonored ; he is enabled to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorser, and it does seem to me, that the defendant in this case had due notice of the dishonor of the Bill from Elsom. This is allowing only one day to each party, which, when the parties all reside in the same town, seems now to be the established rule.'' Verdict for the plaintiff. Shaw *v.* Croft, and Rosher *v.* Kieran, 4 Camp. R. 87, are the only cases, which seem to trench on the rule ; in the other cases, the party giving notice was liable on the Note. Mr. Bayley manifestly doubted the case of Rosher *v.* Kiernan, 4 Camp. R. 87. See Bayley on Bills, ch. 7, § 2, p. 254, 255. The same question was much discussed in Stanton *v.* Blossom, 14 Mass. R. 116, and the Court decided, that a notice by a party to a Bill (the drawee) was not sufficient.

imbursed, is, that it avoids circuity of action. That reason has not the same cogent application, where the party, giving the notice, is absolved from all responsibility.[1]

On that occasion, Mr. Justice Putnam said; "But the point of the most difficulty remains. Shall the information, communicated by the drawees, avail in this action, as if it had been given by the plaintiffs themselves? It has been argued, that the defendants have not been prejudiced at all; that their funds, although not appropriated according to their desire, have yet been applied to the payment of their debts; that the information, coming from the drawees, must have been as useful and authentic as could have been given. It is said, also, that the drawees are a party to the Bill; and, that notice from a party to a Bill inures for the benefit of all. In support of this point, the case of Wilson *v.* Swabey was cited and relied on. That was assumpsit by the indorsee against the drawer. The Bill became due on Thursday; Lewis, an indorser, was notified on Friday, and he notified the defendant on Saturday. The objection was, that there was no notice from the plaintiff; but Lord Ellenborough held, that notice from any person, who was a party to the Bill, was sufficient. But the drawee, who refuses to accept, is not a party, or chargeable in virtue of a Bill; and notice from him is in no degree better than from any other stranger. More than twenty years ago, it was decided in the case of Tindal *v.* Brown, which was cited in the argument for the plaintiffs, that notice must come from the holder; and many later decisions have corroborated the rule. In a late case in Campbell's Reports, this point is directly decided. The holder himself, or some one authorized, must give the notice. Now, the indorser, who has been notified by the holder of the dishonor of the Bill, may, by reason of his liability, be considered as authorized to notify the drawer, for the benefit of the holder, as well as himself; both having an interest in the matter. They can and ought to inform the drawer, whether he must pay the Bill; and that is a material fact to be communicated to him, and which no stranger is presumed to know. The Bill may not be duly honored; and the holder may be willing to accept an equivalent, or may give credit to the drawee. In such case, the drawer would be discharged. There is good sense in the rule, which requires the notice to come from a party liable to be charged upon the Bill, or having an interest in it; and the drawer is not to be affected by information from any other quarter." The case of Chanoine *v.* Fowler, 3 Wend. R. 173, recognizes the same doctrine. See, also, Stafford *v.* Yates, 18 John. R. 327; Chapman *v.* Keane, 3 Adolp. & Ellis, 193, 196–198; Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Story on Bills, § 294, 303, 304; U. S. Bank *v.* Goddard, 5 Mason, R. 366, 372.

[1] See Turner *v.* Leech, 4 Barn. & Ald. 451; Marsh *v.* Maxwell, 2

§ 304. In case of the death of the holder, notice should be given by his executor or administrator, if one is appointed at or before the maturity of the Note.[1] If none is then appointed, it would seem, that notice, given within a reasonable time after administration is taken or assumed by the executor or administrator, will be sufficient.[2] If the Note is payable to a partnership, notice given by any partner will be good for all. If two persons, not partners, be holders, notice by one will be presumed to be for both. In case of joint holders, whether partners, or not, if either die, the survivor is the proper party to give notice, and not the executor or administrator of the deceased party. This results from a general principle of law, that in such cases the legal title in choses in action, belonging to partners and joint holders, survives to the surviving parties.[3]

Camp. R. 210, note ; Smith *v.* Mullett, 2 Camp. R. 208 ; U. S. Bank *v.* Goddard, 5 Mason, R. 366, 372, 373. See Bayley on Bills, ch. 7, § 2, p. 312, (5th edit.) ; Roscow *v.* Hardy, 12 East, R. 434. In U. S. Bank *v.* Goddard, 5 Mason, R. 372, 373, the Court said ; "It is laid down in Bayley on Bills, 163, (4th edit.), and better authority can scarcely be, that 'Though a holder or any other party gives no notice but to the person of whom he took the Bill ; yet, if notice is communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties. It is no objection, in such case, that there was no notice immediately from the plaintiff to the defendant.' And this doctrine is fully supported by decided cases. Jameson *v.* Swinton, 2 Camp. R. 373 ; Wilson *v.* Swabey, 1 Stark. R. 34 ; Stanton *v.* Blossom, 14 Mass. R. 116 ; and Stafford *v.* Yates, 18 Johns. R. 327, are in point. The reason seems to be, that as the notice is sufficient to charge the defendant with the payment in favor of the person, who gives it, it ought to charge him in favor of all subsequent parties, because he sustains no injury from want of notice. It is, as to him, due notice." See, also, Story on Bills, § 303, 304, and note.

[1] Chitty on Bills, ch. 6, p. 225, 226, (8th edit.) ; Id. ch. 9, p. 389 ; Ante, § 241.

[2] Chitty on Bills, ch. 10, p. 485.

[3] See Story on Partnership, § 314 – 346 ; Evans *v.* Evans, 9 Paige, R. 178 ; Ante, § 239.

§ 305. In case of the bankruptcy of the holder, the legal title to the Note will vest in his assignees by relation from the time of the bankruptcy, as soon as they are appointed;[1] and, consequently, notice should be given by them, if the Note has not arrived at maturity until after their appointment. If no assignees have been appointed at the time of the maturity of the Note, then it would seem to be sufficient, if they give notice within a reasonable time after their appointment. Notice, however, in either case, given by the bankrupt holder, would, it should seem, be sufficient to bind the indorser, as the bankrupt stands, as holder, in privity with the assignees, and may be said to have an interest in the Note,[2] and to represent his estate until assignees have been chosen.[3] *A fortiori*, it would be so, if the assignees should ratify the act of the bankrupt in giving notice.

§ 306. If the holder be an infant, it will be sufficient, if the notice of the dishonor be given by the infant himself, or, if he has a guardian, by the latter.[4] The same rule would seem to apply to any other persons under guardianship. If the holder be a single woman, and she marries before the maturity of the Note, notice of the dishonor should be given by her husband.[5] But

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[1] Chitty on Bills, ch. 6, p. 227, (8th edit.); Id. p. 398; Ante, § 249.

[2] Chitty on Bills, ch. 8, p. 368, (8th edit.); Id. ch. 9, p. 398. See 3 Kent. Comm. Lect. 44, p. 108, (5th edit.)

[3] I am unable to find any authority exactly in point. But it would seem to be a just result on principle. See Jones *v.* Fort, 9 Barn. & Cressw. 764, and Ex parte Moline, 19 Ves. 216.

[4] Chitty on Bills, ch. 2, p. 23, 24, (8th edit.); Story on Bills, § 84, 85.

[5] Chitty on Bills, ch. 2, p. 26, (8th edit.); McNeilage *v.* Holloway, 1 Barn. & Ald. 218; Burrough *v.* Moss, 10 Barn. & Cressw. 558; Connor *v.* Martin, 3 Wilson, R. 5; Bayley on Bills, ch. 2, § 3, p. 48, 49, (5th edit.); Story on Bills, § 92, 93; Co. Litt. 351 *b*.

notice, if given by her with his consent, will be equally available;[1] and perhaps, as in the event of his death, without reducing the Note into possession, she would be entitled to recover the amount, as his survivor, notice by her, as a party interested in the Note, will, in all cases, be sufficient.[2] Probably the same rule would be applied in case of a Note given to a married woman during the marriage, since it is suable, either in the name of her husband alone, or in their joint names.[3]

[§ 306 *a.* It remains to consider the effect of an untrue description of the party in whose behalf the notice is given; and on this head a case regarded by the Court as "perfectly novel," has been recently decided in the English Exchequer. A Bill was drawn by A. indorsed by him to B., and by B. to C., in whose hands it was dishonored. C.'s attorney gave notice of the dishonor in due time to A. but stated therein, by mistake, that he was directed by B. (from whom he had no authority) to apply for payment of the Bill. On these facts, it was held, that the misrepresentation of the name of the person on whose behalf notice was given, ought not wholly to avoid the notice, but only to place the party giving it in the same situation, as to the party to whom it was given, as if the representation had been true; and, therefore, the defendant ought to have every defence against the plaintiff that he would have had if the notice had really been given by the party named.[4]]

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1 See Chitty on Bills, ch. 2, p. 26, (8th edit.); Prestwich *v.* Marshall, 7 Bing. R. 565; Cotes *v.* Davis, 1 Camp. R. 485; Story on Bills, § 92.

2 Gaters *v.* Madeley, 6 Mees. & Wels. 423; Richards *v.* Richards, 2 Barn. & Adolp. 446; Story on Bills, § 92, 93.

3 Barlow *v.* Bishop, 1 East, R. 432; Philliskirk *v.* Pluckwell, 2 Maule & Selw. 393; Arnold *v.* Revoult, 1 Brod. & Bing. R. 445; Gaters *v.* Madeley, 6 Mees. & Wels. 423; Story on Bills, § 92, 93, and note.

4 Harrison *v.* Ruscoe, 15 Meeson & Welsby, 231; See also Lysaght *v.*

§ 307. In the next place, as to the persons, to whom notice is to be given. Of course, from what has been already suggested,[1] the holder is bound to give notice to all prior parties upon the Note, whom he means to hold liable to him upon the dishonor thereof; and subject to the exceptions herein before stated,[2] if he does not, those who have not due notice from him, will be absolved from all liability to pay the Note.[3] Notice to a known general agent will be equivalent to notice to his principal.[4] If the party entitled to notice be a bankrupt, and assignees have been appointed, and the holder knows it, notice should be given to them;[5] if no assignees have been appointed, then notice may be given to the bankrupt, because (as we have seen) the bankrupt represents his estate till assignees have been chosen.[6] If the bankrupt has absconded, and a messenger is in possession under the bankruptcy, before the appointment of assignees, then notice should be given to him.[7]

Bryant, 2 Carrington & Kirwan, 1016; Crocker *v.* Getchell, 23 Maine R. 392.

1 Ante, § 299.

2 Ante, § 302, 303.

3 Chitty on Bills, ch. 8, p. 368, 369, (8th edit.); Id. ch. 9, p. 398, 399; Id. ch. 10, p. 528; Story on Bills, § 305; Hutz *v.* Karthause, 4 Wash. Cir. R. 1; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 200.

4 Thomson on Bills, ch. 6, § 4, p. 501; Bayley on Bills, ch. 7, § 2, p. 311, (5th edit.); Smith *v.* Thatcher, 4 Barn. & Ald. 200; Wilcox *v.* Routh, 9 Smedes & Marshall, R. 476.

5 Chitty on Bills, ch. 8, p. 369, (8th edit.); Id. ch. 10, p. 528, 529; Rhode *v.* Proctor, 4 Barn. & Cressw. 517; Thomson on Bills, ch. 6, § 4, p. 499, 500, (2d edit.); 3 Kent, Comm. Lect. 44, p. 199, (5th edit.)

6 Ibid.; Ante, § 305; Ex parte Moline, 19 Ves. 216; Thomson on Bills, ch. 6, § 4, p. 501, (2d edit.); Bayley on Bills, ch. 7, § 2, p. 284, (5th edit.); 3 Kent, Comm. Lect. 44, p. 109, (5th edit.)

7 Rohde *v.* Proctor, 4 Barn. & Cressw. 517. On this occasion, Mr. Justice Bayley, in delivering the opinion of the Court, said; "This was an issue from the Court of Chancery, on the question, whether plaintiffs,

§ 308. In cases of partnership, notice should be given to the firm; but then notice to either of the partners

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as assignees of Messrs. Sawyer, Jobler, & Co., had any debt provable under the estate of John Soady Rains, a bankrupt. Their claim was upon five Bills of Exchange, drawn by Rains upon Joseph Lacklan, and indorsed to Sawyer & Co.; the Bills became due June, 1818, and before that time Rains and Lacklan had both become bankrupts, and Rains had not surrendered to his commission. Rains committed his act of bankruptcy by leaving the kingdom on the 16th of April, 1818. A commission issued against him on the 20th, and he has never returned. Lacklan became bankrupt on the 23d of April, 1818. When the Bills became due, they were dishonored, but no notice was left at Rains's house, nor sent to his assignees; the house was open at the time, and the messenger in it, and the holder of the Bills knew the defendants were Rains's assignees, and the question upon these facts was, whether the want of notice was a bar to the plaintiff's claim; and we think it was. When a Bill is dishonored, it is the duty of the holder to use due diligence to give notice to such of the parties to the Bill, as would be entitled to a remedy over upon it, if they took it up, and the holder makes the Bill his own, as against those parties, and loses his remedy upon the Bill against them by neglecting to use such diligence. It is no excuse, that the chance of obtaining any thing upon the remedy over was hopeless, that the person or persons against whom that remedy would apply were insolvent or bankrupts, or had absconded. Parties are entitled to have that chance offered to them, and, if they are abridged of it, the law, which is founded in this respect upon the usage and custom of merchants, says they are discharged. The bankruptcy, therefore, of Lacklan is no excuse for the want of due diligence, if such want exist in this case, but the question must be answered as it would have been had Lacklan continued solvent. Had Lacklan been solvent, and Rains's assignees had been apprized of the dishonor, they might, at all events, have pressed Lacklan to pay, and had they thought fit to take up the Bill, they might have sued him. Of these opportunities in this case they have been deprived, and the question is, whether they have been deprived by the want of that diligence, which they had legally a right to expect from the holders. It is not necessary to decide in this case whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavor to find out his assignees; nor is it necessary to say what would be the case, if such a party's house were shut up, and there were no means afforded there of discovering him or his representatives, for in this case the bankrupt's house continued open; the agent of his representatives, the messenger, who was also in some degree his representative, was there, and a notice there would have reached the assignees, and have given them the power of considering whether they will be notice to the firm.[1] If the Note be given by a firm, of which the indorser sought to be charged, is a partner, no special notice need be given to him of the dishonor, since he, as one of the firm, must be taken to have full notice of the dishonor.[2] If there are joint indorsers, who are not partners, then notice, it should seem, must be given to each of them; for notice to one will not be deemed notice to all;[3] nor, (as it should seem) in such a case, would notice to one alone bind even him.[4]

§ 309. If the indorser is absent, or gone abroad, and he has left a known general agent in his business, it will be sufficient to leave the notice of the dishonor with

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should have taken any, and what steps against Lacklan. In a very excellent modern publication on the law of Bills of Exchange, combining the Scotch and English law upon the subject, Thomson on Bills, 535, (Id. p. 500, 2d edit.) it is laid down, that in case of the bankruptcy of the drawer or of an indorser, notice must still be given to the bankrupt, 'or to the trustee vested with his estate for behoof of his creditors,' and he refers (amongst other decisions) to the case of Ex parte Moline. Whether this be universally and in all cases true, it is not now necessary to decide; all the present case requires is this, that where the bankrupt's house continues open, and an agent of the assignees there, notice is essential, and a neglect to give it bars the holder's claim against the bankrupt's estate The Bills, therefore, were not provable under the commission issued against the drawer." See Thomson on Bills, ch. 6, § 4, p. 499 - 501, (2d edit.)

[1] Thomson on Bills, ch. 6, § 4, p. 501, (2d edit.); Porthouse *v.* Parker, 1 Camp. R. 82; Bignold *v.* Waterhouse, 1 Maule & Selw. 259; Chitty on Bills, ch. 8, p. 355, 369, 370, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 285, (5th edit.); Gowan *v.* Jackson, 20 John. R. 175; Story on Bills, § 299, 305; Nott *v.* Downing, 6 Miller, Louis. R. 684.

[2] Thomson on Bills, ch. 6, § 2, p. 501, (2d edit.); Chitty on Bills, ch. 8, p. 370, (8th edit.); Rhett *v.* Poe, 2 How. Sup. Ct. R. 457.

[3] Shepard *v.* Hawley, 1 Connect. R. 368; Bank of Chenango *v.* Root, 4 Cowen, R. 126; Willis *v.* Green, 5 Hill, N. Y. R. 232; Post, § 329.

[4] Ibid.; Story on Bills, § 299, and note, § 329; Sayre *v.* Frick, 7 Watts & Serg. 383.

the agent.[1] But it must be shown, that the agent's character is of such a nature, as clearly entitles him to receive notice for his principal. His merely being the attorney at law of the principal will not be sufficient, for he is not *virtute officii* entitled to receive notice.[2] So, where a Promissory Note is indorsed by an agent or attorney, in the name of his principal, under a proper authority to indorse Notes, that is not a sufficient authority for him to receive a notice of the dishonor of the Note; for an authority to indorse does not include an authority to receive notice of dishonor.[3]

§ 310. If the indorser entitled to notice is dead, then notice should be given to his personal representative, if there is any;[4] if there is none, then notice may, or should, be left at the domicil of the deceased.[5] If, in

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[1] See Chateau *v.* Webster, 6 Met. R. 1; Hestres *v.* Petrovic, 1 Rob. Louis. R. 119. When notice to a director of a bank is notice to the bank. See 1 Story, Eq. Jurisp. § 408 *a*; Story on Agency, § 140 *a*, § 140 *b*; 24 Pick. R. 270, 276.

[2] Crosse *v.* Smith, 1 Maule & Selw. 545, 552; Louisiana State Bank *v.* Ellery, 16 Martin, R. 87.

[3] See Louisiana State Bank *v.* Ellery, 16 Martin, R. 87; Montillet *v.* Duncan, 11 Martin, Louisiana R. 534; Crosse *v.* Smith, 1 Maule & Selw. 545, 552, 552; Agan *v.* McManus, 11 John. R. 181.

[4] Bayley on Bills, ch. 7, § 2, p. 286, (5th edit.); Chitty on Bills, ch. 8, p. 369, 370, (8th edit.); Id. ch. 10, p. 474, 528–530; Merchants' Bank *v.* Birch, 17 John. R. 25; Stewart *v.* Eden, 2 Caines, R. 121. See Thomson on Bills, ch. 6, § 1, p. 416, 417, (2d edit.); Id. § 4, p. 501; Story on Bills, § 305; Oriental Bank *v.* Blake, 22 Pick. R. 206.

[5] Ibid.; Willis *v.* Green, 5 Hill, N. Y. R. 232. In this last case, Mr. Chief Justice Nelson seemed to be of opinion, that if one of the joint indorsers (not partners) should die before the maturity of the Note, the surviving indorser would be discharged unless due notice should be given to the personal representative of the deceased, as well as to the survivor. On that occasion, he said; "The plaintiff failed to show, that the estate of Johnson had been charged by notice of non-payment. If the notice relied on for that purpose had been sent to the proper place, no doubt it would have been sufficient, under the circumstances of this case, though directed

case of the Note of a firm, one of the firm die, notice should be given to the surviving partners.[1] Whether notice to the personal representatives of the deceased would be valid does not appear to be settled by the authorities. But, as in such cases the personal representatives are in equity held liable to pay the same, as well as the survivors, it may be thought, that this privity and interest will make such notice good.[2]

§ 311. From analogy to the cases already suggested in respect to the inquiry, by whom notice is to be given,[3] it should seem, that notice of dishonor of the Note should be given to an infant indorser, or to his guardian, if he has one; for the indorsement is at most voidable and not void. And the like rule would seem to apply, that notice should be given to the guardian of a person, who, since the indorsement, has become *non compos* or insane. In case of the marriage of a single woman before or at the maturity of the Note, notice of the dishonor should be given to her husband.

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to Johnson after his death. Stewart *v.* Eden, 2 Caines, R. 121; The Merchants' Bank *v.* Birch, 17 John. R. 25. But the notice was sent to Little Falls, instead of Salisbury, where Johnson resided; and if there were nothing else in the case, I think the failure to charge the estate by due notice would operate a discharge of both indorsers. It clearly would, if both were living, as a joint action could not, in such case, be sustained upon the note. And although the remedy at law survives against Green alone, yet, as he is entitled to contribution from the estate of his co-indorser, it seems to me equally obligatory upon the holder to prove that both were charged, or rather that the estate of the deceased was charged, so as to secure the remedy over. Otherwise, the whole debt would fall upon the survivor. The question, however, is not without its difficulties, and it is unnecessary now to decide it."

[1] See Story on Partn. § 344, 347.

[2] See Story on Partn. § 347, 362; Devaynes *v.* Noble, 1 Meriv. R. 529, 563, 564; 1 Story on Equity Jurisp. § 676; Wilkinson *v.* Henderson, 1 Mylne & Keen, R. 582, 588.

[3] Ante, § 306.

§ 312. In the next place, as to the place and time of giving notice of the dishonor of a Promissory Note. And first, as to the place. Where the party entitled to notice and the holder resides in the same town or city, the general rule is, that notice should be given to the party entitled to it, either personally, or at his domicil, or place of business.[1] If it is given personally, of course it is good, wherever he may be found. If it be not personally given, then it will be sufficient, if it is given, or left at, or sent to his domicil, or place of business; and it need not be at or to both places.[2] It will make no difference, that his domicil is in one town or city, and his place of business is in another town or city; for, in such a case, the holder has his election.[3] If the parties entitled to notice are partners, the notice will in like manner be sufficient, if left at, or sent to, the place of business of the firm, or of any one partner, or to the domicil of either of the partners. If the party, entitled to notice has changed his domicil or place of business

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[1] Story on Bills, § 235, 236, 297; Chitty on Bills, ch. 10, p. 502, 516, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 276, (5th edit.); Bank of Columbia *v.* Lawrence, 2 Peters, Sup. Ct. R. 582; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100; Bank of United States *v.* Hatch, 1 McLean, R. 92; Burrows *v.* Hannegan, 1 McLean, R. 310; Franklin *v.* Verhois, 6 Miller, Louis. R. 730; Wilcox *v.* McNutt, 2 Howard, Mississippi R. 776.

[2] Bayley on Bills, ch. 7, § 2, p. 276, (5th edit.); Story on Bills, § 297, 382; Crosse *v.* Smith, 1 Maule & Selw. 545; Bancroft *v.* Hall, Holt, N. P. R. 476; Franklin *v.* Verbois, 6 Miller, Louis. R. 727; Ireland *v.* Kip, 10 John. R. 490; S. C. 11 John. R. 231; Smedes *v.* Utica Bank, 20 John. R. 372; Laporte *v.* Landry, 17 Martin, R. 359; Louisana State Bank *v.* Rowel, 18 Martin, R. 506; Clay *v.* Oakley, 17 Martin, R. 137; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578; Granite Bank *v.* Ayers, 16 Pick. R. 392; 3 Kent, Comm. Lect. 44, p. 106–108, (5th edit.); Sheldon *v.* Benham, 4 Hill, N. Y. R. 129, 133; Ransom *v.* Mack, 2 Hill, N. Y. R. 587; United States *v.* Barker, 4 Wash. Cir. R. 464; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100.

[3] Ibid.

since he became an indorser, then the notice should be at his new domicil or place of business, at the time when the right to notice accrues.[1]

§ 313. What constitutes the domicil or place of business of the party, entitled to notice, is, in many cases, a mixed question of law and of fact. If the party is a housekeeper, that is his domicil where his family resides. If he is not a housekeeper, but lives at lodgings or at a boarding house, then that place is deemed his domicil.[2] If he keeps a distinct or independent counting-room, or office, in which he usually transacts his business, that is deemed his place of business. If he has no separate counting-room or office of his own, but usually transacts his business at a counting-room, or office, which is partly occupied or used by another, that will, or may, be deemed his place of business. But a place, which he has no particular right to use for such purpose, such as an insurance office, or a bank room, or an exchange room, or a post-office, to which persons in general habitually or occasionally resort, will not be deemed his place of business, in the sense of the rule, although he may occasionally or transiently transact business there.[3]

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[1] Ibid.

[2] See Bank of United States *v.* Hatch, 6 Peters, Sup. Ct. R. 250; Bank of United States *v.* Hatch, 1 McLean, R. 92.

[3] See Bank of United States *v.* Corcoran, 2 Peters, Sup. Ct. R. 121; Ireland *v.* Kip, 10 John. R. 501; S. C. 11 John. R. 231; Granite Bank *v.* Ayres, 15 Pick. R. 392; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582. In this last case, the Court said; "From this statement of the case, it appears, that the Note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant, when he indorsed the Note, lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office, addressed to the defendant at that place, by which it is understood, that the notice was either inclosed in a

§ 314. An indorser, entitled to notice, may, by a previous arrangement or agreement, assign a different place from that of his domicil or place of business, at which the notice of dishonor of the Note or Notes indorsed by him may be delivered or left, or to which it may be sent; and in such a case he will be regularly bound, if the notice is duly left at, or sent to, the place so assigned.[1] Thus, if an indorser should agree with the holder of a Note, that the notice of the dishonor might be left at a particular bank, or insurance office, or at a particular shop, that would make a notice, duly left there, sufficient to bind him in point of law.[2]

§ 315. If the notice is left at the place of business

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letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction 'Georgetown' upon it; and whether this notice is sufficient is the question to be decided. If it should be admitted, that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows, that service at his place of residence, in a different place, would not be equally good. Parties may be, and frequently are, so situated, that notice may well be given at either of several places. But the evidence does not show, that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country, two or three miles distant from that place, in the county of Alexandria. The general rule is, that the party, whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and, whether the notice reaches the party or not, the holder has done all that the law requires of him."

[1] See Ireland *v.* Kip, 11 John. R. 231.

[2] Brent *v.* Bank of the Metropolis, 1 Peters, Sup. Ct. R. 89.

of the indorser, it should be left within the usual hours of business; for, if left after those hours, it will not be deemed sufficient, unless some person in the employment of the indorser is there found ready to receive it.[1] If left at the dwelling-house of the indorser, it should, (as we shall presently see,) be within reasonable hours, and before the house is shut up for the night.[2] If the house be shut up in consequence of the temporary absence of the indorser, still the notice may be left there, or at a neighboring house; for it is the duty of the party, under such circumstances, to leave some person there ready to receive such communications.[3] And it will be a sufficient discharge of the duty of the holder, that he leaves the notice in a way reasonably calculated to bring knowledge thereof to the owner, if he or his servants should visit the house.[4] Indeed, it seems, that it is not necessary in such cases to leave any written notice at all; for, as the notice may be verbal, if the holder or his agent goes to the place of business within the usual hours, and finds it shut up, or if he goes to the dwelling-house within reasonable hours, and finds it shut up, and no one there to receive notice, that will be a sufficient compliance with the rule, requiring notice on the part of the holder, and exonerate him from all implication of laches.[5]

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1 Bayley on Bills, ch. 7, § 2, p. 276, (5th edit.); Crosse *v.* Smith, 1 Maule & Selw. 545; Bancroft *v.* Hall, Holt, N. P. R. 476.

2 Chitty on Bills, ch. 10, p. 502, 503, 516, (8th edit.); Allen *v.* Edmundson, 2 Welsby, Hurlstone & Gordon, 719; S. C. Carrington & Kirwan, 547.

3 3 Kent, Comm. Lect. 44, p. 107, (5th edit.); Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100; Stewart *v.* Eden, 2 Cain. R. 121.

4 Ibid.; Wharton *v.* Wright, 1 Car. & Kirk. 586.

5 Bayley on Bills, ch. 7, § 2, p. 276, (5th edit.); Crosse *v.* Smith,

§ 316. Where the domicil or place of business of the indorser is unknown, it is the duty of the indorsee to make reasonable inquiries, and to use due diligence in endeavoring to ascertain it.[1] Where the indorser has

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1 Maule & Selw. 545; Bancroft *v.* Hall, Holt, N. P. R. 476; Chitty on Bills, ch. 10, p. 488, 502, 503, (8th edit.); Id. p. 516; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100; Hine *v.* Allely, 4 Barn. & Adolp. R. 624. In the case of Crosse *v.* Smith, 1 Maule & Selw. 545, 554, Lord Ellenborough, in delivering the opinion of the Court, said: — "That brings it to the question, whether sending the Bill by a clerk after ten o'clock, and knocking and waiting at the counting-house door was sufficient notice in point of law; and we think that it was. The period from ten to eleven was a time during which a merchant's counting-house ought to be open, and some person expected to be met with there. The counting-house is a place where all appointments respecting the joint business, and all notices should be addressed, and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued, that notice in writing left at the counting-house, or put into the post, was necessary; but the law does not require it, and with whom was it to be left? Putting a letter in the post is only one mode of giving notice, but where both parties are residing in the same post town, sending a clerk is a more regular and less exceptionable mode. The case of Goldsmith *v.* Bland, before Lord Eldon, supports this doctrine. The only notice of the dishonor of the Bill was by a clerk of the indorsee, who went to the counting-house of the indorser, found the counting-house shut up and no person there; saw a servant-girl, who said nobody was in the way, then returned without leaving any message. Lord Eldon told the jury, that if they thought the indorser was bound to have somebody there, the notice was regular. The jury were satisfied, that the hour was a proper hour, and that the defendant ought to have had a clerk there. So, by a recent decision of this Court, in Howe *v.* Bowes, we have held, that if the makers of Notes shut up and abandon their shop, it is substantially a refusal by them to pay."

1 Chapcott *v.* Curlewis, 2 Mood. & Rob. 484. On this subject, Mr. Chitty (p. 486–488) says: "The holder of a Bill of Exchange is also excused for not giving regular notice of its being dishonored to an indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. And Lord Ellenborough observed, 'When the holder of a Bill of Exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the Bill; and I think the law lays down no such rigid rule. The holder must not allow

removed from his old domicil or place of business, and his present domicil or place of business is not known there, it is the duty of the holder to make reasonable inquiries, and to use due diligence in his endeavors to ascertain the new domicil or place of business of the indorser, if he means to charge him.[1] In such a case,

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himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive, that notice given as soon as this is discovered is due notice of the dishonor of the Bill, within the usage and custom of merchants.' And in a late case, where the traveller of A., a tradesman, received in the course of business a Promissory Note, which he delivered to his master, and the Note having been returned to A. dishonored, the latter, not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it; it was held that A. was not guilty of laches, although several days elapsed before he received an answer, and before he gave notice to the next party, as he had used due diligence in ascertaining his address; and two days' delay, after ascertaining the residence, in forwarding notice were excused, the holder and his attorney occupying that time. And it has been considered to be sufficient, when a Promissory Note has been dishonored, to make inquiries at the maker's for the residence of the payee. But in a subsequent case it was held, that, to excuse the not giving regular notice of the dishonor of a Bill to an indorser, it is not enough to show that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the Bill was payable; he should have inquired of every other party to the Bill, and have applied to all persons of the same name in the directory. Applying to the last indorser, and last but one, the day after the Bill was due, to ascertain where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient; and when a person, upon transferring a Bill or Note, declines stating where he lives, but engages to call upon the acceptor to ascertain whether the Bill has been paid, he thereby dispenses with the necessity of giving him any notice." Again, in p. 524, he speaks pointedly to the same effect. See, also, Spencer *v.* Bank of Salina, 3 Hill, N. Y. R. 520; Belden *v.* Lamb, 17 Conn. R. 441; Harris *v.* Robinson, 4 Howard, Sup. Ct. R. 345; Lambert *v.* Chiselm, 9 Ibid. 552; Carroll *v.* Upton, 2 Sandford, Sup. Ct. N. Y. R. 171; Rawdon *v.* Redfield, Ibid. 178.

[1] Chitty on Bills, ch. 10, p. 486-488, 524, (8th edit.); Barnwell *v.* Mitchell, 3 Connect. R. 101; Bank of Utica *v.* De Mott, 13 John. R. 432; Smyth *v.* Hawthorn, 3 Rawle, R. 355; Hill *v.* Varrell, 3 Greenl. R.

it would seem to be immaterial, whether the removal be to another place in the same state, or to another state, or to a foreign country, if his new domicil or place of business is known, or can by reasonable inquiries and due diligence be ascertained; for, under such circumstances, notice may be sent to him by the mail, or by the other usual conveyances resorted to in cases of foreign Bills.[1] [Thus, if the indorser, at the time of pro-

233; 3 Wash. Cir. R. 206; Bank of Utica *v.* Phillips, 3 Wend. R. 408; Fitler *v.* Morris, 6 Whart. R. 406; McLanahan *v.* Brandon, 13 Martin, R. 321.

1 On this subject, Mr. Chitty (p. 524) says: "If the residence of the party to whom the notice ought to be given be not known to the holder, he must nevertheless not remain in a state of passive and contented ignorance, but must use due diligence to discover his residence, and if he do, then the indorser remains liable, though a month or more may have elapsed before actual notice be given; and if he, before the Bill becomes due, be applied to by one of the parties to ascertain the residence of the indorser, and he declined giving him any information, the holder need not, after the Bill became due, renew his inquiries of that party; but, in general, the holder should not only immediately apply to all the parties to the Bill for information, but also make inquiries, and send notice to the place where it may reasonably be supposed the party resides, and if he has employed an attorney, who at length discovers the residence, we have seen, that it will suffice if the attorney, on the next day, consults with his client, and the latter, on the third day, forwards the notice to the discovered indorser, though, in general, notice ought to be given on the next day. And a letter from the holder, giving notice of the dishonor, containing this passage, 'I do not know where, till within these few days, you were to be found,' is not to be taken as proving, that the notice was not given on the next day after the residence of the party was discovered. Where the traveller of a tradesman received, in the course of business, a Promissory Note, which was delivered to him for the use of his principal, without indorsing it, and the Note having been returned to the principal dishonored, and the latter, not knowing the address of the next preceding indorseer, wrote to his traveller, who was then absent from home, to inquire respecting it, it was held, that such principal was not guilty of laches, although it was urged that the traveller ought to have stated the residence when he remitted the Notes, and though several days elapsed before he received an answer, and thereupon he gave notice to the next party, as he had used due diligence in ascertaining the address."

test, be in Washington, as a member of the United States Senate, then in session, and in the daily habit of receiving his letters through the post-office at Washington, while at his last place of abode, in his own State, he has left no agent to receive or forward letters, then notice sent by mail to Washington, would be sufficient.[1]] But, if, upon such inquiries and diligence, the new domicil or the place of business of the indorser cannot be found, or if he has removed into another state, or into a foreign country, and his new residence is not known, and cannot upon reasonable inquires be found, or if he has gone temporarily abroad, leaving no known place of business or domicil here, or no known agent authorized to receive notice, that will dispense with the necessity of giving notice by the holder.[2] Where the domicil or

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1 Walker *v.* Tunstall, 3 Howard, Mississippi R. 259; Tunstall *v.* Walker, 2 Smedes & Marshall, R. 638.

2 Story on Bills, § 297, 299; Chitty on Bills, ch. 10, p. 516, 524, 525, (8th edit.); Bayley on Bills, ch. 7, p. 274, 275, 280–283, (5th edit.); 3 Kent, Comm. Lect. 44, p. 107, 108, (5th edit.); Id. p. 109; McMurtrie *v.* Jones, 3 Wash. Cir. R. 206; Fisher *v.* Evans, 5 Binn. R. 541; Chapman *v.* Lipscombe, 1 John. R. 294; Browning *v.* Kinnear, Gow. R. 81; Firth *v.* Thrush, 8 Barn. & Cressw. 387; Clarke *v.* Sharpe, 3 Mees. & Wels. 166; Barnwell *v.* Mitchell, 3 Connect. R. 101; Safford *v.* Wyckoff, 1 Hill, N. Y. R. 11; Howard *v.* Ives, 1 Hill, N. Y. R. 263; Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Blakely *v.* Grant, 6 Mass. R. 386; Bateman *v.* Joseph, 12 East, R. 433; Preston *v.* Dawson, 7 Miller, Louis. R. 7; Bank of Utica *v.* Davidson, 5 Wend. R. 587; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 160; McLain *v.* Waters, 9 Dana, R. 55, 56. Mr. Bayley (on Bills, ch. 7, § 2, p. 281–283) says: "Where it is not known where a party lives, due diligence must in general be used to find out. And where such diligence is unsuccessful, it will excuse want of notice. But merely inquiring at the house, where a Bill is payable, is not due diligence for finding out an indorser. Inquiry should be made of some of the other parties to the Bill or Note, and of persons of the same name. Calling on the last indorser, and last but one, the day after the Bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving

place of business of the indorser cannot, upon such inquiries and diligence, be found, the reason is obvious, why notice should be dispensed with; for here the maxim forcibly applies, *Lex neminem cogit ad vana seu inutilia peragenda.*[1] Where the party has gone abroad, or removed to another state or country, and his new residence is unknown, and he has left no agent here, and no means of ascertaining his new residence, the law deems it unreasonable to compel the holder to follow the indorser to another state or country, or to search for him there, in order to give him notice, since he has thus voluntarily placed himself out of the reach of personal notice, and has left behind him no reasonable means of ascertaining his residence, and no agent charged with authority to receive it here.[2] *A fortiori*, the holder is not bound to make search, or to institute inquiries all round the world, for an absentee, who has absconded or abandoned his home, leaving no traces behind him to mark out his future contemplated residence.[3]

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the drawer notice, may be sufficient. But if a party, when he passes a Bill or Note, decline saying where he lives, and undertake to call upon the acceptor to see if the Bill is paid, he cannot complain of want of notice. Where the residence of a party entitled to notice is unknown, and the person next to him upon the Bill or Note will give no information where he lives, a Note addressed to the former, if sent to the place where such latter person lives will be sufficient, though the application for information be made before the Bill or Note is due; especially, if the person applied to has acted in any respect, with regard to the Bill or Note, as agent for the party entitled to notice. And, if the holder employ an attorney to give notice, and the attorney after a lapse of time discover where the party lives, he may take a day to apprize the holder, and take his further directions, before he gives the notice." See also, Blakely *v.* Grant, 6 Mass. R. 386.

1 5 Co. R. 21; Wing. Max. 600; Branch's Max. 98.

2 See McGruder *v.* Bank of Washington, 9 Wheat. R. 598; Story on Bills, § 289, 297-299; Chitty on Bills, ch. 16, p. 505, 506, (8th edit.); Blakely *v.* Grant, 6 Mass. R. 386; McMurtrie *v.* Jones, 3 Wash. Cir. R. 206.

3 Chitty on Bills, ch. 7, p. 307, ch 8, p. 360, ch. 10, p. 485, (8th edit.);

§ 317. But if the party has gone abroad, and has left his family, at his residence at home, notice should be left at his residence, if it is known, or can by reasonable inquiries be found out.[1] If, under the like circumstances he has an agent here authorized to receive the notice, who is known, or can by reasonable inquiries be found out, notice should be left with such agent.[2] If the party has removed abroad, and his new domicil is known, or can by reasonable diligence be ascertained, notice should be sent to him by the due and regular conveyance.[3]

Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652; S. C. 2 Esp. R. 516; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100.

[1] Chitty on Bills, ch. 10, p. 505, 506, (8th edit.); Cromwell *v.* Hynson, 2 Esp. R. 511. See Wharton *v.* Wright, 1 Car. & Kirk. 585.

[2] Ibid.

[3] Ante, § 316; Hodges *v.* Galt, 8 Pick. R. 251. See Rothschild *v.* Barnes, 2 (English) Jurist, 1084. We have already seen, that if the maker of a Note removes to another state, or to a foreign country, no presentment or demand is required to be made there upon him; but it is by law dispensed with. Ante, § 236; McGruder *v.* Bank of Washington, 9 Wheat. R. 598; Story on Bills, § 352, and note. The reason for this rule does not apply to the giving of notice, since that need not be personal, but may be by the mail, or other proper and usual conveyance. In McMurtrie *v.* Jones, 3 Wash. Cir. R. 206, 208, Mr. Justice Washington said: "As to the question of notice, there is more difficulty. At the time the assignment was made to the plaintiff, the defendant resided in Philadelphia, as a boarder, at Mrs. Hand's. A few weeks before the Note became due, the defendant left Mrs. Hand's and went to New York, with an intention to embark for England, which he carried into execution. This was known to Longstreth, but it does not appear that it was known to Mrs. Hand, to the plaintiff, or his agent, Mr. Craig, or to any one else; and it is worthy of remark, that it is proved, that before this final removal, he was frequently absent from this city upon visits to the Eastern States. Generally speaking, notice to the indorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used, of which you are the proper judges. But, under all the circumstances of this case, it appears to the Court, that the notice left at the known place of residence of the defendant, before his final departure, was sufficient. The Court give no opinion respecting the custom which has been mentioned,

§ 318. The French Law seems to have adopted a similar doctrine as to notice, with the like exception, where the residence of the indorser is unknown. If due notice be not given, the indorser will be discharged from his liability, if his residence be known, with this qualification, that the holder is not prevented by irresistible force or casualty from giving it in due season. But as we have already seen, the indorser will, by the French Law, be discharged only to the extent of the damage, which he has received from the want of notice.[1] But if the residence of the indorser is unknown, and cannot be ascertained by reasonable inquiry, that will entirely supersede the necessity of any notice to him.[2]

§ 319. In the next place, within what time notice is to be given, in order to charge the indorser? And this may be resolved into the general principle, that notice must in all cases, where it is proper and necessary, be given within a reasonable time.[3] But then, this leaves the inquiry open, what is a reasonable time, or, in other words, how is it to be measured and ascertained? To such an inquiry, the only answer, which can be given, is, that it must depend upon the circumstances.[4] In some particular classes of cases, a rule has been established, artificial it may be, but still established for the purpose of general notoriety and convenience. In other cases, not

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and respecting which some evidence has been given, as it does not appear to be sufficiently proved." See Story on Bills, § 297–299.

1 Ante, § 285.

2 Pardessus, Tom. 2 art. 434.

3 Story on Bills, § 285, 382; Id. § 284, 286; 3 Kent, Comm. Lect. 44, p. 104–106, (5th edit.); Darbishire *v.* Parker, 6 East, R. 1, 9; Scott *v.* Lifford, 9 East, R. 347; 3 Kent, Comm. Lect. 44, p. 105, 106, (5th edit.)

4 See Darbishire *v.* Parker, 6 East, R. 1, 9; Bancroft *v.* Hall, Holt, N. P. R. 476; Scott *v.* Lifford, 9 East, R. 347; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543.

falling within these classes, it is difficult to lay down any general rule, and every case must be decided upon its own circumstances. The principal classes of cases, in which a fixed rule is established, are (1.) First, Where the holder and the indorsers, entitled to notice, reside in the same town or city; (2.) Secondly, Where they reside in different towns or cities.

§ 320. Let us, then, in the first place, consider the rule, where both parties, the holder and the indorser, reside in the same town or city. In such a case, it is the duty of the holder to give notice to the indorser, at farthest, on the next day after the dishonor, at the maturity of the Note, takes place, early enough to enable the indorser to receive it on the same day, either personally or at his domicil or at his place of business.[1]

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[1] Bayley on Bills, ch. 7, § 2, p. 268, (5th edit.); Darbishire *v.* Parker, 6 East, R. 3, 9; Story on Bills, § 288-290, 382; Chitty on Bills, ch. 10, p. 513, 514, 518, (8th edit.); Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Geill *v.* Jeremy, cited in Chitty on Bills, ch. 10, p. 518, (8th edit.) in note; S. C. Mood. & Malk. R. 61; Ireland *v.* Kip, 10 John. R. 490; S. C. 11 John. R. 231; Cayuga County Bank *v.* Bennett, 5 Hill, N. Y. R. 236. Mr. Chitty lays down the rule, that if both parties reside in or near the same town or city, notice is to be given in the manner stated in the text. His language is: "In all these cases, it suffices to cause notice to be received on the next day, by the preceding indorser, when resident in or near the same place; and where the parties do not reside in or near the place of the dishonor, it suffices to forward notice by the general post that goes out on the day after the refusal, or if there be no post on that day, then on the third day, though thereby the drawer or indorser may not, in fact, receive notice till the third day, or sometimes, according to the course of the post, not until the fourth or even subsequent day. The reason why it has been decided, that it shall in no case be necessary to give notice on the day of the dishonor, or on the same day when an indorser receives notice, although the indorser may even live in the same street as the holder, and although the post may go out on the same day, and not on the next, is to prevent nice and difficult inquiries, whether or not, in this or that particular case, the holder could conveniently have given notice on the same day, or whether the pressure of other business did not prevent him from so

Notice will, indeed, be good, if given on the same day of the dishonor, if it be after, but not if it be before,

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doing, the affirmative or negative of which might be in the knowledge only of the holder himself, or might become a very critical inquiry, and be very difficult and uncertain in legal proof. Another reason is, that the holder ought not to be required, omissis omnibus aliis negotiis, to occupy himself, immediately in forwarding notice to the prior parties, when, by delaying that step till the next morning, he would, after the press of other business had subsided, have, in the evening, or early the next morning, before his general business commences, time to look into his accounts with the other parties, and to consider his best steps to obtain payment from them, and to ascertain their precise residences, and to prepare and forward, either by hand or by such next day's post, a proper notice to all the parties against whom he means to proceed to enforce payment." Chitty on Bills, ch. 10, p. 513, 514, (8th edit.); Id. 515, 516. Probably by "in or near the same place," he had in his mind cases, where the residence was near to the town or city, and where no post or mail went, or post-office was kept, in the ordinary course of things, and not cases of residence in towns contiguous to each other, where there was a regular post-office in each. See Laporte *v.* Landry, 17 Martin, R. 359; Lanusse *v.* Masaicott, 3 Martin, R. 261; Carson *v.* Bank of Alabama, 4 Alab. R. 148; Ransom *v.* Mack, 2 Hill, N. Y. R. 587, 591. In this last case, Mr. Justice Bronson, in delivering the opinion of the Court, said: "The rule formerly was, that notice of the dishonor of a Bill or Note must be served personally on the drawer or indorser, or be left at his dwelling-house or place of business; and that rule still prevails in this country when the party to be charged resides in the same place where the presentment or demand is made. Ireland *v.* Kip, 10 John. R. 490; S. C. 11 John. R. 231; Smedes *v.* Utica Bank, 20 John. R. 372; Louisiana State Bank *v.* Rowel, 18 Martin, Louis. R. 506; Laporte *v.* Landry, 17 Martin, Louis. R. 359; Clay *v.* Oakley, Id. 137; Shepard *v.* Hall, 1 Connect. R. 329. See, also, Hartford Bank *v.* Stedman, 3 Connect. R. 489; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578. But where the drawer or indorser resides in a different place from that in which the presentment or demand is made, the old rule, which required personal service, has been relaxed, and it is now well settled, that notice may be sent by mail. The only difficulty arises from the fact, that the defendant resided in the same town, though at the distance of seven miles from the bank, where the Note was made payable. In Ireland *v.* Kip, the indorser resided at Kip's Bay, within the corporate limits of the city of New York, where the demand was made, but at the distance of three and a half miles from the New York post-office, where he received his letters. There was no post-office at Kip's Bay, and notice left at the city post-office was held not to be sufficient. The service should have been personal, or by leaving the

the presentment and dishonor.[1] But it is not indispensable, that it should be given on the same day. It will be sufficient, in all cases, if given on the next day;[2] for

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notice at the indorser's dwelling-house or place of business. The rule laid down in that case has never been, and should not be applied, without some qualification, to our large country towns, which often have more than one post-office, or where, if they have but one, a portion of the inhabitants live so far from it, that they usually receive their letters and papers through a neighboring office in another town. Notice may, I think, always be sent through the post-office, wherever there is a regular communication by mail between the place of presentment or demand and the office where the person to be charged usually receives his letters and papers. In Ireland *v.* Kip, the notice was not left in the New York office to be transmitted by post to another office, but to remain there until called for; and such was also the case in all the other instances where that mode of service has been held to be insufficient. In Laporte *v.* Landry, it was said by Martin, J., that the post-office was not a legal place of deposit for notices; but that service in that mode was sufficient, 'where notice may be conveyed by mail.' And in Louisiana State Bank *v.* Rowel, the rule was laid down by Porter, J., that mail service is good, 'when the indorsers live at such a distance that their residence is nearer another post-office than that where the holder lives.' The corporate limits of our cities and towns have, I think, less to do with this question than the mail arrangements of the general government, and the business relations of our citizens. Whether mail service is good or not does not depend upon the inquiry, whether the person to be charged resides within the same legal district; but upon the question, whether the notice may be transmitted by mail from the place of presentment or demand to another post-office, where the drawer or indorser usually receives his letters and papers. In this case, although the defendant lived in the same town where the demand was made, and there was but one post-office in that town; yet, as he lived remote from the Sacket's Harbor office, and there was another office in his vicinity to which he usually resorted for letters and papers, there can, I think, be no doubt that notice might have been well served by mail."

1 Bayley on Bills, ch. 7, § 2, p. 267, 268, (5th edit.); Chitty on Bills, ch. 8, p. 367, (8th edit.); Id. ch. 9, p. 432; Id. ch. 10, p. 513; Story on Bills, § 290, 382; Burnbridge *v.* Manners, 3 Camp. R. 193; Ex parte Moline, 19 Ves. 216; Clowes *v.* Chaldecott, 7 Law Journ. 147, cited in Chitty on Bills, p. 800, (8th edit.); Shed *v.* Brett, 1 Pick. R. 401; Bussard *v.* Levering, 6 Wheat. R. 102; Lindenberger *v.* Beall, 6 Wheat. R. 104.

2 Bayley on Bills, ch. 7, § 2, p. 268, 271, (5th edit.); Smith *v.* Mullet, 2 Camp. R. 208; Darbishire *v.* Parker, 6 East, R. 1, 9; Scott *v.* Lifford,

the holder is not bound to any diligence more strict, since that would be to require him to devote himself exclusively to the giving notices of the dishonor, *omissis omnibus aliis negotiis.*[1]

§ 321. When it is said, that the notice must, at farthest, be on the next day, this must be understood, not in its literal meaning, but as referring to the next business or secular day; for, if by the laws or usages of the country, the day be devoted to religious services, or public amusements and recreations, or be kept as a festival, or other holyday, it will be sufficient to give the notice on the succeeding day;[2] for such days are treated altogether as days, in which no person is bound to attend to any secular business; but is at liberty to devote himself exclusively to the religious services and observances, or the public festivities of the particular occasion.[3]

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9 East, R. 347; Langdale *v.* Trimmer, 15 East, R. 293; Grand Bank *v.* Blanchard, 23 Pick. R. 305; Lindo *v.* Unsworth, 2 Camp. R. 602; Whittlesey *v.* Dean, 2 Aiken, 263; Chick *v.* Pilsbury, 24 Maine, R. 458. But see Robbins *v.* Pinckard, 5 Smedes & Marshall, R. 51.

1 Ibid.

2 Howard *v.* Ives, 1 Hill, N. Y. R. 263; Haynes *v.* Birks, 3 Bos. & Pull. 599, 601; Wright *v.* Shawcross, 2 Barn. & Ald. 501, note; Bray *v.* Hadwen, 5 Maule & Selw. 68.

3 Martin *v.* Ingersoll, 8 Pick. R. 1; Bayley on Bills, ch. 7, § 2, p. 271, (5th edit.); Thomson on Bills, ch. 6, § 4, p. 489, 490, (2d edit.); Chitty on Bills, ch. 10, p. 519, 520, (8th edit.); Eagle Bank *v.* Chapin, 3 Pick. R. 180, 183, and note of Mr. Perkins, Ibid.; Story on Bills, § 288, 289, 293; Lindo *v.* Unsworth, 2 Camp. R. 602. Mr. Chitty (on Bills. ch. 10, p. 520, 8th edit.) says: "And at common law, and independently of that statute, if a notice be received on a Good Friday or Christmas day, it is not to be considered as received until the next day, and notice need not be forwarded by the party, who actually received it on one of those days, until the third day afterwards. And in the spirit of toleration, it has been held, that a Jew is not obliged to forward notice on the day of a great Jewish festival, during which it is unlawful for any persons of that persuasion to attend to any sort of business." Mr. Bayley (ch. 7, § 2, p. 271, 5th edit.) gives the result of the authorities in his usual succinct manner. He says: "Where a party receives notice on a Sunday, he is in the same

Thus, if the day, on which notice of the dishonor of the Note should ordinarily be given, should happen to fall on Sunday, or Christmas day, or Good Friday, or on any other day set apart by public authority, or usage, for a solemn fast, or thanksgiving, or it is otherwise consecrated to purposes not secular, or it is a known public holyday, (such as in America is the fourth of July,) in every such case, it will be sufficient to give the notice on the next succeeding day after Sunday, Christmas, or such other holyday. Indeed, the law has such a tender regard for the consciences of men, that, if, according to the religion of the holder, or other person, bound to give the notice, or the usages of his religious sect the day on which he is bound to give notice, falls on a day consecrated to religious purposes, such as Saturday among the Jews, in every such case it will be sufficient to give the notice on the next succeeding secular day. Hence, if the dishonor should take place on Friday, it will be sufficient, in the case of a Jew, that he gives the notice on the following Monday.[1]

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situation as if it did not reach him till the Monday; he is not bound to pay it any attention till the Monday; and has the whole of Monday for the purpose. So, if the day on which notice ought thus to be given be a day of public rest, as Christmas day or Good Friday, or any day appointed by proclamation for a solemn fast or thanksgiving, the notice need not be given until the following day. And it has been held, that where a man is of a religion which gives to any other day of the week, the sanctity of Sunday, as in the case of Jews, he is entitled to the same indulgence as to that day. Where Christmas day, or such day of fast or thanksgiving shall be on a Monday, notice of the dishonor of Bills or Notes, due or payable the Saturday preceding, need not be given until the Tuesday." He immediately adds, referring to the provisions of the Statute of 7 and 8 Geo. 4, ch. 15, § 1-4; "And Good Friday, Christmas day, and any day of fast or thanksgiving shall, from 10th April, 1827, as far as regards Bills and Notes, be treated and considered as Sunday. But these provisions do not apply to Scotland." See, also, Deblieux *v.* Bullard, 1 Rob. Louis. R. 66.

[1] Ibid.; Lindo *v.* Unsworth, 2 Camp. R. 602.

§ 322. Where both parties reside in the same town or city, it is not competent for the holder to put a letter containing the notice of the dishonor, into the post-office of the same town or city, directed to the indorser, and to insist upon the same as a sufficient notice; for the law requires, that the notice should be either personal, or at the domicil, or at the place of business of the indorser, so that it may reach him on the very day, on which he is entitled to notice.[1] If, indeed, being so put into the post-office, it nevertheless does in fact reach the indorser on the same day, it will, under such circumstances, be a sufficient notice.[2] But the fact must be brought home directly to the indorser; for it will not be presumed from the mere fact that he is accustomed to send to the post-office several times during the day.[3]

§ 323. There is an apparent exception to the general rule, which, however, is not in reality such, but falls within the general rule. It is this, that, where there is,

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[1] See Crosse *v.* Smith, 1 Maule & Selw. 545, 554; Williams *v.* Bank of U. States, 2 Peters, Sup. Ct. R. 100; Ireland *v.* Kip, 10 John. R. 490; S. C. 11 John R. 231; Smedes *v.* Utica Bank, 20 John. R. 372; Shepard *v.* Hall, 1 Connect. R. 329; Laporte *v.* Landry, 17 Martin, R. 359; McCrummen *v.* McCrummen, 17 Martin, R. 158; Pritchard *v.* Scott, 19 Martin, R. 492; Clay *v.* Oakley, 17 Martin, R. 137; Louisiana State Bank *v.* Rowel, 18 Martin, R. 506; Miranda *v.* City Bank, 6 Miller, Louis. R. 744; Porter *v.* Boyle, 8 Miller, Louis. R. 170; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 583; Story on Bills, § 284–286, 289, 290, 282; 3 Kent, Comm. Lect. 44, p. 105–107, (5th edit.); Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Sheldon *v.* Benham, 4 Hill, N. Y. R. 129; Cayuga County Bank *v.* Bennett, 5 Hill, N. Y. R. 236; Glenn *v.* Thistle, 1 Rob. Louis. R. 572; Manadue *v.* Kitchen, 3 Rob. Louis. R. 261; Seneca Co. Bank *v.* Neass, 5 Denio, R. 330; Kramer *v.* M'Dowall, 8 Watts & Sergeant, R. 138; Saul *v.* Brand, 1 Robinson, Louis. R. 95; Hoggatt *v.* Bingaman, 7 Howard, Mississippi R. 565.

[2] Ibid.

[3] Ibid.; Bank of U. States *v.* Corcoran, 2 Peters, Sup. Ct. R. 121.

as in large towns and cities, a letter-carrier, or, as he is often called, a penny post, who carries letters daily from the post-office, and delivers them at the houses or places of business of the parties, who are accustomed to receive their letters by him, there, if the notice be left at the post-office early enough in the day to go by such letter carrier, or penny post, on the same day to the party entitled to notice, it will be deemed sufficient; for, in such cases, the letter-carrier or penny post is treated as an agent for the purpose, because it is a usual mode of conveyance.[1]

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[1] Chitty on Bills, ch. 10, p. 504, 508, 513, (8th edit.); Id. p. 515, 516, 518; Story on Bills, § 289, 291, 382; Scott *v.* Lifford, 1 Camp. R. 246; S. C. 9 East, R. 347; Smith *v.* Mullet, 2 Camp. R. 208; Hilton *v.* Fairclough, 2 Camp. R. 633; Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Edmonds *v.* Cates, 1 (English) Jurist, 183; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 583, 584; Ireland *v.* Kip, 10 John. R. 490; S. C. 11 John. R. 231; 3 Kent, Comm. Lect. 44, p. 105 - 107, (5th edit.); Thomson on Bills, ch. 6, § 4, p. 476, 477, (2d edit.) — Mr. Chitty (p. 504) says: "Notice of the dishonor of a Bill sent by the two-penny post is sufficient, where the parties live within its limits, whether near or at a distance from each other, but it must be proved, that the letter, conveying the notice, was put into the receiving-house on the next day at such an hour, that, according to the course of the post, it would be delivered to the party to whom it is addressed on the day when he was entitled to receive notice of the dishonor." And again, in p. 515, and 516, he says: "But there is a very material distinction in the time of giving or forwarding notice in cases where the parties reside in or near the same town, and when notice may be readily given on the day after the dishonor or notice of it, either verbally or by special messenger, or by local post, and cases where the parties reside at a distance, and when the ordinary mode of communication is by general post. Thus, when the parties reside in the same town, the holder, or other person to give the notice, must, on the day after the dishonor, or on the day after he received the notice, cause notice to be actually forwarded, by the post or otherwise, to his next immediate indorser, sufficiently early in the day, that the latter may actually receive the same before the expiration of the day; and, therefore, in London, if a letter, containing such notice, be put into the post-office after five o'clock in the afternoon of the second day, and in consequence, it is not received till the morning of the third day, the party who ought to have

§ 324. In the next place, where the holder and the indorser, entitled to notice, reside in different towns and cities. In such cases, the notice may be by the post, or by a special messenger, or by a private hand, or by any other suitable and ordinary conveyance.[1] The usual

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actually received the notice on the second day will be discharged. In London, the local post (usually termed the two-penny post) forwarded letters to be delivered in the metropolis three times within the same day, namely, at eight, two, and five o'clock; and letters put into any receiving-house, before either of those hours, ought regularly to be delivered on the same day; but when out of the metropolis, and within ten miles, there are only two deliveries in each day to and from the metropolis, and a letter put into any proper office in London, before five o'clock in the afternoon, will be delivered on the same day, at any place within such distance of ten miles; and a letter put into a country office within that distance, before four o'clock, ought properly to be delivered in London on the same day. The holder, or party forwarding the notice, may give it verbally, or he may put a letter in the two-penny post, directed even to an indorser who resides in the same street. If he send notice by a private hand, it must be given or left at the indorser's residence before the expiration of the day; if to a banker, during the hours of business; but to another person the hour is not material. If, by any irregularity in the post-office, a letter put in in due time be not delivered till the third day, it should seem, that such laches will not prejudice." In Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 583, Mr. Justice Thompson, in delivering the opinion of the Court, said: "It seems at this day to be well settled that, when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed by uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house, or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling or place of business be within the district of a letter carrier, a letter, containing such notice addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming, that the notice will be brought home to the party without unreasonable delay."

[1] Chitty on Bills, ch. 10, p. 518, (8th edit.); Bayley on Bills, ch. 7, § 2;

mode, where the parties reside in different towns or cities, (which will presently come more fully under our consideration,) is, to send the notice by the post, where both the parties reside in places within the same state or country, between which the ordinary communication is by the post.[1] Wherever the post is thus resorted to, the general rule, which seems at first to have been adopted, was to require, that notice should be sent by the next post after the holder, or other party, who was bound to give notice, had himself received knowledge of the dishonor; at least, this was the rule applied, whenever a reasonable time remained to prepare and send the notice, between the arrival of the knowledge of the dishonor, and the going out of the post afterwards on the same day; that is to say, it was required to be sent, if not by the next possible post, at least by the next practicable post.[2] But this rule was soon

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Crosse *v.* Smith, 1 Maule & Selw. 545, 554: Bancroft *v.* Hall, Holt, N. P. R. 476; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582; Senaca Co. Bank *v.* Mass. 5 Denio, R. 330; Post, § 338.

[1] Chitty on Bills, ch. 10, p. 503, (8th edit.); Bussard *v.* Levering, 6 Wheat. R. 102; Munn *v.* Baldwin, 6 Mass. R. 316.

[2] Bayley on Bills, ch. 7, § 2, p. 268, (8th edit.); Malynes, B. 3, ch. 6, § 1; Marius on Bills, p. 24, (2d edit.); Id. p. 16, (edit. 1794,); Tindal *v.* Brown, 1 Term R. 167; Darbishire *v.* Parker, 9 East, R. 3-8. — In this last case, Lord Ellenborough said: "It comes to the point, whether I was right in telling the jury, that the plaintiffs had till the next day, after they received the notice of the Bill's being dishonored, to communicate that notice to the drawer; for it struck me, that if they were in time to give notice on the 13th at Liverpool, they had the whole of that day, and having sent a letter of advice by a private hand to the drawer, in time for him to have written by the post of that night to London, they might be considered to have used due diligence. There appears to me considerable difficulty in laying down any certain time within which notice must at all events be given. The general direction, indeed, of Marius and other writers, is to send notice of the dishonor of a Bill by the next post where the parties do not live in the same place; and the same was said in Tindal *v.* Brown; and yet, in that case, it was considered sufficient if notice were given the

found to be too narrow and limited for public convenience; and it was gradually enlarged. The established doctrine now is, that it is in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor; but the holder and other party is entitled to the whole of that day to prepare his notice, and it is sufficient, that the notice be put into the office early enough to go by the post of the succeeding day.[1] This rule equally applies, where

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next day, where the parties all lived in the same town. If notice must at any rate be communicated by the next post after it is received, it must often happen, that the party will not have a day, or any thing like a day, to give it in; for the post may go out immediately or very soon after the letter of advice arrives. There must, therefore, be some reasonable time allowed, and that, too, accommodating itself to other business and affairs of life; otherwise it is saying, that a man who has Bill transactions passing through his hands must be nailed to the post-office, and can attend to no other business, however urgent, until this is despatched. But if there be a reasonable time between the coming in and going out of the post on the same day, as in this case four or five hours may be contended to be, allowing for reasonable diligence in other concerns as well as in this, it would be a material question, if neatly raised, whether the party were bound to communicate by the next post the intelligence he had received by the post on the same day. I think, however, there is sufficient doubt in this case, whether reasonable diligence were used, to make it proper to send the case to be considered by another jury; for here the plaintiffs not only did not write by the next post of the same day, which went out after an interval of four or five hours, but they did not even write by the post of the next day, but relied on a private hand to carry the letter of advice, by which it was not in fact delivered until after the post hour of delivery in Liverpool." Story on Bills, § 288 — 290, 382, 383; Chitty on Bills, ch. 10, p. 510, (8th edit.); Id. p. 514, 515. See, also, Whitwell *v.* Johnson, 17 Mass. R. 449; Geill *v.* Jeremy, cited in Chitty on Bills, ch. 10, p. 518, note; 1 Mood. & Malk. 61; Lenox *v.* Roberts, 2 Wheat. R. 373; Whittlesey *v.* Dean, 2 Aiken, R. 263; Chick *v.* Pillsbury, 24 Maine R. 458; But see Robbins *v.* Pinckard, 5 Smedes *v.* Marshall, R. 51.

[1] Darbishire *v.* Parker, 6 East, R. 3, 8; Bayley on Bills, ch. 7, § 2, p. 268 - 270, (5th edit.); Chitty on Bills, ch. 10, p. 510, 519, 520, (8th edit.); Scott *v.* Lifford, 9 East, R. 347; Langdale *v.* Trimmer, 15 East, R. 231, 293; Bray *v.* Hadwen, 5 Maule & Selw. 68; Wright *v.* Shawcross, 2 Barn. & Ald. 501, note; Hawkes *v.* Salter, 4 Bing. R. 715;

there are two posts, which go out on the same day; for, in such a case, it is sufficient, if the notice is put

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Smith *v.* Mullett, 2 Camp. R. 208; Poole *v.* Dicas, 1 Scott, R. 600; Geill *v.* Jeremy, 1 Mood. &. Malk. 61; Whitewell *v.* Johnson, 17 Mass. R. 449, 454; Seaver *v.* Lincoln, 21 Pick. R. 267; Eagle Bank *v.* Chapin, 3 Pick. R. 180, 183; United States *v.* Barker's Adm'x, 4 Wash. Cir. R. 464; S. C. 12 Wheat. R. 559; Story on Bills, § 288, 289, 382, 383. — The progress of opinion may be traced in the latter authorities with great accuracy. In Bray *v.* Hadwen, (5 Maule & Selw. 68) Lord Ellenborough said: "It has been laid down, I believe since, the case of Darbishire *v.* Parker, as a rule of practice, that each party, into whose hands a dishonored Bill may pass, should be allowed one entire day for the pnrpose of giving notice; a different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove, that he could not reasonably be expected to send notice by the same day's post which brought it. This rule is, I believe, in conformity with what Marius states upon the subject of notice, and it has been uniformly acted upon at Guildhall, by this Court, for some time. It has, moreover, this advantage, that it excludes all discussions as to the particular occupations of the party on the day. As to the objection, that notice was not given by the holders immediately to the defendant, it was given by one, who was an indorser, and not by a stranger, which is enough to satisfy the allegation, that the defendant had notice." In Williams *v.* Smith, 2 Barn. & Ald. R. 496, 500, Lord Tenterden said: "It is of the greatest importance to commerce, that some plain and precise rule should be laid down to guide persons in all cases, as to the time within which notices of the dishonor of Bills must be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonor. And in that sense the passage cited from the very learned treatise on Bills of Exchange must be understood, as well as the judgment of Lord Mansfield in Tindal *v.* Brown. If, instead of that rule, we were to say, that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situation of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated. In its application to the present case, the result is, that the plaintiff has been guilty of no laches, and that he is entitled to our judgment. It appears, that, if these Notes had been transmitted direct to Newbury by the post, they would not have been paid; for they discontinued payment there on Monday morning; and though the circumstance of one set of halves being sent by the coach caused their arrival in London two hours later, still, that being a reasonable precaution, the plaintiff had a right to send them by that conveyance.

into the post early enough to go by either post of that day, however late in the day one of them may be; for the fractions of the day are not counted.[1]

§ 325. The doctrine thus laid down may, perhaps, admit, if it does not require, some other qualifications and limitations. Thus, for example, in some towns and cities, the post for the succeeding day goes out very early in the morning, or soon after midnight, and the mail is made up and closed sometimes at an early hour, and sometimes at a late hour, of the preceding evening. In such a case, the question might arise, whether, if the notice was not put into the post-office until after the mail was closed on the evening of the day of the dishonor, the notice would be too late, or whether the holder or other party would be entitled to the next day to prepare and send his notice by the next succeeding post. No decision upon this point seems to have occurred in England. But it would deserve consideration, whether, under such circumstances, the second post might not be deemed the next practicable post, in the sense of the rule; for, other-

There is a difference between this case and that of a Bill of Exchange, payable to order, for such Bill may be specially indorsed, and no risk incurred by sending it then by the post. But, here, it would not have been so safe to have transmitted Notes payable to the bearer on demand by that conveyance. Then, in addition to this, it appears, that the defendant has not been in the least degree prejudiced by this mode of conveyance having been adopted. On the whole, therefore, the plaintiff is entitled to our judgment." See, also, 3 Kent, Comm. Lect. 44, p. 106, 107, (5th edit.); Hilton *v.* Shepherd, 6 East, R. 14, note; Townsley *v.* Springer, 1 Miller, Louis. R. 125; Ind. 515; Hubbard *v.* Troy, 2 Iredell, N. C. R. 134; Bank of U. States *v.* Merle, 2 Rob. Louis. R. 117; Commercial Bank of Natchez *v.* King, 2 Rob. Louis. R. 243; Wample *v.* Dangerfield, 2 Smedes & Marshall, R. 445.

[1] Whitewell *v.* Johnson, 17 Mass. R. 449, 454; Howard *v.* Ives, 1 Hill, N. Y. R. 263. Contra, Bank of U. States *v.* Merle, 2 Rob. Louis. R. 117.

wise, the holder, or other party, could not have the entire day of the dishonor to prepare his letter, or until the next day to put it in the post.[1] *A fortiori*, there would be strong grounds to contend for such an extension of the rule, where there is not a reasonable time left, between the knowledge of the dishonor and the closing of the mail, which is to go out on the next morning, to prepare such notice, without neglecting all other engagements and business.[2]

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1 Demonds *v.* Kirkman, 1 Smedes & Marsh. R. 644.

2 Story on Bills, § 288. To such a case, the language of Mr. Justice Lawrence, in Darbishire *v.* Parker, 6 East, R. 3, 9, 10, seems properly to apply. He there said ; " The question in this case is not, whether notice of the dishonor of a Bill must be communicated by the next post after it is received ? but, whether the party may omit to make such communication for the two next posts ? for here it appears, that no notice was given to the drawer till after the time when the second post would have conveyed it. Whenever the general question shall arise, it will be fit, according to what was said by Lord Mansfield in Tindall *v.* Brown, to lay down, with as much certainty as possible, some general rule with respect to the reasonableness of notice. The general rule, as collected from that and other cases, seems to be, with respect to persons living in the same town, that the notice shall be given by the next day ; and, with regard to such as live at different places, that it shall be sent by the next post ; but, if in any particular place the post should go out so early after the receipt of the intelligence as that it would be inconvenient to require a strict adherence to the general rule, then, with respect to a place so circumstanced, it would not be reasonable to require the notice to be sent till the second post. Considering the immense circulation of paper in this kingdom, it is very material to have some general rule by which men may know how they are to act in these cases ; leaving parties in particular cases, where compliance with such rule cannot be reasonably expected, to account for their non-compliance with the strict rule. When it is said to be strange, that notice given the next day to persons living in the same town should be sufficient, and yet that notice should be required to be sent by the next post on the same day to persons living at another place, it must be considered not merely when it is sent, but when it is received by the persons who are to act upon it. Marius, and other general writers, say, that the notice ought to be transmitted by the next post after it is received ; and what was said by some of the Judges in Tindal *v.* Brown, and in other cases, agrees with this. As to whether reasonable notice be

§ 326. The benefit of this rule is not confined to a mere holder for value, but it applies, also, to a holder,

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a question of law or fact, it must be recollected, that the facts stated in the report of Tindal *v.* Brown were afterwards found in a special verdict, in which the jury did not find whether the notice were reasonable or not; on which special verdict this Court gave judgment for the plaintiff, and that judgment was unanimously confirmed in the Exchequer Chamber.'' The very point seems to have been adjudged by the Supreme Court of the United States in Bank of Alexandria *v.* Swann, 9 Peters, R. 33. Mr. Justice Thompson, in delivering the opinion of the Court upon that occasion, said; "The general rule, as laid down by this Court in Lenox *v.* Roberts, 2 Wheat. 373, 4 Cond. R. 163, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that, according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half past eight o'clock, P. M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock, A. M.; and it is argued, on the part of the defendant in error, that, as demand of payment was made before three o'clock, P. M., notice of the non-payment of the Note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the Note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the Bank of Columbia *v.* Lawrence, 1 Peters, 583, it is said by this Court to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and, although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice Hosmer, in the case of the Hartford Bank *v.* Stedman and Gordon, 3 Connect. R. 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, who acts as a mere agent for another person. Thus, if a note has been transmitted by the holder to an agent or banker, for the purpose of procuring payment thereof at its maturity, such agent or banker will be entitled to the same time to give notice of the dishonor to his principal or customer, as if he were himself the real holder for value; and the principal or customer will be entitled, after he receives such notice from his agent or banker, to the like time to communicate notice to the antecedent parties, whom he means to charge, as if he were an indorser, and had received the notice from the real holder for value, and not from his own agent or banker.[1] In short, for all the purposes of the law, the agent or banker is, in such cases, treated as substantially a distinct and independent holder. Indeed, upon any other ground,

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therefore, that the notice sent by the mail, the next day after the dishonor of the Note, was in due time." Mr. Chitty uses language not quite so explicit. He says; "When the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day; but he is not legally bound, on account of there being no post on the day after he receives notice, to forward it on the very day he receives it." Chitty on Bills, ch. 10, p. 517, 518, (8th edit.) See, also, Story on Bills, § 288 – 290, 382, 383; Wright *v.* Shawcross, 2 Barn. & Ald. 501; Bray *v.* Hawden, 5 Maule & Selw. 68.

[1] Bayley on Bills, ch. 7, § 2, p. 272, 273, (5th edit.); Chitty on Bills, ch. 10, p. 521, 522, (8th edit.); Story on Bills, § 292; Haynes *v.* Birks, 3 Bos. & Pull. 599; Clode *v.* Bayley, 7 (English) Jurist, 1092; Scott *v.* Lifford, 9 East, R. 347; Langdale *v.* Trimmer, 15 East, R. 291; Howard *v.* Ives, 1 Hill, N. Y. R. 263; Colt *v.* Noble, 5 Mass. R. 167; Church *v.* Barlow, 9 Pick. R. 547, 549; Ogden *v.* Dobbin, 2 Hill, N. Y. R. 12; United States Bank *v.* Goddard, 5 Mason, R. 366; Mead *v.* Engs, 5 Cowen, R. 303; 3 Kent, Comm. Lect. 44, p. 108, (5th edit.) See Sewall *v.* Russell, 3 Wend. R. 276; Bank of Orleans *v.* Smith, 3 Hill, N. Y. R. 560; Bank of U. States *v.* Davis, 2 Hill, N. Y. R. 451.

it would be impracticable for the real holder, in many cases, to make due presentment, and give due notice of the dishonor of the Note, so as to charge the antecedent indorsers, especially if he lived at a distance from the place, where the presentment and dishonor took place. And for the purposes of this rule and within its scope, are deemed all cases, where a bank has different branches established in different places, and a Bill is sent from the one to the other for collection; for in such cases each of the branches will be deemed to be independent indorsers, and each be entitled to the usual notice of dishonor, and entitled to give notice to paramount parties accordingly.[1]

§ 327. We have said, that the notice, when sent by the post, should be sent by the post of the next day, or by the next post after the day of the dishonor, or notice of the dishonor.[2] And this is regularly true, where the residence of the party entitled to notice is known; but, as we shall presently see, more time is allowed, where the residence is unknown, and inquiries are necessary to be made to ascertain it, before any letter can safely be put into the post.[3] At present let us refer to the language, that it is sufficient for the notice to be sent by the next post. And this is most material to be considered, in cases, where the post does not go out every day, but only every other day, or every third day, or even once a week only, as formerly happened in many of the country towns in the United States, and now exists as between sparse and scattered settlements. In all cases of this sort, it will be sufficient, that a letter is

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[1] Clode *v.* Bayley, 12 Mees & Wels. 51.
[2] Ante, § 324.
[3] Post, § 335.

put into the post-office early enough after the day of the dishonor of the Note to go by the next post, whether it be a bi-weekly, or tri-weekly, or a mere weekly conveyance, if it be the ordinary mode of communication.[1] Hence, if the dishonor, or notice thereof to the holder, is on Monday, and the post does not again go out until Wednesday to the place, where the party entitled to notice lives, it will be sufficient, that it is put into the post-office early enough to go by the post of that day.

§ 328. And here, again, it is important to state, that, if the notice be put into the post-office to go by the proper post, it is wholly immaterial to the rights of the holder, whether it actually goes by the proper post, or whether it ever reaches the party entitled to notice, or not. All that the law requires of the holder is due diligence to send the notice within the proper time; and he has done his whole duty, when he puts it into the proper post-office in due season, and it is properly directed. The holder has no control over the acts, or operations, or conduct, of the officers of the post-office, and is not responsible for the accidents, or neglects, which may prevent a due delivery of the notice to the party entitled to notice.[2]

§ 329. We have already seen, that, where there are joint indorsers entitled to notice, notice to one is not

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[1] Post, § 331, note.

[2] Story on Bills, § 300; Chitty on Bills, ch. 10, p. 503, 504, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 279, (5th edit.); Saunderson *v.* Judge, 2 H. Black. 509; Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Kufh *v.* Weston, 3 Esp. R. 54; 3 Kent, Comm. Lect. 44, p. 106, 107, (5th edit.); Shed *v.* Brett, 1 Pick. R. 401; Munn *v.* Baldwin, 6 Mass. R. 316; Jones *v.* Wardell; 6 Watts & Serg. 398; Smyth *v.* Hawthorn, 3 Rawle, R. 356; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 583; Thompson on Bills, ch. 6, § 4, p. 475, (2d edit.); Stocken *v.* Collin, 7 Mees. & Wels. R. 515; Woodcock *v.* Houldsworth, 16 Ibid. 124.

notice to all; but that each is entitled to a separate and independent notice, in order to bind him, exactly as if he were the sole and single indorser.[1] The result of this rule is, that where joint indorsers reside in different towns and cities, at different distances from the place of the dishonor, or place, where the notice thereof is dated, or to be given, the notice may reach one of the joint indorsers long before it does the other. But this circumstance will make no difference in the rights of the holder; for he has performed his whole duty, and exercised reasonable diligence, and his rights are complete and perfect, although the notice should not have reached both, or even either of the joint indorsers.[2]

§ 330. The holder may, when the Note has been dishonored, either resort to his immediate indorser, and then he must give him notice within the proper time, or he may resort to any, or all, of the other indorsers, in which case he must give them notice respectively, in the same manner, as if each were the sole indorser; for the holder is not entitled to as many days to give notice, as there are prior indorsers; but each indorser has his own day.[3] If, therefore, there are five indorsers, and the holder should not give notice to the first indorser until five days, that will be too late; and, unless some subsequent indorser has given him notice in due time, who has himself received due notice, such first indorser will be discharged from all liability to the

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[1] Ante, § 308; Shepard *v.* Hawley, 1 Connect. R. 360; Bank of Chenango *v.* Root, 4 Cowen, R. 126; Willis *v.* Green, 5 Hill, N. Y. R. 232.

[2] Ante, § 328.

[3] Bayley on Bills, ch. 7, § 2, p. 275, (5th edit. 1830); Chitty on Bills, ch. 10, p. 522, (8th edit. 1833); Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Marsh *v.* Maxwell, 2 Camp. R. 210; Turner *v.* Leech, 4 Barn. & Ald. 451; Etting *v.* Schuylkill Bank, 2 Barr. R. 355.

holder.[1] In this respect, the French Law seems to be in entire conformity to ours.[2]

§ 331. Hitherto, we have spoken principally of the notice of the dishonor, to be given by the holder of the Note to the indorser. But in many cases there are numerous successive indorsers on the Note, each of whom is, or may be, entitled to notice, and each of whom is bound equally to give notice to the antecedent indorsers, who are liable to indemnify him, if he should pay the Note after due notice of the dishonor from the holder. The question, in such a case, naturally arises, within what time, after receiving such notice of the dishonor from the holder, is the indorser bound to give notice thereof to the antecedent indorsers upon the Note, whom he means to hold liable to reimburse him? The general rule, now firmly established, is, that each successive indorser, who receives notice of the dishonor, is entitled to the whole day, on which he receives the notice, and need not give any notice to the antecedent indorsers until the next day after receiving the notice, even when they live in the same town or city with him; and, if they live in different towns and cities, and he is to give notice by the post, it will be sufficient, if he sends the notice by the post of the next day after he has himself received notice of the dishonor.[3] Thus, for ex-

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1 Bayley on Bills, ch. 7, § 2, p. 275, (5th edit. 1830); Chitty on Bills, ch. 10, p. 522, 527, (8th edit. 1833); Marsh *v.* Maxwell, 2 Camp. R. 210; Dobree *v.* Eastwood, 3 Carr. & Payne, R. 250; Turner *v.* Leech, 4 Barn. & Ald. 451; U. States Bank *v.* Goddard, 5 Mason, R. 366. See Story on Bills, § 303, 304; Ante, § 301 - 303.

2 Pardessus, Droit Comm. Tom. 2, art. 429, 430; Chitty on Bills, ch. 10, p. 523, note (*a*). See Code de Comm. art. 165; Pothier, De Change, n. 148, 152, 153.

3 Bayley on Bills, ch. 7, § 2, p. 268 - 270, (5th edit.); Chitty on Bills, ch. 10, p. 513 - 515, 518, 520, 521, (8th edit.); Story on Bills, § 291,

ample, if there are five indorsers, the holder himself, if he means to give notice to all of them, must give it by

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294; Hilton *v.* Shepherd, 6 East, R. 14; Smith v. Mullett, 2 Camp. R. 205; Bray *v.* Hadwen, 5 Maule & Selw. 68; Wright *v.* Shawcross, 2 Barn. & Ald. 501; Hawkes *v.* Salter, 4 Bing. R. 715; 3 Kent, Comm. Lect. 44, p. 106, 107, (5th edit.); Lenox *v.* Roberts, 2 Wheat. R. 373; Bank of Alexandria *v.* Swann, 9 Peters, Sup. Ct. R. 33; Howard *v.* Ives, 1 Hill, N. Y. R. 263. — Mr. Chitty, (p. 520, 521,) on this subject, says: "It is usual for the holder only to give notice to the person, from whom he immediately received the Bill or Note, especially if he is ignorant of the residence of the other parties; and, if so, his neglect to give notice to the other prior indorsers, and to the drawer, cannot, on any sound principle, deprive either of the indorsers of the right to proceed against the person who indorsed to him, and all prior parties, provided he, in his turn, has duly forwarded notice. The rule is, therefore, clearly settled, that each party to a Bill or Note, whether by indorsement or mere delivery, has, in all cases until the day after he has received notice to give or forward notice to his prior indorser, and so on till the notice has reached the drawer. And this rule is so strongly fixed, that a party receiving notice of the dishonor of a Bill need not give or forward notice to the party immediately before him till the next post after the day, on which he himself received notice, although he might easily have forwarded it on that day, and although there is no post on the day following. The reasons on which this rule is founded are the same as those applicable to the first notice of dishonor. Therefore, where a Bill of Exchange passed through the hands of five persons, all of whom lived in London, or the neighborhood, and the Bill, when due, being dishonored, the holder gave notice on the same day to the fifth indorser, and he, on the next day, to the fourth, and he, on the next day, to the third, and he on the next day, to the second, and he, on the same day, to the first, the Court were of opinion, on a case finding these facts, that due diligence had been used; indeed, both the first and last notices were given a day sooner than was requisite. The usual expression is, 'each indorser has a day,' and this is strictly correct when all the parties live in London; but where they reside in different distinct parts of the country, then, according to the course of the past, frequently several days may intervene between each." The whole doctrine on this subject is very accurately and succinctly summed up in Kent's Comm. Vol. 3, Lect. 44, p. 105, (5th edit.) It is there said: "The elder cases did not define, what amounted to due diligence in giving notice of the dishonor of a Bill, with that exactness and certainty, which practical men and the business of life required. According to the modern doctrine, the notice must be given by the first direct and regular conveyance; and if to the drawer, it must be according to the law of the place where the Bill the post of the next day, or by the next post after the dishonor, or after his own knowledge of the dishonor; and each of these indorsers, in succession, is entitled to

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was drawn, and if to the indorsers, according to the law of the place where the respective indorsements were made. This means the first mail that goes after the day next to the third day of grace; so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may, indeed, be sent on Thursday, but must be put into the post-office, or mailed, on Friday, so as to be forwarded as soon as possible thereafter; and if the parties live in the same town, the rule is the same, and the notice must be sent by the penny post, or placed in the office on Friday. The law does not require excessive diligence, or that the holder should watch the post-office constantly, for the purpose of receiving or transmitting notices. Reasonable diligence and attention is all that the law exacts; and it seems to be now settled, that each party successively, into whose hands a dishonored Bill may pass, shall be allowed one entire day for the purpose of giving notice. If the demand be made on Saturday, it is sufficient to give notice to the drawer or indorser on Monday, and putting the notice by letter into the post-office is sufficient, though the letter should happen to miscarry. If the holder uses the ordinary mode of conveyance, he is not required to see that the notice is brought home to the party. Nor is it necessary to send by the public mail. The notice may be sent by a private conveyance, or special messenger, and it would be good notice, though it should happen to arrive, on the same day, a little behind the mail. Where the parties live in the same town, and within the district of the letter-carrier, it is sufficient to give notice by letter through the post-office. If there be no penny post that goes to the quarter where the drawer lives, the notice must be personal, or by a special messenger sent to his dwelling-house or place of business, and the duty of the holder does not require him to give notice at any other place. The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still the notice may be left there. If the parties live in different towns, the letter must be forwarded to the post-office nearest to the party, though, under certain circumstances, a more distant post-office may do; but the cases have not defined the precise distance from the post-office at which the party must reside, to render the service of notice through the post-office good. The law does not presume, that the holder of the paper is acquainted with the residence of the indorsers; and if the holder or notary, after diligent inquiry as to the residence of the indorser, cannot ascertain it, or mistakes it, and gives the notice a wrong direction, the remedy against the indorser is not lost."

the whole of the day, on which he receives notice of the dishonor, and until the post of the next day, or the next post thereafter, to give the like notice to the antecedent indorsers. So that, if the fifth indorser receives notice on Monday, it is sufficient for him to give notice to the fourth indorser and the preceding indorsers on Tuesday, and for the fourth indorser, if he receives the notice on Wednesday, to give notice to the third indorser and the preceding indorsers on Thursday; and, if the third indorser receives the notice on Friday, it is sufficient for him to give notice to the second indorser and the preceding indorser on Saturday; and, if the second indorser gets the notice on Sunday, or Monday, it will be sufficient for him to give notice to the first indorser on Tuesday following. In this way, in point of fact, a week or more may elapse between the first and the last notice; and yet there will be no laches in any of the indorsers, but each will have done his duty, and will be entitled to reimbursement, if he pays the Note.

§ 332. Great care should, however, be taken by each successive indorser, in cases of this sort, not to miss a day in duly giving or forwarding notice to the antecedent parties; for, if he should miss a day without any legal excuse for the omission, a link in the regular chain will be broken; and all the prior parties will be discharged from their obligations to him, unless, indeed, they shall have received due notice from some other party to the Note, to whom such indorser is liable.[1] It is no excuse for not giving notice the next day after a

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[1] Chitty on Bills, ch. 10, p. 522, 523, (8th edit.); Dobree *v.* Eastwood, 3 Carr. & Payne, R. 250; Marsh *v.* Maxwell, 2 Camp. R. 210, note; Turner *v.* Leech, 4 Barn. & Ald. 451; Bayley on Bills, ch. 7, § 2, p. 255, 256, 275, (5th edit.); Story on Bills, § 294, 303, 304.

party receives one, that he received his notice earlier than the preceding parties were bound to give it; and that he gave notice within what would have been proper time, if each preceding party had taken all the time the law allowed him. The time is to be calculated according to the period, when the party in fact received his notice. Nor is it any excuse, that there are several intervening parties between him, who gives the notice, and the defendant, to whom it is given; and that, if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice sooner.[1]

§ 333. The French Law entertains the same doctrine as our law, as to the duties of the successive indorsers to give notice of the dishonor of the Note to the prior parties, who are chargeable thereon, within the same period, as the holder is required to give it; and, if it is omitted, then the antecedent parties will be exonerated. And hence, the holder, in order to preserve his own rights in all cases, in case his immediate indorser should fail to give notice to the antecedent parties, may himself, nay, is bound, if he means to hold them liable to him under such circumstances, to give them all notice within the period prescribed by law.[2]

§ 334. We have already seen, that notice, given by any party to a Note, at least if he has himself received notice, and will, upon payment thereof, be entitled to reimbursement to any antecedent party on the Note, will inure to the benefit of all the other parties to the

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[1] Bayley on Bills, ch. 7, § 2, p. 275, (5th edit.); Id. p. 255; Turner *v.* Leech, 4 Barn. & Ald. 454; Louisiana State Bank *v.* Hennen, 16 Martin, R. 226.

[2] Pothier, De Change, n. 149, 152, 153; Pardessus, Droit Comm. Tom. 2, art. 429, 430; Code de Comm. art. 164, 165.

Note, to whom he is liable.[1] Hence, the holder may in the case above stated of five indorsements, avail himself of the notice given by each of the successive antecedent indorsers to the other antecedent indorsers, although he may not have himself given any notice, except to the fifth or last indorser, in the same manner and to the same extent, as if he had himself directly given notice to all these indorsers.[2] But, here, it is to be distinctly borne in mind, that, if an indorser pays a Note without having received due notice of the dishonor, he cannot thereby make an antecedent indorser liable to repay the amount, unless the latter has already, by due notice, or otherwise, become absolutely bound to pay the same; for, if he is discharged by want of notice, or laches, then no other subsequent indorser can revive his liability by his voluntary act.[3]

§ 335. The time of giving notice may also be affected by other considerations and circumstances; such, for example, as by the residence of the party entitled to notice being unknown, either by a change of his domicil since the Note was given, or by his voluntary absence abroad, or otherwise. In such cases, as we have seen,[4] it is incumbent upon the holder and all other parties, who are bound to give notice, to use reasonable diligence, and to make due inquiries as to the actual residence of the party so entitled to notice.[5] What will be due and reasonable diligence in this respect must depend upon

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[1] Ante, § 302, 303; Bayley on Bills, ch. 7, § 2, p. 256, (5th edit.); Abat *v.* Rion, 9 Martin, Louis. R. 465, 469.

[2] Ibid.

[3] Roscow *v.* Hardy, 12 East, R. 434; 2 Camp. R. 458; Turner *v.* Leech, 4 Barn. & Ald. 451; Grosvenor *v.* Stone, 8 Pick. R. 79; Post, § 386, 388.

[4] Ante, § 316, 317.

[5] Story on Bills, § 299; Bank of Utica *v.* Phillips, 3 Wend. R. 408;

the circumstances of the particular case; for no other rule can be laid down than that, which has just been stated; and what would be due and reasonable diligence in one case might fall far short of it in another.[1] But the time, within which notice may be sent, will from necessity be prolonged during the whole period, in which such due and reasonable inquiries are making; for until the residence of the party entitled to notice is thus ascertained, there can be no laches imputable to the holder, or other party, bound to give notice, in not giving or forwarding notice.[2] Thus, if the holder or his

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McLanaham *v.* Brandon, 13 Martin, R. 321; Chapcott *v*, Curlewis, 2 M. & Rob. 484; Miers *v.* Brown, 11 Mees. & Wels. 372.

1 Ante, § 316, 317; Preston *v.* Daysson, 7 Miller, Louis. R. 7; Barnwell *v.* Mitchell, 3 Connect. R. 101; Bank of Utica *v.* De Mott, 13 John. R. 432; Sewall *v.* Russell, 3 Wend. R. 276; Bank of Utica *v.* Phillips, 3 Wend. R. 408; Cuyler *v.* Nellis, 4 Wend. R. 398; Bank of Utica *v.* Bender, 21 Wend. R. 643.

2 Chitty on Bills, ch. 10, p. 516, 524, 525, (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 274, 275, 280–283, (5th edit. 1830); McMurtrie *v.* Jones, 3 Wash. Cir. R. 206; Pardessus, Droit. Comm. Tom. 2, art. 434; Fisher *v.* Evans, 5 Binn. R. 542; Chapman *v.* Lipscombe, 1 John. R. 294; Browning *v.* Kinnear, Gow, R. 81; Bateman *v.* Joseph, 12 East, R. 433; Beveridge *v.* Burgis, 3 Camp. R. 262; Firth *v.* Thrush, 8 Barn. & Cressw. 387; Clarke *v.* Sharpe, 3 Mees. & Wels. 166; Barnwell *v.* Mitchell, 3 Connect. R. 101; 3 Kent, Comm. Lect. 44, p. 107, 108, (4th edit.); Stewart *v.* Eden, 2 Cain. R. 121; Blakeley *v.* Grant, 6 Mass. R. 386; Safford *v.* Wyckoff, 1 Hill, N. Y. R. 11; Howard *v.* Ives, 1 Hill, N. Y. R. 263; Ransom *v.* Mack, 2 Hill, N. Y. R. 587. — Mr. Chitty says; "If the residence of the party, to whom the notice ought to be given, be not known to the holder, he must, nevertheless, not remain in a state of passive and contented ignorance, but must use due diligence to discover his residence, and, if he do, then the indorser remains liable, though a month or more may have elapsed before actual notice be given; and, if he, (the holder) before the bill become due, should apply to one of the parties, to ascertain the residence of any indorser, and he should decline giving him any information, the holder need not, after the Bill became due, renew his inquiries of that party.* But, in general, the holder

* I have varied Mr. Chitty's text in this place, to correct its inaccuracy and obscurity.

agent should be employed four days in endeavors, by reasonable inquiries, to ascertain the residence of the

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should not only immediately apply to all the parties to the Bill for information, but also make inquiries, and send notice to the place, where it may reasonably be supposed the party resides; and, if he has employed an attorney, who, at length discovers the residence, we have seen, that it will suffice, if the attorney, on the next day, consults with his client, and the latter, on the third day, forwards the notice to the discovered indorser, though, in general, notice ought to be given on the next day. And a letter from the holder, giving notice of the dishonor, containing this passage, 'I did not know where, till within these few days, you were to be found,' is not to be taken as proving, that the notice was not given on the next day after the residence of the party was discovered. Where the traveller of a tradesman received, in the course of business, a Promissory Note, which was delivered to him for the use of his principal, without indorsing it, and the Note having been returned to the principal dishonored, and the latter, not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it, it was held, that such principal was not guilty of laches, although it was urged, that the traveller ought to have stated the residence, when he remitted the Notes, and though several days elapsed before he received an answer, and thereupon he gave notice to the next party, as he had used due diligence in ascertaining the address." Chitty on Bills, ch. 10, p. 524, 525, (8th edit. 1833); Id. 516. Mr. Bayley says; "A letter directed to a man at a large town, without specifying the part in which he lives, the trade he carries on, or any other circumstance to distinguish him, may be sufficient, if he be the drawer, and has dated the Bill generally at that place; or if, upon reasonable inquiry, no information can be obtained to enable the party to give a better direction. But, primâ facie, such a direction will be insufficient, because it is not likely, upon such a direction, the latter will reach the person, for whom it is intended, in proper time. If, however, it be proved, that there was a directory at the time, for that place, and that a reference to the directory would have shown in what part of the place the person intended lived, such a direction might, perhaps, be held sufficient. Where it is not known, where a party lives, due diligence must, in general, be used to find out. And, where such diligence is unsuccessful, it will excuse want of notice. But merely inquiring at the house, where a Bill is payable, is not due diligence for finding out an indorser. Inquiry should be made of some of the other parties to the Bill or Note, and of persons of the same name. Calling on the last indorser, and last but one, the day after the Bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, may be sufficient. But, if a party, when he passes a Bill party entitled to notice, and should be successful only on the fourth day, it will be sufficient, if he sends notice by the post of the next day, or by the next post, after the fourth day.[1] And if, by the exercise of such reasonable diligence and inquiries, the residence of such party cannot be ascertained, then the holder, or other party, will be absolved from all objections on account of the want of notice.[2]

§ 335 *a*. A question may also arise in cases, where a regular notice is sent to an indorser, and does not arrive at all, or does not arrive until long after the period, when by the regular course of the mail, it ought, what becomes his duty as to the antecedent indorsers? Is he bound to send them notice if he receives, and when he receives notice of the dishonor, either directly or circuitously, or after the protracted delay? No case exactly in point seems to have been decided. But it would seem, upon the analogy of other cases, that if the indorser is, by the regular notice sent to him, although not received at all, or not received until after a long delay, bound to pay

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or Note, decline saying, where he lives, and undertake to call upon the acceptor to see if the Bill is paid, he cannot complain of want of notice. Where the residence of a party entitled to notice is unknown, and the person next to him upon the Bill or Note will give no information, where he lives, a Note addressed to the former, if sent to the place where such latter person lives, will be sufficient. Though the application for information be made before the Bill or Note is due. Especially if the person applied to has acted in any respect, with regard to the Bill or Note, as agent for the party entitled to notice. And, if the holder employ an attorney to give notice, and the attorney, after a lapse of time, discover where the party lives, he may take a day to apprize the holder, and take his further directions, before he gives the notice." Bayley on Bills, ch. 7, § 2, p. 280 – 283, (5th edit. 1830); Story on Bills, § 299, and note; Chitty on Bills, ch. 10, p. 486 – 488, (8th edit.); Safford *v.* Wyckoff, 1 Hill, N. Y. R. 11; Baldwin *v.* Richardson, 1 Barn. & Cressw. 245; Miers *v.* Brown, 11 Mees. & Wels. 372.

1 Ibid.

2 Ibid.

the Note, notice sent by him to the antecedent indorsers whenever he receives notice of the dishonor, will give him a claim against them.

§ 336. Where the party entitled to notice is resident in another state, colony, or country, than the state, colony, or country, where the dishonor takes place, or from which the notice is to be sent, and the ordinary communication between such state, or colony, or country, and the other state, colony, or country, is by means of the post-office, there, it will be sufficient if the notice is put into the proper post-office, with suitable directions, on the day after the dishonor, or after the knowledge thereof, early enough to go by the post of that day, if any, or, if there be none, by the next succeeding post.[1] In the United States, this is the usual and customary course of giving notice to persons residing in other States in the Union, whose

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[1] Story on Bills, § 287, 383; Chitty on Bills, ch. 10, p. 485, 486, 524, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 279, (5th edit.); Mead *v.* Engs, 5 Cowen, R. 303. See Bank of Utica *v.* Davidson, 5 Wend. R. 587; Pindar *v.* Nathan, 4 Martin, Louis. R. 346; Thomson on Bills, ch. 6, § 4, p. 477, (2d edit.) The doctrine is somewhat more fully stated in Story on Bills, § 298, p. 332, where it is said; "The same rule will generally apply to cases, where the notice is to be sent abroad to a foreign country. It should be directed to the party at his domicil, or at his place of business, if they are in different towns; and it should be sent by the regular packet, if there be any, bound for the port or place of his domicil; and, if there be none, then by some other conveyance to, or as near his place of domicil, or other direction, as is practicable. If the packet do not proceed directly to the port, where the party resides, or has his place of business, it would seem sufficient to write the proper direction of the party on the notice, so that it may be sent in the usual manner, by the post or otherwise, after the arrival of the packet, to the proper place, to which it is directed. It is, however, almost impracticable, on such a subject, to lay down any specific rules, which shall govern all cases, since the circumstances may so essentially vary. The most, that can be said, is, that reasonable diligence should be used, in all cases, to make the notice effectual."

residences are known; and the same course is now adopted in many, if not in all, of the continental nations of Europe, where regular posts are established between them.[1]

§ 337. When, as frequently occurs between distant countries, the usual intercourse is carried on by means of regular packets, sailing at particular periods, (as is the case between New York and England, and New York and Havre,) or by means of regular steam-ships, sailing at the like periods, (as is the case between Boston and Liverpool,) then, and in such cases, notice should be sent by the next regular packet or steam-ship, that sails for the port, where the party, to whom notice is to be given, resides, or to some neighboring port, according to the usual course of transportation of letters of business, if a reasonable time before its departure remains for writing and forwarding the notice.[2] On the other hand, if there are no such regular packets or steam-ships, or their times of sailing are at distant intervals, and, in the mean time, other ships are about to sail for the same port, or for some neighboring port, it may be proper to send the notice by such ship, if, upon reasonable calculation, her arrival may be presumed to be earlier than the regular packets or steam-ships.[3] If the communication is irregular with the ports of the country, where the Notes are protested, or it is, at different seasons, by different routes or ways of conveyance, that should be adopted, to send the

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1 Ibid.

2 See Bayley on Bills, ch. 7, § 2, p. 279, (5th edit. 1830); Muilman *v.* D'Eguino, 2 H. Black. 525; Chitty on Bills, ch. 10, p. 505, 508, (8th edit. 1833); Darbishire *v.* Parker, 6 East, R. 3, 7.

3 See Muilman *v.* D'Eguino, 2 H. Black. 565; Darbishire *v.* Parker, 6 East, R. 3, 7; Bayley on Bills, ch. 7, § 2, p. 279, (5th edit. 1830.)

notice, which may reasonably be presumed to be the most certain and expeditious under all the circumstances. Thus, for example, if a Note, drawn in America, is protested in St. Petersburgh in the winter, and the usual mode of communication is by land, in common commercial transactions, through the continental ports, to London or Havre, that would seem to be the proper route; whereas, if the protest were in the summer, the direct route by water between St. Petersburgh and America might be more expeditious and satisfactory. So, if a Note be protested in China or India, the mode of giving notice must vary according to circumstances, and sometimes may be direct by water between that and the foreign country, to which the notice is destined; and sometimes be indirect and overland; and, in each case, there will be a just compliance with the requisitions of the law. So, if, by reason of war or other political occurrences, the usual direct mode of communication be interdicted or obstructed, any other suitable and reasonable mode may be adopted.[1] And, indeed, it would seem, that an omission to give due notice, in consequence of an accident, or casualty, or superior force, would, in all cases, excuse the holder from a strict compliance with the general rule.[2]

§ 338. Hitherto we have mainly spoken of the time of giving notice by means of the general post, or by regular packets, or by some other regular conveyance,

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[1] Chitty on Bills, ch. 9, p. 389, (8th edit. 1833); Id. ch. 9, p. 422; Id. ch. 10, p. 485, 505, 510.

[2] Chitty on Bills, ch. 10, p. 485, 486, 524, (8th edit. 1833); Pothier, De Change, n. 144. See Hopkirk *v.* Page, 2 Brock. R. 20; Story on Bills, § 284, 298, 383; Duncan *v.* Young, 1 Martin, Louis. R. 32; Spencer *v.* Stirling, 10 Martin, Louis. R. 90.

where the parties reside at a distance, or in a foreign country. But there is nothing in the rules of law, which prevents notice in any case from being given by a private messenger, if the holder should elect so to do, and is willing to run the chance of this hazardous mode of giving notice. If he does so elect, and thus supersedes the ordinary and regular mode of giving notice by the general post, or otherwise, it is indispensable, that the notice should reach the party, for whom it is designed, on the same day (although not, perhaps, at as early an hour,) on which he would otherwise be entitled to receive it; for, if it arrive a day later, the party will be discharged.[1] Cases, indeed, may exist, in which notice by a special messenger may be most reasonable and proper (and then his expenses must be borne by the party who receives the notice); as, for example, where the party resides at a distance from any post town, or there is no regular or speedy communication with his place of residence.[2] It does not seem, however, that, in any case, it is necessary to send notice by a special messenger, if there be a regular mode of giving it, by the post, or otherwise, even if thereby the notice might have arrived earlier.[3]

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1 Chitty on Bills, ch. 10, p. 504, 505, 518, 519, (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 279, 280, (5th edit. 1830); Darbishire *v.* Parker, 6 East, R. 8, 9; Pearson, *v.* Crallon, 2 Smith, R. 404; Bancroft *v.* Hall, 1 Holt, R. 476; Story on Bills, § 290, note; Ante, § 324; 3 Kent, Comm. Lect. 44, p. 106, 107, (4th edit.); Jarvis *v.* St. Croix Manuf. Co. 23 Maine, R. 287.

2 Chitty on Bills, ch. 10, p. 504, 505, 518, 519, (8th edit. 1833); Pearson *v.* Crallon, 2 Smith, R. 404.

3 Chitty on Bills, ch. 10, p. 503, 505, 518, 519, (8th edit. 1833); Muilman *v.* D'Eguino, 2 H. Black. R. 565; Darbishire *v.* Parker, 6 East, R. 7; Bank of Columbia *v.* Lawrence, 1 Peters, R. 582, 584; Kufh *v.* Weston, 3 Esp. R. 54. But see Hordern *v.* Dalton, 1 Carr. & Payne, 181. On this subject Mr. Chitty (on Bills, ch. 10, p. 505, 8th edit.) says;

§ 339. The time of giving notice may also be most materially affected by the law of the place, where the

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"Where there is no post, it is sufficient to send notice by the ordinary mode of conveyance, though notice by a special messenger might arrive earlier; and therefore, in the case of a foreign Bill, it is sufficient to send it by the first regular ship bound for the place to which it is to be sent, and it is no objection, that, if sent by a ship bound elsewhere, it would, by accident, have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent. If the deputy post-master, in a country town, should neglect to deliver the letter in the usual time, but there is, nevertheless, time to send the notice by a special messenger, it should be done. It has been decided, that where it is necessary or more convenient for the holder to send notice by other conveyance than the post, he may send a special messenger, and he may recover the reasonable expenses incurred by that mode of giving notice." Again, in page 518, he says; "We have seen, when considering the modes of giving notice, that it may be given either by the post, or by a special messenger or private hand; but if, when there is a regular post, and the notice be nevertheless sent by a private conveyance, care must be observed that it arrive as soon, or at least on the same day, that a notice by the post would have arrived. If there be no post for a considerable time after a party receives notice, it may then be incumbent on him to forward notice to his immediate indorser by the next ordinary conveyance, or even by a special messenger, as in some parts of Yorkshire, where the manufacturers reside at a distance from the post town, and the letters might, if not so forwarded, lie for a long time before they are called for, in which case it may be necessary to send notice by a special messenger, and the expense of which would then be recoverable. If the notice be unnecessarily forwarded by a private hand or unusual conveyance, and miscarry, or be delayed a day beyond the usual time, the party giving the notice may thereby lose his remedies." See, also, Chitty on Bills, ch. 10, p. 503, 504, (8th edit.); Kufh *v.* Weston, 3 Esp. R. 54; Bancroft *v.* Hall, Holt, N. P. R. 476. This last case was an action against the drawer of a Bill of Exchange, who resided at Liverpool; the Bill was accepted by one Hind, payable in London, and indorsed by the defendant to the plaintiff. The Bill being dishonored, notice was given to the plaintiff, who lived at Manchester, on the 24th of May. On that day he sent a letter, by a private hand, to his agent at Liverpool, directing him to give Hall notice of the acceptor's default. On the 25th, in the afternoon, the agent received the letter, and went, about six or seven in the evening, to the counting-house of Hall, but after knocking at the door, and ringing a bell, no one came to receive a message. The merchants' counting-houses at Liverpool do not shut up till eight or nine. The 26th was a Sunday, and notice was not in fact given till the morning contract is made, or is to be executed, whether it be the original contract between the immediate parties to an indorsement, or between those who stand in the relation of remote indorser and indorsee. The general rule (as we have already seen[1]) is, that the law of the place, where the contract is made, is to regulate the rights and duties of the parties.[2] Hence, it should seem, that as the contract by indorsement takes effect in the country, where it is made, according to the laws of that country,

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of the 27th. It was objected for the defendant, that the notice was not in time after the London letter reached Manchester, a mail set out next morning to Liverpool. The plaintiff should have sent the notice by the mail, which reached Liverpool by ten o'clock; if he prefers a private conveyance, or if he attempts to give notice earlier than by law he is bound to do, and fails in giving an effectual notice, he is not therefore exempt from giving proper legal notice. Bayley, J.; "Notice must be given in time, but all a man's other business is not to be suspended for the sake of giving the most expeditious notice. He is not bound to write by post as the only conveyance, or to send a letter by the very first channel which offers. He may write to a friend, and send by a private conveyance. Here the notice reaches Liverpool on the 25th. No expedition could have brought it earlier. Between six and seven in the evening of that day, the witness goes to the defendant's counting-house, and it is shut up. A merchant's counting-house, or residence of trade, is not like a banker's shop, which closes universally at a known hour. It was the defendant's fault, that he did not receive notice on the 25th, which he might have done if he had kept his counting-house open till eight or nine, which are the customary hours of closing them at Liverpool." Verdict for the plaintiff. And see Bayley on Bills, ch. 7, § 2, p. 280, (5th edit.) But see Beeching *v.* Gower, Holt, C. N. P. 315. In Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582, 584, the Supreme Court said; "Some countenance has lately been given in England, to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He may employ a special messenger if he pleases, but it has not been decided that he must. To compel the holder to the expense of a special messenger would be unreasonable."

[1] Ante, § 159.

[2] Ante, § 159, 165, 170, 173–176.

all the incidents thereto, such as the time of giving notice of the dishonor, should be governed by the same law.[1] Now, in England and America, (as we have al-

[1] Story on Bills, § 176, 177, note; Id. § 206; Chitty on Bills, ch. 10, p. 506, 508, (8th edit.) See also, Aymar *v.* Sheldon, 12 Wend. R. 439; Yeatman *v.* Cullen, 5 Black. R. 240; Burrows *v.* Hannegan, 1 McLean, R. 315. The case of Rothschild *v.* Currie, 1 Adolp. & Ellis, New R. 43, appears to contradict the doctrine stated in the text. It was the case of a Bill drawn in England on, and accepted by, a house in France, payable at Paris, in favor of a payee domiciled in England, by whom it was indorsed, in England, to an indorsee, who was also domiciled there. The Bill was dishonored at maturity, and due notice was given to the payee of the protest and dishonor, according to the law of France; but not (as it was suggested) according to the law of England; and it was held by the Court, in a suit brought by the indorsee against the payee, that the notice was good, being according to the law of France, the lex loci contractûs of acceptance. For this doctrine reliance was mainly placed upon the text of Pothier, De Change, n. 155. The language of Pothier is, that the form of the protest, the time of making it, and the notice of it, are to be regulated by the law of the place, where the Bill of Exchange is payable. In respect to the form of the protest, he says, there is no doubt; for it is a general rule, that, in respect to the formalities of acts, we are to follow the law and style of the place, where the act is done. He then adds, that the same thing applies in respect to the time, within which the protest ought to be notified; for the Bill of Exchange is to be deemed contracted in the place, where it is payable, according to the rule, Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit; and, consequently, the obligations of it ought to be governed by the laws and usages of the same place, to which the parties must be presumed to have submitted themselves according to another rule; In contractibus veniunt ea, quæ sunt moris et consuetudinis in regione, in qua contrahitur. Now, so far as regards the formalities of the protest, and the time of making it, there is no doubt, whatsoever, that the rule is universally adopted in the commercial world, that they are to be according to the law of the place, where the acceptance and payment of the Bill are to be made. Chitty on Bills, ch. 10, p. 490, (8th edit. 1833.) But the doctrine of Pothier is supposed to go much farther; and, if it does, and extends to the case of notice to indorsers, who have indorsed the Bill in a foreign country, (upon which it seems to me, there may be room for doubt,) his reasoning in support of it is founded upon a false foundation; and the maxim, cited by him, Contraxisse, &c., would lead to the opposite conclusion. The acceptor agrees to pay in the place of acceptance, or the place fixed for the payment

ready seen,) the notice is regularly to be given by the post of the next day, or by the next post after the dishonor

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(Cooper *v.* Earl of Waldegrave, 2 Beavan, R. 282) ; but, upon his default, the drawer and the indorser do not agree, upon due protest and notice, to pay the like amount in the same place; but agree to pay the like amount in the place, where the Bill was drawn or indorsed by them respectively. Hence it is, that the notice, to be given to each of them, must and ought to be notice, according to the law of the place, where he draws or indorses the Bill, as a part of the obligations thereof. The drawer and indorser, in effect, contract in the place, where the Bill is drawn, or indorsed, a conditional obligation, that is, if the Bill is dishonored, and due notice is given to them of the dishonor, according to the law of the place of their contract, they will respectively pay the amount of the Bill at that place. The law of the place of the acceptance or payment of the Bill has nothing to do with their contract ; for it is not made there, and has no reference to it. The maxim, Contraxisse, &c., in truth, has no just application to such a case. It properly applies to the case, where the same person by a contract, made in one place, promises to pay money in another place. But, if it is to have any application to the case of a drawer or an indorser of a Bill, it must be to make the other maxim apply; In contractibus veniunt ea, quæ sunt moris et consuetudinis in regione, in qua contrahitur. Pardessus lays down the rule in its true sense ; and insists upon the distinction between the cases of the contract of the acceptor, and the contract of the drawer and indorser. The contract of the acceptor is a contract made in the place of acceptance, and governed by the law of that place. But the contract of the drawer is a contract made in the place, where it is drawn, and of the indorser, a contract in the place, where the indorsement is made, and governed by the law thereof. Hence he says, that, if a Bill is drawn in France, where a protest is required to prove the dishonor of a Bill, upon a foreign country, where no protest is required ; still the drawer will not be bound, unless a protest is duly made in the foreign country. Whether this doctrine be strictly correct, or not, it shows, in a striking manner, the opinion of Pardessus upon the whole subject. He adds, what is most material to the present purpose, that the indorser is liable only in the same manner, and under the same circumstances, as the drawer would be; that is, according to the law of the place of his contract ; and that all the obligations and qualifications of it, imposed by the local law, are binding and operative upon him. (Pardessus Droit Comm. Tom. 5, art. 1488, 1497 - 1499, p. 252 - 255, 280 - 287.) And he expressly declares, that every indorser is to have notice, according to the law of the place of his indorsement, since it is a part of the contract. (Id. art. 1485, 1499.) His reasoning is at variance with that of the learned Judge who delivered the opinion of the Court in Rothstakes place, or is known to the holder, or other party, who is bound to give notice.[1] But in France the holder or other party is allowed certain specific periods of time, after the dishonor takes place, to give the notice, and these periods are fixed with reference to different distances and localities.[2] If, therefore, the indorsement is

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child *v.* Currie, 1 Adolp. & Ellis, New R. 43. With the greatest deference for that learned Judge, it seems to me, that the decision of the Court is not sustained by the reasoning, on which it purports to be founded. The Court there admit, that the notification of the dishonor is parcel of the contract of the indorser; and, if so, then it must be governed by the law of the place (England) where the indorsement was made, upon the very rules cited by the Court from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the acceptor with the contract of the drawer and the indorser. Mr. Chitty takes the same view of the law, which is taken in the text. Chitty on Bills ch. 10, p. 490, 491, (8th edit. 1833); Id. p. 506. The case of Aymar *v.* Sheldon, (12 Wend. R. 439) seems also opposed to the doctrine in Rothschild *v.* Currie. Indeed, I cannot but think, that the language of Pothier has been misunderstood, as to its true interpretation and meaning. He there says; "On doit décider la même chose à l'égard du temps lequel le protêt doit être fait ou dénoncée," which, literally construed, means, "We ought to decide the same thing in regard to the time, when the protest ought to be made or proclaimed"; thus using the words "made *or* proclaimed" as equivalents, and expressive merely of the time, when the act of protest is to be made or declared by the holder, and not when notice thereof is to be given to the indorser. See, also, 3 Burge, Comm. 773; 2 Kent, Comm. 460, and note, (5th edit.); Astor *v.* Benn, 1 Stuart, Canada R. 69, 70; Wallace *v.* Agry, 4 Mason, R. 336, 344; Pothier, n. 64, 67. See, also, Story on Bills, § 285, 296, 366, 391, and notes ibid.

[1] Ante, § 324.

[2] Chitty on Bills, ch. 10, p. 506, 507, (8th edit. 1833.) Mr. Chitty gives the following summary statement of the French Law; "In France, also, a protest for non-payment must not be made until the day after the day, when the Bill became due, that entire day being allowed by law to the drawee to prepare for and make payment; but it is otherwise with respect to Bills payable at sight, when the terms of the Bill denote, that the party is to pay upon demand; and, therefore, the protest may, in that case, be made on the very day of presentment. If the day for making the protest should fall on a Sunday, or legalized holyday, then the protest is to be made on the day after it; and, if the distance of parties, or other circumstances,

made in England, or America, the notice ought to be according to the laws of those countries; if in France,

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occasion delay, a reasonable further time, on making the protest, will not prejudice. A premature protest, would, no doubt, be unavailing. In France, also, the time, within which the notice of dishonor must be given, differs materially from that required in England, and affords more indulgence to the holder. Thus, it there suffices, if the protest be notified within five days, reckoned from the date of the protest, when the drawer or indorser resides within fifteen miles; and, if the party to whom the notice is to be given, resides more than fifteen miles from the place where the Bill was payable, the time is increased in proportion, and according to such increased distance; but, if the last of the five days be a Sunday, the notice must arrive the day before. When the Bill drawn in France falls due in a foreign country, (as in England,) the drawer and indorsers, resident in France, must have notice within two months after the date of the protest; and, when the Bill is payable in other countries, more or less prescribed time is allowed; and, if the English holder neglect to observe the law of France, as to the time of protest, and notice, and proceeding in France, he will lose his remedy against the French drawer and indorsers. The French Law does not assume to determine what delay may be allowed in giving notice to, and proceeding against, the drawer and indorsers residing in a foreign country. In general, they are regulated, and are to be given effect to, in France, according to the law of such foreign country, where there are conflicting regulations in different countries in regard to commerce." Chitty on Bills, ch. 10, p. 507, 508, (8th edit. 1833.) It appears to me, that Mr. Chitty has mistaken the rule of the French law; and that it is fifteen instead of five days, and twenty-five miles instead of fifteen miles. Indeed, he seems, in p. 508, in some measure to correct his own error. Mr. Rodman gives the following translation of the two articles (165 and 166) of the Code of Commerce; "If the holder would pursue his remedy individually against his immediate indorser, or the drawer, in case the Bill came directly from him, he must give him notice of the protest, and, in default of reimbursement, commence his suit against him within fifteen days from the date of the protest, if the said indorser or drawer reside within the distance of five myriametres (ten leagues, equal to about twenty-five miles.) This period of delay, with respect to the indorser or drawer, domiciled at a greater distance than five myriametres from the place, where the Bill of Exchange was payable, shall be increased one day for every two and a half myriametres exceeding the five before mentioned. In the case of the protest of Bills of Exchange drawn in France, and payable out of the continental territory of France in Europe, the remedy against the drawers aud indorsers residing in France must be pursued within the following periods, to wit: Two months for Bills payable in according to the law of France. At least, such would seem to be the just result of the principle applicable to the case, notwithstanding some contrariety of opinion in the authorities.[1]

§ 340. In the next place, let us proceed to the consideration of the mode, or manner, in which notice is to be given. This, indeed, is so intimately connected with the time, when notice is to be given, that much of what would properly engage our attention here has been already anticipated under the preceding head. The mode or manner of giving notice admits of various modifications and directions, according to circumstances. It may be, (1.) either personal; (2.) or at the domicil or place of business of the party; (3.) or by the post; (4.) or by a special messenger; or (5.) by a regular packet-ship or steamer; (6.) or by an irregular or casual conveyance, when that is the only one properly within the reach of the holder, or other party, bound to give the notice. All these different modes, and the circum-

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Corsica, in the island of Elba, or of Capraja, in England, and in the countries bordering on France; four months for those payable in the other states of Europe; six months for those payable in the ports of the Levant, and on the northern coasts of Africa; a year for those payable on the western coasts of Africa, as far as and including the Cape of Good Hope, and in the West Indies; two years for those payable in the East Indies. These periods of delay are allowed in the same proportions, for pursuing the remedy against the drawers and indorsers residing in the French possessions situated out of Europe. The abovementioned delays, of six months, a year, and two years, are allowed to be doubled in time of maritime war." Code of Commerce, by Rodman, p. 139, 141, (edit. 1814.) In the recent case of Rothschild *v.* Currie, 1 Adolp. & Ellis, New R. 43, the Court of Queen's Bench seems to construe the French Code as I have construed it. See, also, Pardessus, Droit Comm. Tom. 2, art. 430, 431; Pothier, De Change, n. 152; Jousse, Sur L'Ord. 1673, art. 13-15, p. 105-107, (edit. 1802); Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 165, 166, p. 519-522.

[1] Ibid.

stances to which they properly apply, have been sufficiently, for practical purposes, already examined. It may, however, be here added, that when there are no regular means of communication between the places, from which and to which notice is to be sent, in a direct route, or to the direct port, it will be sufficient, if the holder avails himself of the next most convenient mode, or route of conveyance, by an application, as it were, of the doctrine *cy pres*, or by any one, which is reasonably fit for the purpose.[1] It is certainly not necessary to send a special messenger to another state, or to another foreign country; although that mode of notice is sometimes resorted to, in cases of notice in the same state or country, where both the parties reside.[2]

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[1] Story on Bills, § 298, 383; Ante, § 336.

[2] Ante, § 338; Story on Bills, § 289, 295; McGruder *v.* Bank of Washington, 9 Wheat. R. 598; Chitty on Bills, ch. 10, p. 503–505, (8th edit.); Id. p. 518, 519; Bayley on Bills, ch. 7, § 2, p. 279, 280, (5th edit.); 3 Kent, Comm. Lect. 44, p. 107, (5th edit.); Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 584; Hazelton Coal Co. *v.* Ryerson, Spencer, N. Jersey, R. 129; Kufh *v.* Weston, 3 Esp. R. 54. This case was a case of assumpsit on a foreign Bill of Exchange drawn by Garde, at Exeter, on Messrs. Guetano & Co. at Genoa. The defendants indorsed the Bill to the plaintiffs. The Bill was presented for acceptance at Genoa, and the acceptance refused. The defence was, that it had not been presented in a reasonable time, nor the protest for non-acceptance sent to this country as soon as it ought to have been, and that, therefore, the defendants had not had due notice of its being dishonored. In answer to this, it was proved, that the Bill had been put into the post-office at London, the third day after it was received from the defendants, which was the first Italian post-day after it had been so received. It was further proved, that from the disturbed state of Italy, for some time before, the regular post had been interrupted, and the Bill had not arrived at Genoa till a month after it became due; that it was immediately presented for acceptance, which being refused, it was protested, and the protest sent off immediately by the post to England. Lord Kenyon said, "That the defendants grounded their defence on the supposed laches of the plaintiff, but he was of opinion, that if the plaintiffs had sent the Bill by the ordinary course of

§ 341. The mode or manner of the notice admits also of some other modifications. It may be oral, or verbal, or it may be in writing. It may be oral or verbal in all cases, where it is directly made to the person, who is to receive the notice; and it may also be oral or verbal, when it is at his place of business, or at his dwelling-house; although, in the latter cases, it is most usually in writing.[1] But where the notice is to be sent by the post, or other regular conveyance, and not by a special messenger, there, it seems indispensable, that it should be in writing; for, otherwise, the party could not have any means accurately to ascertain its character, object, or operation.[2] [Where an indorser, residing in the town

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the post, they had done all they were called upon to do; that they could not foresee, that the post would be interrupted, and it could not be expected that they should send the Bill by a special messenger, or any extraordinary mode of conveyance." His Lordship said, he therefore thought the plaintiffs had been guilty of no laches, and were entitled to recover, and they accordingly had a verdict.

[1] Story on Bills, § 300; Chitty on Bills, ch. 10, p. 502, 503, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 276–278, (5th edit.); 3 Kent, Comm. Lect. 44, p. 106, 107, (5th edit.); Cuyler *v.* Stevens, 4 Wend. R. 566; United States *v.* Barker's Ad'mr, 4 Wash. Cir. R. 464; Williams *v.* Bank of United States, 2 Peters, Sup. Ct. R. 100; Thomson on Bills, ch. 6, § 4, p. 474, 475, (2d edit.) Mr. Chitty (on Bills, ch. 10, p. 502, 8th edit.) says: "With respect to the mode of giving the notice, personal service is not necessary, nor is it requisite to leave a written notice at the residence of the party, but it is sufficient to send to, or convey verbal notice at, the counting-house or place of abode of the party, without leaving notice in writing; and the giving such verbal notice to a servant at his home, the defendant having left no clerk in his counting-house, as it was his duty to do, suffices. And where the drawee has a counting-house where he transacts business, and at which the Bill was addressed, it suffices to apply there for the purpose of giving notice, without attempting to give or leave notice at the residence of the drawee. And it is sufficient, both in the case of a foreign and an inland Bill, to send twice during hours of business, and to knock there and wait a short time, and then go away without leaving or sending any written notice."

[2] Ibid.; Chitty on Bills, ch. 10, p. 517, 518, (8th edit.); Story on Bills,

of F., upon a Note payable in the town of R., was in the latter town on the day of the maturity of the Note,

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§ 300; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582. Mr. Thomson (on Bills, ch. 6, § 4, p. 475–477, 2d edit.) says: "Although verbal notice, if proved, does not appear to be excluded, even when the parties reside in different places, it is most convenient, in such a case, to send notice by letter. The post being the authorized channel for transmitting letters, it is in all cases safest to send them by it. If it is proved that a letter containing notice was put into the post-office properly addressed, but only in that case, this will be sufficient to preserve recourse, whether the letter has been delivered or not. The same rule is applicable, in London, to letters of notification put into the two-penny post; it being held, that putting them into it in due time is sufficient, as to parties residing within the limits of that post, whether the letters reach them or not. It will also be sufficient, in Edinburgh, to put such letters into the penny post. But such notice must be put into a regular post-office. The post-mark will be held good evidence of the letter being put into the post-office, and of the date of putting it in. If a person sends notice by a private hand, when he might have the benefit of the post, it would seem, though the point has not been expressly decided, that he thereby takes on himself the risk of irregularity in the conveyance, since he is blamable for not adopting the most secure conveyance. At least, if the conveyance arrive much later than the post, the delay must rest with him. It is difficult to lay down a precise rule as to the extent of delay in the arrival of a private conveyance, which will nullify the notice, although such delay as prevents the person getting notice, even for one post, from sending advice to his correspondent will probably be fatal. It would likewise appear, that in such a case the holder must prove the safe arrival of the letter. But, when a person, instead of sending notice directly by post, writes to a correspondent on the spot to give notice, and that correspondent goes to the defendant's warehouse for this purpose, sooner than a letter could have reached him by post, but is prevented by finding the warehouse shut during business hours, the defendant cannot plead the lateness of the notice. Farther, if it is necessary to send notice by a special messenger, as where the party receiving it lives out of the course of the regular post, the expense of such notice will be allowed; and the person giving it will not be responsible for the accidental delay of the conveyance, as he could not have employed any other. When notice is to be sent abroad, to a place to which there is no post, it is sufficient to send it by the ordinary conveyance, as by the first regular ship bound to that place, and it will not be an objection, that it has not been sent by a ship bound elsewhere, but which accidentally touched at the place for which the notice was intended, before the arrival of the regular ship."

lying ill at the house of the notary who protested it; and the notary took a written notice of the protest to the indorser's room, approached his bed, and remarked to him that he had that day protested a Note on which he was indorser, but did not describe the Note, and could not say that the indorser heard the remark, and then left the written notice on the mantle-piece in the room; it was held, that the notice was sufficient.[1]]

§ 342. Another most important consideration, as to the mode or manner of notice, respects the particular place, or post-office, to which the written notice is to be sent. The party entitled to notice may reside, (1.) In a town or place, where there is no post-office; (2.) Or in a town or place, where there are two or more post-offices; (3.) Or, he may be accustomed to receive the letters, addressed to him, by and through the post-office of a different town, from that in which he resides; (4.) Or, he may be accustomed to receive letters equally from the post-office of the town, where he resides, and from the post-offices, also, in the contiguous towns; (5.) Or, he may reside in the country, on a plantation, where there are no towns, but merely a country court-house, or country post-offices in different parts of the same county, such, for example, as in Virginia and some others of the Southern States of America; (6.) Or, he may reside at two places alternately during the year, going frequently from one to the other. All these different classes of cases (and others might be mentioned) may practically require different modifications, as to the mode of notice; and some of them may involve questions of no inconsiderable nicety and perplexity.

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[1] Miles *v.* Hall, 12 Smedes & Marshall, R. 332.

§ 343. In general, it may be stated; First, That, if the party, entitled to notice, resides in a town or village, where there is no post-office, the letter containing the notice may be sent to the post-office where he is accustomed to receive his letters, if that is known, or can by reasonable inquiries be found out. If, upon such reasonable inquiries, it cannot be ascertained at what post-office he is accustomed to receive his letters, then it will be sufficient to send the letter to the post-office of the neighboring town nearest his residence, or as near as can be ascertained.[1] Secondly, If he resides in a town, where there are two or more post-offices, (a not infrequent case in our Northern States) then the letter may be sent to either post-office in the town, unless, upon reasonable inquiries, it can be ascertained, that he is accustomed to receive his letters at one of the offices only in that town, in which latter case it should be sent to the accustomed post-office, and not elsewhere.[2] Thirdly, If he is accustomed to receive his letters at a post-office in a neighboring town, either because near to his actual residence, or for any other reason, and that fact is known, or can by reasonable inquiries be found out, then notice

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[1] See Shed *v.* Brett, 1 Pick. R. 401; Ireland *v.* Kip, 11 John. R. 231; Davis *v.* Williams, 1 Peck, R. 191; Bank of United States *v.* Carneal, 2 Peters, R. 543, 551; Gist *v.* Lybrand, 3 Hamm. Ohio R. 319. By a statute of Louisiana of 13th of March, 1837, § 2, notice when sent by mail must be sent to the post-office nearest to the party's residence. Union Bank of Louisiana *v.* Brown, 1 Rob. Louis. R. 107; Mechanics & Traders Bank *v.* Compton, 3 Rob. Louis. R. 4; Nicholson *v.* Marders, 3 Rob. Louis. R. 242; Duncan *v.* Sparrow, 3 Rob. Louis. R. 164, 167.

[2] Cuyler *v.* Nellis, 4 Wend. R. 398. See Nashville Bank *v.* Bennett, 1 Yerger, R. 166; Catskill Bank *v.* Stall, 15 Wend. R. 365; Downer *v.* Remer, 21 Wend. R. 10; Gale *v.* Kemper's Heirs, 10 Miller, Louis. R. 205; Bank of Geneva *v.* Howlett, 4 Wend. R. 328; Bank of Manchester *v.* Slason, 13 Verm. R. 334; Hunt *v.* Fish, 4 Barbour, Sup. ch. R. 324; Carmena *v.* Bank of Louisiana, 1 Robinson, Louis. R. 369.

should be sent through such neighboring post-office.[1] Fourthly, If he is accustomed to receive his letters sometimes from the post-office in his own town, and sometimes from that in a neighboring town, or sometimes from all the post-offices of his own town, there being several, or sometimes from post-offices in different towns in his neighborhood, the letter, sent to either, will be good notice, even although it might reach him earlier by the one route than by the other, if the latter fact be unknown to the party who sent the notice.[2] Fifthly,

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[1] Reid *v.* Payne, 16 John. R. 218; Bank of Geneva *v.* Howlett, 4 Wend. R. 328; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 539, 551; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578; Carmeena *v.* Bank of Louisiana, 1 Robinson, Louis. R. 369; Hunt *v.* Fish, 4 Barbour, Sup. Ct. R. 324. But, see Seneca Co. Bank *v* Neass, 3 Comstock, R. 442; S. C. 5 Denio, R. 329; Mercer *v.* Lancaster 5 Barr, R. 160; Jones *v.* Lewis, 8 Watts & Sergeant, R. 14.

[2] Bank of Utica *v.* Smith, 18 John. R. 230. See Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 582; Mechanics & Traders Bank of New Orleans *v.* Compton, 3 Rob. Louis. R. 4; Nicholson *v.* Marders, 3 Rob. Louis. R. 242; Hazelton Coal Co. *v.* Ryerson, Spencer, N. Jersey, R. 129; Bank of the United States *v.* Carneal, 2 Peters, R. 543, 549, 550. In this last case the Court said; "Then, as to the other point of notice, the facts are, that the defendant, Carneal, resides in Campbell county, in the State of Kentucky. The Note became due on the 24th of October, 1820, and on the next day the notary put a sealed notice of the protest and non-payment into the post-office in Cincinnati, directed, 'To Thomas D. Carneal, Campbell county, Kentucky,' the postage on which was not paid. At that time Carneal's residence in Campbell county was without the limits of any post town, and about two miles from Cincinnati, across the River Ohio; and his residence was well known to the officers of the bank, as well as the postmaster at Cincinnati. The county seat of Campbell county is Newport, where there is a post-office, about three miles distance from Carneal's residence, the River Licking being between them; and there is also another post-office at Covington, below the River Licking, about two miles distance from his residence. In October, 1820, the mails from Cincinnati, passed once a week only through Covington, and three times a week through Newport. Carneal was in the habit of receiving letters at the Newport office, as well as at the offices in Covington and Cincinnati. He was in the habit of receiving all the letters directed to him at Cincinnati

If he resides in the country on a plantation in a county, where there is no town, or where there are several county

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at the office in that place, and had given orders to the postmaster to detain all such letters there until he called for them. He visited Cincinnati very frequently, and almost daily, having business and being a director of a bank located at that place. The postmaster was in the habit of sending letters directed to him, in Campbell county, by the Covington mail, whenever he observed the address, unless, as was sometimes the case, he called for letters at the office before the Covington mail was sent. But other letters, directed generally to Campbell county, when the place of residence of the party was unknown, were sent by the postmaster to Newport. The notary himself, when he put the present notice into the post-office at Cincinnati, supposed that Carneal received all his letters at that office. The first mail which left Cincinnati for Newport, after the deposit of this notice, was on the 26th of October; and the first which left for Covington was on the 28th of the same month. There is no evidence in the case, that the letter in question went either by the mail of the 26th to Newport, or by that of the 28th to Covington. The defendant, Carneal, has not produced the letter, if it was ever received by him; and the circumstances afford a strong presumption that it might have been received at Cincinnati. Such is a summary of the material facts, upon which this Court is called to pronounce, whether there was due diligence in the transmission of the notice to the defendant. The latter having asked the Court below to instruct the jury as in case of a nonsuit; and the Court having acceded to his request, that instruction can be maintained only upon the supposition, that there was no contrariety of evidence, as to the facts which ought to have been left to the jury; and consequently, every inference fairly deducible from the facts which afforded a presumption of due notice ought to be made in favor of the plaintiffs. It is difficult to lay down any universal rule, as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post town. If it is not, then to the post-office or post town nearest to his residence, if known. But the rule, as to the nearest post-office, is not of universal application, for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and that fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience or business, it may be sufficient to send it to either. The object of the law in all these cases is, to enforce the transmission of the notice by such a route as that it may reach the party in a reasonable time. This doctrine is fully recognized by this Court in the case of The Bank of Columbia *v.*

post-offices, the same general rules will apply. Notice sent to the post-office, where he is accustomed to receive

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Lawrence, decided at the last term. (1 Peters, R. 579.) It has been objected, that the direction of this letter to Campbell county generally was not sufficient, but that it ought to have been directed to the nearest office, for otherwise it might happen, that it would be sent to a post-office, which, though the county seat, might be very distant from the residence of the party. Whether a mere direction to the county, without farther specification, where the party does not reside in any town therein, would be sufficient in all cases, and under all circumstances, we do not think it necessary to decide. That question may well be left until it is necessary in judgment. But where the description is general, if it is in fact sent to the proper post-office, or if, after due inquiry, it is the only description within the reach of the person sending the notice, we think it may be safely declared to be sufficiently certain, and that a different doctrine would materially clog the circulation of negotiable paper. We think the description in the present case was in every view sufficient. There was no misdirection; for Carneal did live in Campbell county. His actual residence was well known to the postmaster at Cincinnati, and the description did not and could not mislead him. If the direction was observed, it would be sent to Covington, or would be delivered at Cincinnati. If not, it would be sent, at farthest, to Newport. Then, was the notice in fact duly given, or duly sent through the proper post-office? We are all of opinion that it was. The post-office at Cincinnati was almost as near to the party's residence as that at Covington. The difference is too trifling to afford any just ground of preference; and Cincinnati was the place where he was most likely to receive the letter promptly, since it was the place of his business, and of his habitual and almost daily resort. If it had never been transmitted from that office at all, we are not prepared to say, that, under such circumstances, the notice left there was not of itself sufficient, since the party was known there, and his description unequivocal. It does not appear, in point of fact, that it ever left that place for any other post-office. If it did not, the strong presumption is, that it was there delivered to the party. But if it was sent to Newport, how can the Court say that it was missent? The party was in the habit of receiving letters there; it was the county seat; and the mail by that route was three times a week, and that by Covington only once a week. The probabilities, therefore, in favor of an early receipt of the letter from this circumstance might fairly balance any in the opposing scale, from the increase of distance and the intervention of the River Licking. And, in fact, the letter would at that time have reached Newport two days earlier than it would have reached Covington. We think it would be inconvenient and dangerous to lay down any rule, that the person sending a notice ought, under such circumstances, to direct the letter to the nearest post-office. We think that the notice would have his letters; if known, will be proper; if unknown, or it can be found out on reasonable inquiries, then to the nearest to his residence; if that is unknown, or cannot on such inquiries be found out, then it may be sent to the most generally used post-office, such as that at or near the county court-house, or perhaps it will be sufficient, in such a case, to send it directed generally to the county or district of the county, where he resides.[1]

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been good by either route; indeed, good, if left at the post-office at Cincinnati."

[1] Story on Bills, § 297; Weakly *v.* Bell, 9 Watts, R. 273. See Yeatman *v.* Erwin, 5 Miller, Louis. R. 264; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543; Bank of Columbia *v.* Lawrence, 1 Peters, Sup. Ct. R. 578, 583, 584. In this case, Mr. Justice Thompson, in delivering the opinion of the Court, said; "So, when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail, being a usual channel of communication, notice sent by it is evidence of due diligence. And, for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed, that it would comport with practical convenience, to fix any precise distance from the post-office, within which the party must reside, in order to make this a good service of the notice. Nor would we be understood, as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder, or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence. In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof, that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown.

Sixthly, If he resides at two places alternately during the year, being generally at one place during one portion of the year, and at the other the rest, but going frequently from the one to the other, notice of the dishonor directed to him at either place will be good and sufficient.[1] Indeed, in all these classes of cases, if the holder, or other person bound to give notice, is unable, after diligent inquiries, to ascertain the particular post-office, to which the letter of notice ought to be sent, it seems to be sufficient for him to put it into the proper post-

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But there is nothing showing, that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And, as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the Court, which have suggested any limits to the distance from the post-office within which a party must reside, in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the Court, and the notice held sufficient. 16 John. R. 218. In cases, where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think, that the present case is clearly one, which does not impose upon the plaintiffs such duty. We do not mean to say, no such cases can arise; but they will seldom, if ever, occur, and at all events such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of Pearson *v.* Crallan (2 Smith, R. 404; Chitty on Bills, 222, note,) is one of this description. But in that case the Court did not say, that it was necessary to send a special messenger, and it was left to the jury to decide, whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger, if he pleases; but no case has been found, where the English Courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule, that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable."

[1] Exchange and Banking Company of New Orleans *v.* Boyce, 3 Rob. Louis. R. 307.

office, from which it is to be forwarded, directed to the proper town or county, where the party entitled to notice resides, and leave it there, without farther directions, to take the ordinary course of the mail route to such town or county, according to the general regulations of the post-office department.[1]

§ 344. In many cases, where the actual residence of the party entitled to notice cannot, after reasonable inquiries, be ascertained, it may, perhaps, be sufficient to direct the letter of notice to the place where the Note bears date;[2] or to the place, where the indorser was residing at the time of his indorsement, if no change of residence is known;[3] or to the place, where the agent, or other party, procuring the discount, at the time states that the indorser resides;[4] or even to a place, where the indorser does not reside, if another party to the Note, upon inquiry, states that to be his residence.[5] *A fortiori*, if, upon diligent inquiries, information is obtained of the residence of the indorser in a place, where he does not at the time actually reside, and the notice is directed accordingly to that place, it will be sufficient to bind the indorser.[6] In many cases, where an indorser of the Note points out a particular place, to which the notice

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[1] See Bank of Utica *v.* De Mott, 13 John. R. 432; Seneca Co. Bank *v.* Neass, 3 Comstock, R. 442; S. C. 5 Denio, R. 329.

[2] See Moodie *v.* Morrall, 1 So. Car. Const. R. 367. But see Hill *v.* Varrell, 3 Greenl. R. 233; Spencer *v.* Bank of Salina, 3 Hill, N. Y. R. 520.

[3] Bank of Utica *v.* Phillips, 3 Wend. R. 408; McMurtrie *v.* Jones, 3 Wash. Cir. R. 206.

[4] Bank of Utica *v.* Davidson, 5 Wend. R. 587; Catskill Bank *v.* Stall, 15 Wend. R. 364.

[5] Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Bank of Utica *v.* Bender, 21 Wend. R. 643.

[6] See Bank of Utica *v.* De Mott, 13 John. R. 432; Reid *v.* Payne, 16 John. R. 218; Post, § 347.

shall be sent to him, it will be sufficient, that the notice is sent to him, at that place, although it may not be his domicil, or place of business; and the antecedent parties will also be bound by a notice from him after the receipt of such notice, if given in due time, in the same manner and under the same circumstances, as if the notice had been regularly sent to his domicil, or place of business; at least, if there be no fraud.[1]

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[1] Shelton *v.* Braithwaite, 8 Mees. & Wels. R. 252. In this case, at the trial before Rolfe, Bar., at the Middlesex Sittings in Hilary Term, it appeared, that the Bill was indorsed by the defendant to the plaintiffs, who carried on business under the title of the Patent Rivet Company at Smethwick, about four miles from Birmingham, and by them to the Birmingham and Midland Counties' Bank, who indorsed it to one Williams. It became due on the 17th of August, 1840, when it was presented for payment, and dishonored. On the 18th it was returned to the bank, who received it at Birmingham on the 19th. The plaintiff, Shelton, had previously given directions at the bank, that all communications for the Patent Rivet Company should be made to him at Tremadoc, in Caernarvonshire, whither he had gone on business, being engaged in a mining concern in the neighborhood. The bank accordingly sent notice of dishonor of the Bill to him at Tremadoc, by the post, which reached him there on the 21st of August; and on the 22d, he, Shelton, sent notice of dishonor by post to the defendant. It was objected for the defendant, that this notice was too late; that the bank ought to have given notice directly to the plaintiffs at Smethwick, instead of sending it to the plaintiff, Shelton, at Tremadoc, in which case the defendant would have received notice a day sooner. The learned Judge reserved the point, and a verdict passed for the plaintiffs. Afterwards, on a rule for a nonsuit, the question was argued; and Lord Abinger said; "I am of opinion, that there is no ground for this rule. The question is, whether the plaintiffs could have defended an action against themselves by the bank. They could not; because notice was sent to a particular place pointed out by one of themselves. If that notice had been given in fraud of the defendant or any other party, that should have been found by the jury. If there are several parties in a firm, and one of them goes to Brighton for a week, and gives notice to their banker to send all letters for the firm to him there, that will be sufficient, unless there is fraud. An indorsee is not bound to be always at his place of residence; he may not expect the Bill will come back. I think, that, if the plaintiffs are bound by the notice they have received, all prior parties are also bound, in the absence of fraud." Mr. Baron Alderson said; "I am of the same

§ 345. Intimately connected with this part of the subject is the consideration of the mode of address and manner of direction of the letter, containing the notice of the dishonor, and the consequences of misdirection, as to the mode of address or place of direction. When the notice is to be sent in a letter by post, care must be observed, that the letter be accurately directed and addressed; for any mistake occasioning delay, and which might have been avoided by due care, will deprive the holder of all remedy against the party, to whom the notice ought to have been given. If the party reside in a large city, or town, the direction should not be to him at that place generally, by his surname alone; but some other special designation should be added to identify the person; such as the particular street or part of the town, where he resides, and his trade or occupation, so as to prevent the risk of misdelivery, which might at least occasion delay in the proper person receiving such notice. Therefore, it has been held, that a notice

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opinion. It is clear, that the bank at Birmingham had received due notice; and the question comes to this, whether the defendant is discharged in consequence of insufficient notice to the plaintiffs; and I am of opinion, that the notice was sufficient, unless the plaintiffs have in some way disqualified themselves from receiving notice so soon as they otherwise would. They have not so disqualified themselves. The plaintiff, Shelton, being, so far as appears, about to be resident at Tremadoc, some time previously to his going there, directs the bank to send all letters to him at Tremadoc, and they do so accordingly. That appears to me to be sending a notice in a reasonable manner, and as men of business would naturally act. The question, which, upon the motion for this rule, the Court thought worthy of consideration, is answered by the facts. It was then supposed that the plaintiff, Shelton, had his residence at Smethwick, and that, instead of receiving notices there, he had given directions, that letters should be sent to him at Tremadoc, where he was going on a visit, and that thereby time was lost, and prior parties placed in a worse situation, than if notice had been sent to his ordinary residence. I do not know, that even that would have made the notice bad; but the facts turn out differently."

to an indorser thus, "Mr. Haynes, Bristol," is too general and insufficient, without express evidence, that the proper party received it in due time; because, the place being so populous, there may be many persons of the same surname there.[1]

§ 346. Indeed, where the party, to whom notice is to be given, resides in a large city or town, it is not always safe, and perhaps, in some cases, it may be held not sufficient to send a notice or direction addressed to him at that city or town, by his Christian name and surname alone, without some farther direction as to his residence, at least if the party, giving the notice, has knowledge,

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1 Walter *v.* Haynes, Ryan & Mood. R. 149; Chitty on Bills, ch. 10, p. 506, (8th edit.); Bayley on Bills, ch. 7, § 2, p. 280, (5th edit.); Spencer *v.* Bank of Salina, 3 Hill, N.Y. R. 520; Bank of Utica *v.* De Mott, 13 John. R. 432. In this last case, Mr. Chief Justice Spencer, in delivering the opinion of the Court, said; "The defendant is sued as indorser of a Promissory Note, payable at the Bank of Utica. When the Note fell due, notice of its non-payment was given, by a letter put into the post-office at Utica, directed to the defendant, at Canandaigua. It was proved that the defendant lived at Ovid, in the county of Seneca, and had resided there for ten years past. The excuse for the misdirection of the notice is, that the book-keeper, who gave it, was informed by the cashier and some of the directors of the bank, that the defendant resided at Canandaigua. The notice is bad. The defendant was entitled to information of the non-payment of the Note, and that he was looked to for payment. He had a permanent residence, for ten years, in a different county. With ordinary diligence, the place of his abode might have been ascertained; and it must be the plaintiff's loss, not the defendant's, that the notice was not given. It is an essential part of the contract, that the indorser shall be notified of the non-payment of the Note, that he may take measures accordingly; and if any loss has happened from the want of notice, it must be borne by the party, on whom the burden of giving due notice is thrown by law, and who has been guilty of laches. The case of Chapman *v.* Lipscombe and Powel, 1 John. R. 294, was peculiarly circumstanced. There was great diligence used in that case to find out the defendant's residence, and the Bill was dated at Norfolk, to which place one of the notices was directed. Here the Note was not dated at any place, and the inquiry was very limited."

or can, by reasonable inquiries, obtain information of the particular street, or ward, where he resides. Thus, it is said, that a general direction to a person by his Christian name and surname, addressed to him in "London," generally, has been thought to be insufficient. And possibly there may be some foundation for the objection in cases, where the name is very common, such for example, as the name "John Smith," of which name there probably are fifty persons in that city. But there is certainly no small danger in requiring any more than the general address and description of the party by his full name, and, if known by his occupation or business also, in the direction of the letter.[1] Even in large cities, a general direction seems all that ought reasonably to be required, unless in cases, where the party has the means within his reach of giving more exact directions, as to the street, or ward, or domicil, or place of business of the party. And if the Note itself should be dated generally, as at "London," or "Manchester," it would seem sufficient for the party, sending the notice, to use as general a description of place in the direction of the notice.[2]

§ 347. If there be a mistake in the direction, and yet it corrects itself, or it is such, as cannot mislead the party, to whom the letter is addressed, as, for example, if his surname is "Selwyn," and it is spelt "Selwin," or his Christian name is Josiah, and it is written in the direction in an abbreviated form, "Josh." or his Christian name is John, and it is written "Jno."; in these and the

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[1] Chitty on Bills, ch. 10, p. 506, (8th edit.) See Jones *v.* Wardell, 6 Watts & Serg. R. 399.

[2] Chitty on Bills, ch. 10, p. 505, (8th edit.) ; Mann *v.* Moors, Ryan & Mood. R. 249 ; Clarke *v.* Sharpe, 3 Mees. & Wels. R. 166.

like cases, if the error is merely nominal, and is not calculated to mislead, or does not mislead the party, the mistake will not be fatal. So, if there are several towns of the same name in the same State, or one town in one State of the same name as another in an adjoining State, as, for example, "Manchester," in Massachusetts, and "Manchester," in New Hampshire, or "Bedford," in Massachusetts, and "New Bedford," in Massachusetts, the latter being in the language of conversation often called "Bedford"; in each of these cases, if the letter is in fact sent to the right post-office, the imperfect description will not vitiate it. But it would be otherwise, if the imperfection in the description led to the transmission to a wrong post-office. There are many towns in different States in the Union, which have the same name; and, in such cases, it seems almost indispensable, to prevent errors in the transmission, that the State where the letter is intended to go, should be added to the direction.[1] If, however, the misdirection, as to place, be in consequence of erroneous information, after reasonable inquiries made, the holder, or other party, will be held to be excused, and will retain all his rights, as if due notice had been given; for in such a case, he has done all that the law requires in point of diligence.[2]

§ 348. In the next place, as to the form of the notice of the dishonor to be given, or sent to the indorser. No precise form of words is necessary to be used upon such occasions. Still, however, it is indispensable, that it should either expressly, or by just and natural implica-

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[1] Beckwith *v.* Smith, 22 Maine R. 125, (9 Shepley.)

[2] Ransom *v.* Mack, 2 Hill, N. Y. R. 587; Bank of Utica *v.* Bender, 21 Wend. R. 643; Ante, § 344; 3 Kent, Comm. Lect. 44, p. 107, (5th edit.)

tion, contain, in substance, the following requisites:—(1.) A true description of the Note, so as to ascertain its identity; (2.) An assertion, that it has been duly presented to the maker at its maturity, and dishonored; (3.) That the holder, or other person, giving the notice, looks to the person, to whom the notice is given, for reimbursement and indemnity.[1]

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[1] Story on Bills, § 301, 390, and authorities there cited; Tindal *v.* Brown, 1 Term R. 169; Per Buller, J., Hartley *v.* Case, 4 Barn. & Cressw. 339; Mills *v.* Bank of United States, 11 Wheat. R. 431; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543; Ramsom *v.* Mack, 2 Hill, N. Y. R. 587, 593; Reedy *v.* Seixas, 2 John. Cas. 337; Lockwood *v.* Crawford, 18 Conn. R. 361; Chewning *v.* Gatewood, 5 Howard, Mississippi R. 552; 3 Kent, Comm. Lect. 44, p. 108, (5th edit.); Bayley on Bills, ch. 7, § 2, p. 256, 257, (5th edit.); Chitty on Bills, ch. 10, p. 501, (8th edit.) In Hartley *v.* Case, 4 Barn. & Cressw. 339, Lord Chief Justice Abbott said; "There is no precise form of words necessary to be used in giving notice of the dishonor of a Bill of Exchange, but the language used must be such as to convey notice to the party what the Bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say, that the Bill was ever accepted. We, therefore, think the notice was insufficient, and the rule for a new trial must be discharged." In Solarte *v.* Palmer, 7 Bing. R. 530, 533, Lord Chief Justice Tindal, in delivering the opinion of the Court, said: "The notice of dishonor, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover, most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party, to whom it is addressed, either in express terms, or by necessary implication, that the Bill has been dishonored, and that the holder looks to him for payment of the amount. The allegation in the declaration is, that the Bill has been presented to the acceptor, who has refused payment, whereof the defendant has had notice; and, consequently, to satisfy this allegation, though no express form of words is necessary, the notice should convey an intimation to the party, to whom it is addressed, that the Bill is in fact dishonored. Now, looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents. Besides, it is perfectly consistent with this notice, that the Bill has never been presented at all, and that the plaintiff means to rely upon some legal excuse for the non-presentment.

§ 349. And, first, as to the description of the Note in the notice. It is obvious, that as the object of the notice is to put the party, to whom it is given, in possession of the material facts, on which his own liability is founded, so as to secure the liability of others over to him, and his own reimbursement, upon payment of the Note, there should be a sufficiently definite description of the Note to enable him to know, to what one in particular the notice applies; for an indorser may have indorsed many Notes of very different dates, sums, and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the notice is special, to which it properly applies, or which it designates.[1] But a misdescription of the Note in the

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The present case is stronger against the sufficiency of the notice, than that of Hartley *v.* Case, where there was at least an allegation, that the Bill had become due, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonor to the indorser, and may have been information, that an action was about to be brought by the attorney, taking for granted, that the notice of the Bill's dishonor had been given in the ordinary way before the Bill was put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice. We think, therefore, the judgment ought to be affirmed." The judgment in this case was affirmed in the House of Lords, 1 Bing. New Cas. 194. See, also, Chapman *v.* British Guiana Bank, 6 Moore, Cases before Privy Council, 26; Caunt *v.* Thompson, 7 Manning, Gr. & Scott, R. 400.

[1] Story on Bills, § 390; Hartley *v.* Case, 4 Barn. & Cressw. 340; Ante, § 348, note; Beauchamp *v.* Cash, Dowl. & Ryl. N. P. Cas. 3; Mills *v.* Bank of United States, 11 Wheat. R. 431; Reedy *v.* Seixas, 2 John. Cas. 337; Bank of Rochester *v.* Gould, 9 Wend. R. 279; Smith *v.* Whiting, 12 Mass. R. 6, 7; Ransom *v.* Mack, 2 Hill, N. Y. R. 587-593; Bradley *v.* Davis, 13 Shepley, R. 45; Clark *v.* Eldridge, 13 Metcalf, R. 96; Wheaton *v.* Wilmarth, Ibid. 422. In Mills *v.* Bank of United States, 11 Wheat. R. 431, 436, the Court said; "It is contended, that this opinion is erroneous, because the notice was fatally defective by reason of its not stating, who was the holder, by reason of its misdescription of the date of the Note, and by reason of its not stating, that a demand

notice will not vitiate, if it does not mislead the party, to whom it is addressed, and is not calculated to mislead him, whether the misdescription be in the date, or the form, or the names of the parties, or otherwise;[1] [as where it can be shown that there was no other Note in existence to which the description was applicable.[2]]

§ 350. Secondly, as to the statement in the notice, that the Note has been duly presented and dishonored.

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had been made at the bank when the Note was due. The first objection proceeds upon a doctrine, which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whomsoever he may be; and it is time enough for him to ascertain the true title of the holder, when he is called upon for payment. The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained, that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular Note, which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed, that on the 22d of September, a Note indorsed by him, payable in sixty days, was protested for non-payment; and yet the Note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the Court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other Note, payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other Note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one Note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?"

1 Stockman *v.* Parr, 11 Mees. & Wels. 809; S. C. 1 Car. & Kirk, 41; Rowan *v.* Odenheimer, 5 Smedes & Marshall, R. 44; Routh *v.* Robetson, 11 Ibid. 382.

2 Cayuga Co. Bank *v.* Wade, 1 Comstock, R. 413.

This statement is essential to establish the claim, or right of the holder, or other party, giving notice; for, otherwise, he will not be entitled to any payment from the indorser. It will be sufficient, indeed, if the notice sent necessarily, or even fairly implies, by its terms, that there has been a due presentment and dishonor at the maturity of the Note.[1] But mere notice of the fact, that the Note has not been paid, affords no proof whatsoever, that it has been presented in due season, or even that it has been presented at all; for it may be, that the holder means to rely upon some legal excuse for non-presentment.[2] [And where a notice stated that the Note had been "*this day* presented for payment" and payment refused, but the notice was *without* date, it was held to be defective.[3]]

§ 351. Perhaps it is to be lamented, in a practical view, that the rule, originally established in England, has included in it so much strictness; since the holders of Notes can rarely be able, in the hurry and multiplicity of their business, to weigh the full force of their words, or to understand the necessity of great precision and fulness in the statement of the material facts. The inconveniences of the rule have been severely felt by the mercantile world; and a few examples may serve to show, with what rigorous exactness the rule was at first interpreted and applied. Thus, where the holder

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[1] Hartley *v.* Case, 4 Barn. & Cressw. 340; Solarte *v.* Palmer, 7 Bing. R. 530, 533; S. C. in House of Lords, 1 Bing. New Cas. 194; Messenger *v.* Southey, 1 Mann. & Grang. R. 76; Strange *v.* Price, 10 Adolp. & Ellis, 125; Boulton *v.* Welsh, 3 Bing. New Cas. 688; Dole *v.* Gold, 5 Barbour, Sup. Ct. R. 490; Cayuga Co. Bank *v.* Warden, 1 Comstock, R. 413.

[2] Ibid.; Lockwood *v.* Crawford, 18 Conn. R. 361.

[3] Wynn *v.* Alden, 4 Denio, R. 163.

sent a letter to the drawer of a Bill, saying, "I am desired to apply to you for the payment of the sum of £150 due to myself on a draft drawn by Mr. C. on Mr. C., which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which will otherwise immediately take place"; it was held to be an insufficient notice, because the letter did not apprize the party of the fact of the dishonor, but contained a mere demand of payment.[1] So, where the attorney of the holders sent a notice to the indorser of a Bill in the following language: "A Bill for £683, drawn by Mr. K. upon Messrs. J. & Co., and bearing your indorsement has been put into our hands by the assignees of Mr. A. (the holders,) with directions to take legal measures for the recovery thereof, unless immediately paid"; it was held, for the like reason, that the notice was insufficient.[2] So, where a notice was sent by an indorser to a prior indorser, in these words: "The Promissory Note for £200, drawn by H. H., dated the 18th of July last, payable in three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid, I therefore give you notice thereof, and request, you will let me have the amount thereof forthwith"; it was held, for the like reason, that the notice was insufficient.[3]

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1 Hartley *v.* Case, 4 Barn. & Cressw. 339; Shelton *v.* Braithwaite, 7 Mees. & Wels. 436.

2 Solarte *v.* Palmer, 7 Bing. R. 530; S. C. 1 Bing. New Cas. 194; 8 Bligh, N. S. R. 874. See, also, Phillips *v.* Gould, 8 Carr. & Payne, 355.

3 Boulton *v.* Welsh, 3 Bing. New Cas. 688. See, also, Beauchamp *v.* Cash, Dowl. & Ryl. N. P. R. 3. On this occasion, Lord Chief Justice Tindal said; "I do not see how it is possible to escape from the rule established by the two decided cases, without resorting to such subtile distinctions, as would make the rule itself useless in practice. The rule requires, that, either expressly or by necessary inference, the notice shall disclose, that the Bill or Note has been dishonored. The form of a pro-

So, where a letter by the indorsee to the indorser of a Promissory Note in these words: "This is to inform you, that the Bill I took of you for £15 2*s.* 6*d.* is not took up, and 4*s.* 6*d.* expense and the money I must pay immediately. My son will be in London on Friday morning"; it was held, that the notice was insufficient, because it did not pointedly state a regular presentment of the Note and dishonor, but rather more an expectation that the party addressed, or some prior party on the Note, had engaged to take it up.[1] So, where the indorsees of a Bill of Exchange gave notice to the indorser in these words: "Messrs. S. & Co. inform Mr. J. P. that that Mr. J. B.'s acceptance £87 5*s.* is not paid. As indorser, Mr. P. is called upon to pay the money, which will be expected immediately"; it was, for the like reason, held insufficient.[2] So, where the notice was

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test is, 'Know all men, that I, A. B., on the day of at the usual place of abode of the said have demanded payment of the Bill, of the which the above is the copy, which the said did not pay, wherefore I the said do hereby protest the said Bill. Dated this day of .' The two important facts are, that payment of the Bill has been demanded of the acceptor, and that payment has not been obtained. In like manner, in the case of a Promissory Note, the notice should show a presentment to the maker, a demand of payment, and refusal. Here, the notice, only states, that the Note became due and was returned unpaid. These facts are compatible with an entire omission to present the Note to the maker. I think, therefore, the notice is insufficient, and that this rule must be made absolute."

[1] Messenger *v.* Southey, 1 Mann. & Grang. R. 76.

[2] Strange *v.* Price, 10 Adolp. & Ellis, 125. It is obvious, that the Court, in this case, began at this time to entertain some scruples as to the soundness of the former decisions. Lord Denman, on this occasion, said; "I have some doubt as to the reasoning, on which the decisions in Hartley *v.* Case and in Solarte *v.* Palmer, have turned; but the decision in the latter case (as was observed in the Court of Exchequer) is binding, and I think it authorizes our saying here, that the notice is not sufficient. As in Solarte *v.* Palmer, so here, the notice does not convey full information, that the Bill has been dishonored. In all the cases, where such notices have

in the following language: "This is to give you notice that a Bill drawn by you, and accepted by J. B., for £47 18*s.* 9*d.*, due July 9, 1835, is unpaid, and lies due at Mr. F.'s, 65 Fleet Street"; and another, stating, "A Bill for £29 17*s.* 3*d.*, drawn by W. on H., due yesterday, is unpaid, and I am sorry to say the person, at whose house it is made payable, don't speak very favorably of the acceptor's punctuality. I should like to see you upon it to-day"; and another, stating, "W. H.'s acceptance for £21 4*s.* 4*d.*, due on Saturday, is unpaid. He has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible"; it was held that all these notices were insufficient.[1]

§ 352. A strong disposition has, however, been shown, in some of the recent cases in the English Courts, to escape from these rigorous interpretations of the general rule, and to place it upon a footing, more consonant with the common understanding of merchants and public convenience; and, at all events, there is a manifest disinclination to extend its operation. The courts have, therefore, laid hold of any expressions in the notice, which might fairly be presumed to indicate, that a due presentment or dishonor had taken place, and that the notice was designed to put that fact as the ground of the liability.[2] Thus, for example,

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been held defective, it might have been said, that they furnished a reasonable implication of the fact; but clearly, that is not sufficient; the notice must be a positive statement, that the Bill has been accepted and dishonored. In cases where the strict rule has been thought not applicable, there have been circumstances connected with the notice which showed that the necessary implication did arise."

[1] Furze *v.* Sharwood, 3 Adolp. & Ellis, N. S. R. 388.

[2] Mr. Chitty (on Bills, ch. 10, p. 501, 8th edit.) says; "There is no precise form of words necessary to be used in giving notice of the non-payment of a Bill; any act of the holder, distinctly signifying the refusal

where the notice to the indorsers was in the following language; "The Bill of Exchange drawn by S. R. on and accepted by C. B., and bearing your indorsement, has been presented for payment to the acceptor thereof, and *returned* dishonored, and now lies overdue and unpaid with me, as above, of which I hereby give you notice;" it was held to be a sufficient notice.[1] So, where the notice to the indorser was in the following language; I am desired by Mr. H. to give you notice that a Promissory Note, dated and made by S. T., and payable to your order two months after date thereof, became due yesterday, and has been *returned* unpaid; and I have to request, that you will send the amount thereof *with* 1s. 6*d*. *noting*, free of postage, by return of post"; it was held to be a sufficient notice.[2] So,

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of the drawee, will be a sufficient notice. It has indeed been said, in the course of argument, that it is not enough to state in the notice, that the drawee has refused to honor, but that it must go farther, and express that the holder does not intend to give credit to the drawee. But it should seem, that, as the only reason, why notice is required, is, that the drawer and indorsers may have the earliest opportunity of resorting to the parties liable to them, it is not necessary, that this consequent liability should be stated to them, because that is a legal consequence of the dishonor, of which they must necessarily be apprized by mere notice of the fact of non-payment. The notice, however, must explicitly state, what the Bill or Note is, and that payment has been refused by the drawee or maker, and must not be calculated in any way to mislead the party to whom it is given. A letter from an indorsee to a drawer, merely containing a demand of payment, without stating, that the Bill had been presented and refused payment, is not sufficient; nor is a notice stating the Bill to have been drawn by the party, when, in fact, he was not the drawer, but only an indorser, sufficient, as it misstated the facts. But a letter to the payee and indorser of a Note, in these terms, — 'Mr. Ellis (the maker) is unable to pay the Note for a few days; he says he shall be ready in a week, which will be in time for us — only form to acquaint you'; was held to be a sufficient notice."

[1] Lewis *v*. Gompertz, 6 Mees. & Wels. R. 399. See, also, Houlditch *v*. Cauty, 4 Bing. New Cas. 411.

[2] Hedger *v*. Steavenson, 2 Mees. & Wels. R. 799.

where a parol notice was as follows; "I called to tell Mr. B., that the Bill for £37 10*s.* was presented at the banker's, is unpaid and dishonored, and I hope he will call and provide for it"; it was held to be a sufficient notice.[1] So, where the notice was in the following words; "Your Bill drawn on T. T. and accepted by him is this day *returned with charges*, to which we request your immediate attention"; it was held to be a sufficient notice.[2] So, where the notice was in these words; "I beg to inform you that Mr. D.'s acceptance for £200 drawn and indorsed by you, due 31st July, has been presented for payment and *returned*, and now remains unpaid"; it was held, that the notice was sufficient.[3] So, where a notice by an attorney was in the following words; "I am requested to apply to you for payment of £35 9*s.* 4*d.*, the amount of an overdue acceptance drawn by you on and accepted by E. M., and to inform you, that unless the same be paid to me with interest, and 5*s.* for this application, before eleven to-morrow, proceedings will be taken without further notice"; it was held, that the notice was sufficient.[4] So, a notice, which states, that a Bill or Note "has been dishonored," has been held to be sufficient, without stating that the Bill or Note has been presented for payment.[5]

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[1] Smith *v.* Boulton, 1 Hurl. & W. 3.

[2] Grugeon *v.* Smith, 6 Adolp. & Ellis, 490.

[3] Cooke *v.* French, 10 Adolp. & Ellis, 131, note.

[4] Watson *v.* Blackwell, 6 (English) Jurist, 738; Robson *v.* Curlewis, 1 Carr. & Marsh. R. 378; S. C. 2 Adolph. & Ellis, New R. 421; Stockman *v.* Parr, 7 (English) Jurist, 886; S. C. 1 Car. & Kirk. 41; 11 Mees. & Wels. 809; Robson *v.* McGregor, 3 Gale & David. 69.

[5] Edmonds *v.* Cates, 2 (English) Jurist, N. P. C. 183; Stocken *v.* Collins, 9 Carr. & Payne, R. 653; S. C. 7 Mees. & Wels. R. 515; King *v.* Bickley, 2 Adolp. & Ellis, New R. 419; Robson *v.* Curlewis, 2 Adolp.

§ 353. Thirdly, as to the statement in the notice, that the holder looks to the indorser, to whom it is sent

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& Ellis, New. R. 421. In this distressing state of the English authorities, turning, as they do, upon such niceties of interpretation, it seems important to bring before the learned reader the very full exposition of them given by Lord Denman, in the recent case of Furze *v.* Sherwood, 2 Adolp. & Ellis, New. R. 388, 409. In delivering the opinion of the Court in that case, upon the point already cited, his Lordship said; "Lord Mansfield, after observing, in the case of Tindal *v.* Brown, that certainty is of the highest importance in mercantile transactions, proceeded to settle the question there raised, whether the notice of dishonor was in point of law too late. The whole Court affirmed that proposition, and more than once set aside a verdict founded on the opposite assumption. Nothing more was required for the decision. But Mr. Justice Willes took a second objection; and Mr. Justice Ashhurst a third. 'Notice,' said his Lordship, 'means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say, that the maker does not intend to pay; but' (it ought to be farther said) 'that he (the holder) does not intend to give credit. In the present case, there is no notice; for the party ought to know, whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.' This is repeated with great approbation by Buller, J. Near forty years after, the sufficiency of a notice of dishonor was canvassed in an action between Hartley *v.* Case, decided by Lord Tenterden at Nisi Prius. It ran thus: 'I am desired to apply to you for the payment of the sum of £150 due to myself on a draft drawn by Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.' The report says, 'The Lord Chief Justice was of opinion, as this letter did not apprize the party of the fact of dishonor, but contained a mere demand of payment, it was not sufficient; and the plaintiff was nonsuited.' After argument, on a rule for setting aside the nonsuit, his Lordship said; 'There is no precise form of words necessary to be used in giving notice' of dishonor, 'but the language used must be such as to convey notice to the party what the Bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say, that the Bill was ever accepted. We, therefore, think the notice was insufficient.' This short judgment, in which the whole Court concurred, comprising Bayley, Holroyd, and Littledale, Justices, is perfectly correct in its statement of the fact and the law, and has the merit of adhering closely to the point raised in argument. It has never been questioned by any judicial authority. The same learned Chief Justice was afterwards called upon to decide on the sufficiency of the following notice;

for reimbursement and indemnity. This is certainly laid down in some of the authorities as indispensable;[1]

'A Bill of £683, drawn by' A, upon B. C., 'and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, Gentlemen, your very obedient servants, J. and S. P.' Here was no statement of the dishonor, the presentment, or the acceptance. If any notice of the dishonor as a distinct fact is necessary, this document is plainly worthless. It was so holden by Lord Tenterden; but, from the magnitude of the sum and the importance of the question, his Lordship suggested, that a bill of exceptions might be tendered. This was done, and the case brought by writ of error into the Exchequer Chamber, when, as might have been expected, the Lord Chief Justice delivered a unanimous judgment, that Lord Tenterden's direction to the jury was right, and the notice insufficient. It was, however, thought right to bring the matter before the House of Lords, where the late Mr. Justice Park delivered the opinion of all the Judges present (nine in number) to the same effect. Thus, without one dissentient voice, the Judges of all the Courts on these different occasions concurred with Lord Tenterden in holding express notice of the fact of dishonor to be necessary; the only point on which he had given an opinion. This was the celebrated case of Solarte *v.* Palmer. The Lord Chief Justice in the Exchequer Chamber laid down this rule, that 'The notice of dishonor should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the Bill has been dishonored, and that the holder looks to him for payment of the amount.' Park, J., when delivering the Judges' opinion to the Lords, omits the latter clause, and merely says, that 'such a notice ought, in express terms, or by necessary implication, to convey full information, that the Bill had been dishonored.' This decision, therefore, did not turn upon or require any allusion to the doctrine of Ashhurst and Buller, Js., in Tindal *v.* Brown, on the necessity of stating, that the holder looks to the party addressed, and does not give credit to any other person. But much controversy has arisen on the branch of the notice, as to which the Lord Chief Justice and Park, J. agree, requiring notice of dishonor in express terms, or by necessary implication; and hence the task of examining all the decisions is imposed upon us. In Grugeon *v.* Smith, this Court held the dishonor of a Bill to be sufficiently notified by the phrase, 'The Bill is this day returned with charges.' A few days after, but without being aware of this decision, the Court of Common Pleas, Boulton *v.* Welsh, held the notice insufficient, where it is said, 'The Promis-

1 Solarte *v.* Palmer, 7 Bing. R. 530; S. C. 1 Bing. New Cas. 198; 8 Bligh, (N. S.) R. 874; Tindal *v.* Brown, 1 Term R. 167.

but it seems now to be admitted, by the more recent authorities, that, although in strictness it may be re-

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sory Note' 'became due yesterday, and is returned to me unpaid;' the Lord Chief Justice there observing, that he did not see how it was 'possible to escape from the rule established by the two decided cases, without resorting to such subtile distinctions as would make the rule itself useless in practice. The rule requires, that, either expressly or by necessary inference, the notice shall disclose that the Bill or Note has been dishonored.' Upon which we will merely observe, in passing, that there is no necessary difference of opinion between the two Courts, as Parke, B., supposed in Hedger *v.* Steavenson. The Common Pleas might have held, that 'returned with charges' did necessarily imply presentment and dishonor. And it does not follow from any thing we said, that we might not have thought 'returned to me unpaid' insufficient. But the case of Hedger *v.* Steavenson brought the Court of Exchequer into direct collision with the Common Pleas, not indeed on the sufficiency of the notice, for it was not identical in the two cases,) but on the principle of deciding. The Note, &c., 'is returned unpaid' was the form, which the Common Pleas held wrong. The same form, with the addition of 1*s.* 6*d.* for noting, the Exchequer held right; and Parke, B., while submitting to the authority of Solarte *v.* Palmer, excepts to the reasons given for the judgment, and the language in which they are couched, and doubts whether he could go so far as to say, that 'it ought to appear upon the face of the instrument "by express terms or necessary implication, that the Bill was presented and dishonored"'; thinking it 'enough if it appear by reasonable intendment, and would be inferred by any man of business, that the Bill has been presented to the acceptor, and not paid by him.' He remarks, however, that, even if the rule were properly laid down in those words, it ought to receive a more liberal construction than the Common Pleas appeared to have adopted, in which sentiment Barons Bolland and Alderson agreed, having been two of the Judges consulted by the Lords when Park, J., promulged their opinion there. The next case in order of time is Houlditch *v.* Cauty. There the general doctrine was discussed; and the Lord Chief Justice declared his adherence to Boulton *v.* Welsh, but distinguished the case then before him. The sufficiency of the written notice was not directly in question; for it had been followed by a verbal communication between the plaintiff and defendant. Strange *v.* Price followed. This Court there held it insufficient to 'inform Mr. James Price' 'that Mr. John Betterton's acceptance, £87 5*s.*, is not paid.' A fortiori, the Common Pleas would have agreed with us. I do not believe that the Exchequer would have differed. In Easter term, 1840, doubts springing from the same fruitful source were stirred in the Court of Common Pleas, (Messenger *v.* Southey) and the Exchequer, (Lewis *v.* Gomquired, where the language is otherwise doubtful or uncertain, yet that it will ordinarily be presumed,

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pertz); the former condemning, the latter supporting, the notice in those respective cases; but the forms were so entirely different, that the judgments given might have been consistently formed by either Court. But Messenger *v.* Southey shows a great relaxation of the rigor of the rule laid down in the Exchequer Chamber and House of Lords, on the part of the Lord Chief Justice, who admits that Grugeon *v.* Smith might have been well decided by force of the words 'returned with charges,' and possibly Hedger *v.* Steavenson also, because the notice declared the Bill to have been 'returned unpaid.' But these are the very words, which were held insufficient under the operation of the rule in Boulton *v.* Welsh, a case decided by the Common Pleas reluctantly, from deference to what was decided in Solarte *v.* Palmer, and which can hardly be now deemed a satisfactory authority. Upon the whole, it is to be feared, that none of the rules for construing this branch of the instrument designed to be a notice of dishonor will be found capable of very general application. The advantage of clear and certain rules, where it can be secured, is indeed inestimable. Perhaps Lord Mansfield never conferred so great a benefit on the commercial world, as by his decision of Tindal *v.* Brown, where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immediate notice as a matter of law. But in the matter in hand we can scarcely hope to attain such a rule. For if we are to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we can hardly decide it without the intervention of a jury, whose opinions will naturally vary with the circumstances of each case; and, if on the other hand, the Court must decide on examination of the document according to legal and grammatical rules of interpretation, we shall frequently give it a sense, in which neither party could ever have understood it. If we adopt the middle course, requiring at least a necessary implication, but qualifying these words by Lord Eldon's comment in Wilkinson *v.* Adam, we have just seen, that (if the reports be accurate) the same eminent Judge, who gave them one sense in Boulton *v.* Welsh, may admit them to be susceptible of a sense directly opposite in Hedger *v.* Steavenson. This rule, however, was recommended by great authority, twice asserted by the Court of Exchequer, not repudiated by the Court of Common Pleas. Perhaps it goes no farther than to require, that the Court must see that, by some words or other, notice of dishonor has been given. We have entirely excluded the supposition, that the mere fact of making a communication respecting the non-payment of the Bill at the proper season can extend the meaning of the words conveying notice of dishonor. This exists in almost every case; and, as one can hardly conjecture any other motive for giving the information, so the party addressed where the notice is in other respects sufficient.[1] For sending notice of the dishonor would seem in itself to be sufficient to show, that the party means to rely on the indorser for reimbursement or indemnity, unless the language of the instrument naturally or necessarily repels that presumption.[2]

§ 354. The rule adopted in the American Courts is far more liberal than that generally maintained in the

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can hardly fail to infer, that it is given in order to fix him with liability. Yet no one disputes that the fact must be stated, the notice of dishonor plainly given. But, if this be done, we may now inquire where is the authority establishing the position of Ashhurst and Buller, Js. (unnecessary for the case before them), that the notice must also tell the party addressed, that he looks to him for payment? If not, why send the notice? True; he may have some other reason for informing the party addressed of the dishonor, while looking elsewhere for his money. But, unless he tells him this, the receiver of such a notice cannot but be certain that the sender means to call upon him for payment. The protest, for which notice was substituted, has no such clause, but begins and ends with the history of the dishonored Bill, including the protest itself. Where notice has been given by another party than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment, or a statement, that it will be required of the party addressed; but in no case has the absence of such information been held to vitiate a notice in other respects complete, and which has come directly from the holder. Nothing now remains but to declare our opinion on the several forms of notice set forth in the special verdict. And the second, of July 11th; the third, July 20th; the fourth, July 13th; the fifth, September 11th; the sixth, September 25th; and the eighth, September 26th; we think bad, because they contain no notice of dishonor according to any of the decisions, or within any of the rules. Consistently with all that is set forth, the plaintiff, either from ignorance or inadvertence, or because he may really have looked to another, may have abstained altogether from presenting any one of these Bills. But this amount reduces the plaintiff's claim below the defendants' set-off. Our judgment must then be for the latter, even on the supposition that it would be against them on all the important general points that have been raised."

1 Furse *v.* Sharwood, 2 Adolp. & Ellis, New. R. 388, 416; King *v.* Bickley, 2 Adolp. & Ellis, New. R. 419; Ante, § 351; Miers *v.* Brown, 11 Mees. & Wels. 372.

2 Ibid.

English Courts, and proceeds upon the ground, that it is sufficient to state in the notice, that the Note has not been paid, and, either expressly or by implication, that the holder looks to the indorser for reimbursement or indemnity.[1] If, however, there be no statement of the dishonor of the Note, nor any thing from which it can fairly be implied, that a due presentment has been made, the notice would seem to be fatally defective.[2]

§ 355. Passing from these considerations, let us in the next place inquire, what circumstances will amount, (1.) to an excuse of the omission of due notice, and (2.)

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[1] Mills *v.* Bank of United States, 11 Wheat. R. 431, 437; Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543; Reedy *v.* Seixas, 2 John. Cas. 337; Ransom *v.* Mack, 2 Hill, N. Y. R. 588, 593; Ex'ors of Sinclair *v.* Lynch, 1 Spear, R. 244; Cayuga Co. Bank *v.* Worden, 1 Comstock, R. 414.—In Mills *v.* Bank of United States, 11 Wheat. R. 431, 437, the Court said; "The last objection to the notice is, that it does not state that payment was demanded at the bank when the Note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of the non-payment of the Note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, practice is, not to state in the notice the mode or place of demand, but the mere naked fact of non-payment." Again, in Bank of United States *v.* Carneal, 2 Peters, Sup. Ct. R. 543, 553, the Court said: "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the Note, is not sufficient, unless the party sending it also informs the indorser, that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice." See, also, Story on Bills, § 301, and note, § 390.

[2] Ibid. Lockwood *v.* Crawford, 18 Conn. R. 361; Dole *v.* Gold, 5 Barbour, Sup. Ct. R. 490.

what will amount to a waiver of notice. Many of the principles and authorities have already been examined, in considering what is an excuse, and what is a waiver, of the omission of due notice. And, so far as they have been examined, we shall pass them over in this place with a concise and summary enumeration of them.

§ 356. Let us, then, first consider what will constitute a sufficient excuse for the omission of due and regular notice of the dishonor. In the first place, as falling within this predicament, we may enumerate. (1.) The cases, where notice is prevented by inevitable accident, or overwhelming calamity.[1] (2.) The prevalence of a malignant disease, which interrupts and suspends the ordinary operations of trade and business.[2] (3.) Occurrences of a public and political character, which interrupt or stop the course of trade and business; such as war, blockade of the place, invasion or occupation by the enemy.[3] (4.) The public interdiction or prohibition of commerce between the countries from which, or to which, the notice is to be sent.[4] (5.) The utter impracticability of giving notice, by reason of the party entitled thereto having absconded, or having no fixed place of residence, or his place of residence or business being unknown, and incapable of being ascertained upon reasonable inquiries.[5]

§ 357. In the next place, we may enumerate excuses of a special and peculiar character. Among these are, (1.) That the Note was given for the accommodation of the indorser only, and that he has the sole interest in

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[1] Ante, § 258, 259; Story on Bills, § 308, 309. But see Turner *v.* Leach, Chitt. & Hulme on Bills, 330, 9th edit.

[2] Ante, § 260; Story on Bills, § 308, 309.

[3] Ante, § 261, 262.

[4] Ante, § 263.

[5] Ante, § 264.

the payment, and must ultimately pay the same.[1] (2.) An original agreement on the part of the indorser, made with the maker or other party, at all events to pay the Note at its maturity to the holder.[2] (3.) The receiving of a security or indemnity from the maker, or other party, for whose benefit the Note is made, by the indorser, to secure him for his liability thereon.[3] If the security be to the full amount of the Note, the indorser will be held liable, without notice, for the full payment of the Note. If the security be partial, he will be bound *pro tanto*.[4] (4.) *A fortiori*, The receiving money from the maker, or other party, for whose benefit the Note was made, to take up and pay the Note.[5] (5.) Receiving the Note as collateral security for another debt, where the debtor is no party to the Note, or if a party, he has not indorsed it.[6] All these classes of cases have been already sufficiently considered, and the reasons, on which they are founded, have been explained, and need not be here again repeated. (6.) An original agreement by the indorser to dispense with the necessity of notice, or to be bound without notice.[7] As, if the indorser, before the Note becomes due, agrees to pay

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1 Ante, § 368-270; Story on Bills, § 310, 314-316; Cory *v.* Scott, 3 Barn. & Ald. 619; French's Ex'or *v.* The Bank of Columbia, 4 Cranch, R. 141.

2 Ante, § 208-270.

3 Ante, 281; Story on Bills, § 316; Bond *v.* Farnham, 5 Mass. R. 170; Andrews *v.* Boyd, 3 Metc. R. 434.

4 Ante, § 281, 282; Story on Bills, § 316. See Burrows *v.* Hannegan, 4 McLean, R. 310.

5 Ante, § 281.

6 Ante, § 284; Story on Bills, § 305, note; Id. § 372; Swinyard *v.* Bowes, 5 Maule & Selw. 62; Van Wart *v.* Woolley, 3 Barn. & Cressw. 439, 445; Thomas *v.* Breedlove, 6 Mill. Louis. R. 577.

7 Ante, § 271, 272; Story on Bills, § 317, 371. See Leffingwell *v.* White, 1 John. Cas. 99; Leonard *v.* Gary, 10 Wend. R. 504; Taunton

it in consideration of time being given to him, such a promise is a dispensation with the necessity of presentment for payment, and of notice of the dishonor.[1] (7.) An order or direction from the indorser to the maker not to pay the Note, if it be presented at its maturity; for this plainly will dispense with notice of the dishonor, since it is procured by the indorser's own act, although it will not dispense with the presentment of the Note for payment.[2]

§ 358. But the subject of waiver, although it has been already brought under review,[3] deserves in this place a more full and exact consideration, especially as

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Bank *v.* Richardson, 5 Pick. R. 436; Chitty on Bills, ch. 10, p. 484, 485, (8th edit.); Murray *v.* King, 5 Barn. & Ald. 165; Coddington *v.* Davis, 3 Denio, R. 16.

[1] Norton *v.* Lewis, 2 Connect. R. 478.

[2] Ante, § 293; Chitty on Bills, ch. 10, p. 484, (8th edit.) Mr. Chitty (p. 484) says: "But where the drawer of a Bill, a few days before it became due, stated to the holder, that he had no regular residence, and that he would call and see if the Bill had been paid by the acceptor, it was held, that he was not entitled to notice of its dishonor, he having thus dispensed with it; and an order by the drawer to the drawee not to pay the Bill, if presented, dispenses with notice of dishonor, though not with the presentment itself; and if the drawer, on being applied to by the holder, before a Bill is due, to know if it will be paid, answer that it will not, he is not entitled to notice of non-payment; and where one of several drawers of a Bill was also the acceptor, it was held, in an action against the drawers, that proof of these circumstances dispensed with the necessity for proving that notice of non-payment was in fact given, because notice to one of several joint drawers of a Bill is sufficient, and the acceptor being himself a drawer, he had notice of his own default. Where persons who are bankers, as well for the drawer as the acceptor of a Bill, and having renewed it for the drawer, and given credit for it in account between them, have received directions from the acceptor before it became due to stop the payment of it at the place of payment, and then did so accordingly, they are not bound to give notice to the drawers of such private instructions, which are to be considered as confidential, and a general notice of non-payment suffices."

[3] Ante, § 271-280.

it is one, upon which the authorities are not, as we have seen,[1] agreed; and, indeed, upon principle, some of these authorities would seem difficult to be maintained, at least in the extent to which they are sometimes pressed in argument. Let us, then, next consider, what is a waiver of the want of due notice. The doctrine, applicable to this, is often confounded with that applicable to excuses for not giving notice; but it is certainly distinguishable in its nature, and character, and operation. An excuse for the omission or neglect of due notice is in its nature a justification for such omission or neglect, without any consent, express or implied, on the part of the indorser, to be bound by it. On the other hand, a waiver of the want of due notice presupposes, not only, that due notice has not been given, but that the holder has no just cause for the omission or neglect. In cases of waiver, strictly so called, the indorser is discharged from all liability by the antecedent laches of the holder, or other party; and he incurs a new liability by his subsequent assent and waiver of his rights after the laches is incurred, and has been fully made known to him.[2] In many cases, indeed, the conduct or language of the indorser, although in the form of a waiver, may yet amount to distinct proof, that he has received due notice.[3] But in such cases there is no waiver of any rights by the indorser; but merely presumptive proof of his admission of his original liability, founded upon due notice. It is therefore a misnomer to designate

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1 Ante, § 275, and note, § 280.

2 Thornton v. Wynn, 12 Wheat. R. 183.

3 Bell v. Frankis, 5 Scott, R. 460; S. C. 4 Mann. & Grang. 446. See Taunton Bank v. Richardson, 5 Pick. R. 436; Donelly v. Howie, Hayes & Jones, Irish R. 436.

such cases as cases of waiver. They are properly confessions of present absolute liability and obligation to pay the Note, founded upon legal notice or legal liability.

§ 359. It is on this account that payment of a part of the Note, or a promise to pay the whole Note after full notice of the default of the holder, is often held to be a sufficient excuse for the omission of notice; for it evinces, that the party so paying, or promising, could not have sued on the Note on payment thereof, and consequently he cannot insist on the want of due notice. In short, he is presumed to be the true party, for whose benefit the Note is made. And a promise to pay the Note after its known dishonor,[1] where no circumstances appear to show, that due notice has not been given, will be *primâ facie* proof of due notice, upon the ground, that men do not usually promise to pay money, unless legally bound so to do; and therefore the burden of proof of the want of due notice, under such circumstances, lies upon the indorser.[2] But, if the want of due notice is shown, then the declaration in the action

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[1] Bayley on Bills, ch. 7, § 2, p. 292, 293, (5th edit.); Blesard *v.* Hirst, 5 Burr. 2670; Thornton *v.* Wynn, 12 Wheat. R. 183.

[2] Bayley on Bills, ch. 9, p. 406, (5th edit.); Cory *v.* Scott, 3 Barn. & Ald. 619; Lundie *v.* Robertson, 7 East, R. 231; Dixon *v.* Elliot, 5 Carr. & Payne, 437; Hicks *v.* Duke of Beaufort, 4 Bing. New Cas. 229; Brownell *v.* Bonney, 1 Adolph. & Ellis, New. R. 39. — In Lundie *v.* Robertson, 7 East, R. 231, 235, Lord Ellenborough said: "The case does not admit of any doubt. The defendant is charged as the indorsee of a Bill of Exchange, and when applied to for payment, he says he has no cash by him then, but if the witness will call again, and bring the account with him, he will pay it. Now when a man, against whom there is a demand, promises to pay it, for the necessary facilitating of business in transactions between man and man, every thing must be presumed against him. It was therefore to be presumed, primâ facie, from the promise so made, that the Bill had been presented for payment in due time and dis-

will not be sufficient, if it avers a due notice; but it should be shown, that there was either a sufficient excuse, or an effectual waiver.[1]

§ 360. In general, it may be stated, that an indorser, who is once discharged by want of notice, or other laches on the part of the holder, is always discharged; and he cannot again be made liable on the Note, except by his own voluntary act or agreement.[2] The subject of waiver, therefore, strictly so called, admits, if it does not require,

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honored, and that due notice had been given of it to the defendant. But taking the subsequent conversation as connected with the former, the only limitation of it would be, that the defendant stated that he had not had regular notice of the dishonor; but even that objection was waived in the same breath; for the defendant said, that as the debt was justly due he would pay it. Then it stands on the first conversation, as an absolute promise to pay the Bill; thereby admitting, (for I do not put it on the ground of waiver of any objection to the non-presentation of the Bill in due time as existing in fact,) that there did not exist any objection to his payment of the Bill; but that every thing had been rightly done. That supersedes the necessity of the ordinary proof. And though an objection was stated in the second conversation to the want of regular notice, yet that objection was immediately waived."

[1] Ibid. In Cory *v.* Scott, 3 Barn. & Ald. 619, 624, Mr. Justice Bayley said: "On the other point, I am inclined to think that it is incumbent on the plaintiffs to allege, in their declarations the want of effects, in order to excuse notice. If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances, which excuse the giving of notice, does not seem to me ad idem with such an averment. Possibly, however, it might be considered, that such circumstances would be evidence of notice, inasmuch as they would be evidence, that the party knew the Bill would be dishonored. It is not necessary, however, to decide that question, as I am clearly of opinion, that a notice in this case was requisite." See Legge *v.* Thorpe, 12 East, R. 171; Frazier *v.* Harvie, 2 Littell, Ken. R. 185; Hill *v.* Varrell, 3 Greenl. R. 233; Blakely *v.* Grant, 6 Mass. R. 386; Taunton Bank *v.* Richardson, 5 Pick. R. 436; Firth *v.* Thrush, 8 Barn. &. Cressw. 387; Story on Bills, § 320 and notes. Leonard *v.* Gary, 10 Wend. R. 504; Chapman *v.* Annett, 1 Carr. & Kir. 552, 554, note; Farmers & Mechanics Bank *v.* Day, 13 Verm. R. 36.

[2] Story on Bills, § 320; Bayley on Bills, ch. 7, § 2, p. 312, (5th edit.); Chitty on Bills, ch. 10, p. 541, (8th edit.); Jones *v.* Fales, 4 Mass. R.

a twofold consideration; (1.) When, and under what circumstances, a waiver duly proved is held obligatory. (2.) What is due and sufficient proof of a waiver. Of these we shall speak in their order.

§ 361. First, then, under what circumstances is a waiver duly proved held obligatory. In order to make a waiver, however clearly proved, obligatory upon the party making it, it is indispensable, that it should be made with a full knowledge of all the facts, that is, with a full knowledge, that there has been a want of due notice of the dishonor of the Note.[1] For, if he makes a promise to pay the note in ignorance of the facts, nay, more, if he even pays the same under such ignorance, he will not be bound thereby; but in the former case he will be absolved from his promise, and in the latter case he will be entitled to recover back the money.[2]

§ 362. But where the party has full knowledge of all the facts, and he promises to pay the Note, that, if deliberately done, will, it is said, amount to a complete waiver of the want of due notice, and of the laches of the holder, notwithstanding the promise may have been

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245, 253; Central Bank *v.* Davis, 19 Pick. R. 373, 375; Thornton *v.* Wynn, 12 Wheat. R. 183; Thomson on Bills, ch. 6, § 4, p. 528-530, (2d edit.)

[1] Chitty on Bills, ch. 8, p. 373, (8th edit.); Id. ch. 10, p. 533, 536-539; Bayley on Bills, ch. 7, § 2, p. 290, 294, (5th edit.); Blessard *v.* Hirst, 5 Burr. R. 2670; Goodall *v.* Dolley, 1 Term R. 712; Stevenson *v.* Lynch, 12 East, R. 38; Jones *v.* Savage, 6 Wend. R. 658; Miller *v.* Hackley, 5 John. R. 385; Bell *v.* Gardiner, 4 Mann. & Grang. R. 11; May *v.* Coffin, 4 Mass. R. 341; Warder *v.* Tucker, 7 Mass. R. 449; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287; Garland *v.* Salem Bank, 9 Mass. R. 408; Leonard *v.* Gary, 10 Wend. R. 504; Mills *v.* Rouse, 2 Littell, R. 203; Martin *v.* Ingersoll, 8 Pick. R. 1; Richter *v.* Selin, 8 Serg. & Rawle, 425.

[2] Ibid.; Griffin *v.* Goff, 12 John. R. 423; Garland *v.* Salem Bank, 9 Mass. R. 408; Crutchers *v.* Wolf, 2 Munroe, R. 88.

made under a mistake of law, or a false supposition of legal liability, by the party to pay the same. Originally, it certainly must be admitted, that there was very strong ground to question this doctrine in the general extent in which it is laid down.[1] In the first place, there might be good reason for taking a distinction between cases, where the money had been paid under a mistake of law, and cases, where there had only been a promise to pay, and, upon a suit brought, the party insisted upon the defence of a mistake of law. In the former cases, it might be open to the suggestion, that the holder was equitably entitled to hold the money, which had been voluntarily paid; and, in the latter cases, that a just foundation for the suit failed, because of the mistake of law, and of the promise being without any valuable consideration to support it, and, therefore, like any other promise, founded upon a mere moral obligation. In the next place, independent of this special ground, it would seem, upon general principles of law, that a mere promise to pay, (even if a payment made would be valid,) having no valuable consideration to support it, ought to be held a nullity, upon the new well settled ground, that a promise founded upon a mere moral obligation, without any legal obligation to sustain it, is not obligatory or binding, so as to be capable of enforcement at law.[2] Now in cases of laches in

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[1] Ibid.; Thomson on Bills, ch. 6, § 4, p. 529, 530, (2d edit.)

[2] See Rann *v.* Hughes, 7 Term R. 750, note; Crosbie *v.* McDoual, 13 Ves. 148; Price *v.* Easton, 4 Barn. & Adolp. R. 433; Britten *v.* Webb, 2 Barn. & Cressw. 483; Bates *v.* Cort, 2 Barn. & Cressw. 474; Brealey *v.* Andrews, 7 Adolp. & Ellis, 108; Herring *v.* Dorell, 8 Dowl. Parl. Cas. 604; Story on Contracts, § 132, 133, 142; Holliday *v.* Atkinson, 5 Barn. & Cressw. 501; Mills *v.* Wyman, 4 Pick. R. 207; Cook *v.* Bradley, 7 Connect. R. 57; Story on Bills, § 181, 182.

the holder, the indorser, if he is once discharged, would seem to be within the reach of this doctrine, so that he ought not to be held liable on a promise to pay, unless some new consideration should arise to support such promise.[1] It is sufficient, however, to say, that the doctrine of the liability of the indorser, under such circumstances, whether originally well or ill founded, seems now so well established in England, that it cannot be easily overturned;[2] and in America, although the deci-

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[1] In Story on Bills, § 320, note, it is said: "It is probably too late to attempt to modify or recall the doctrine in respect to a waiver of notice, by a new promise to pay the Bill. When such a promise is made, after the party is discharged in point of law, it would seem, upon principle, difficult to perceive, how it can, or ought, to be binding, if there is not a new and sufficient consideration to support it; for a moral obligation is not sufficient. (See Borradaile *v.* Lowe, 4 Taunt. R. 93.) And there might, originally, have been a good ground to say, that the money, if paid by mistake of law, ought not to be recovered back, if, in point of moral propriety, it could be retained; and to have held, at the same time, that a mere promise to pay, under a mistake of law, was not of binding obligation, so as to be enforced in a suit. And, upon the other point, as a matter of evidence, a promise to pay may, in the absence of all controlling circumstances, be, primâ facie, sufficient evidence of a regular protest and notice. But, when the fact is made out, that there was no protest or notice, it seems difficult to perceive upon what ground it can be maintained, that the promise to pay, with knowledge of the fact, can be evidence of a protest and notice, which never existed. Mr. Bayley (on Bills, ch. 9, p. 406, 5th edit. 1830) has justly remarked, that, under an allegation of notice, it may be questionable whether evidence can be given to excuse the want of notice, or, whether, to let in such evidence, the facts, to excuse notice, should not be pleaded specially; and he has cited Cory *v.* Scott, 3 Barn. & Ald. 619. In this respect, there may be just ground for a distinction between a case of protest, and notice given, but too late, and a case, where no protest or notice has been given at all. Firth *v.* Thrush, 8 Barn. & Cressw. 387; Baker *v.* Gallagher, 1 Wash. Cir. R. 461; Potter *v.* Rayworth, 13 East, 417; Richter *v.* Selin, 8 Serg. & Rawle, 438; Pierson *v.* Hooker, 3 John. R. 48; Martin *v.* Ingersoll, 8 Pick. R. 1; Thornton *v.* Wynn, 12 Wheat. R. 183.

[2] Ibid.; Bayley on Bills, ch. 7, p. 291-293, (5th edit.); Chitty on Bills, ch. 10, p. 533-536, (8th edit.); Vaughan *v.* Fuller, 2 Str. R. 1246;

sions are at variance with each other, yet there seems a considerable preponderance of authority in favor of the same doctrine.[1]

Rogers *v.* Stevens, 2 Term R. 713; Wilkes *v.* Jacks, Peake, R. 202; Blessard *v.* Hirst, 5 Burr. 2670; Herford *v.* Wilson, 1 Taunt. R. 12; 1 Selwyn, Nisi Prius, 52, (10th edit.); Lundie *v.* Robertson, 7 East, R. 231; Haddock *v.* Bury, 7 East, R. 236, note; Gibbon *v.* Coggon, 2 Camp. R. 188; Wood *v.* Brown, 1 Starkie, R. 217; Taylor *v.* Jones, 2 Camp. R. 105; Story on Bills, § 320, 373.

[1] Hopkins *v.* Liswell, 12 Mass. R. 52; Trimble *v.* Thorne, 16 John. R. 152; Miller *v.* Hackley, 5 John. R. 375; Martin *v.* Winslow, 2 Mason, R. 241; Ladd *v.* Kenney, 2 N. Hamp. R. 340; Creamer *v.* Perry, 17 Pick. R. 332; Boyd *v.* Cleveland, 4 Pick. R. 525; Thornton *v.* Wynn, 12 Wheat. R. 183, 187; Reynolds *v.* Douglass, 12 Peters, R. 497; Hart *v.* Long, 1 Rob. Louis. R. 83; Glenn *v.* Thistle, 1 Rob. Louis. R. 572, affirm the English doctrine. But Lawrence *v.* Ralston, 3 Bibb, Ken. R. 102; Peabody *v.* Harvey, 4 Connect. R. 119; May *v.* Coffin, 4 Mass. R. 341; Warder *v.* Tucker, 7 Mass. 449; Freeman *v.* Boynton, 7 Mass. R. 483, are in the negative. Chitty on Bills, ch. 10, p. 534-536, (8th edit. 1833); Bilbie *v.* Lumley, 2 East, R. 469; Story on Eq. Jurisp. § 111, 116, 137; Stewart *v.* Stewart, 6 Clark & Fin. R. 964-971; Richter *v.* Selin, 8 Serg. & Rawle, 438. — On this subject Mr. Chitty says: "It seems to have been once considered, that a misapprehension of the legal liability would prevent a subsequent promise to pay from being obligatory, and that even money, paid in pursuance of such promise, might be recovered back. But from subsequent cases, it appears that such doctrine is not law, and that money, paid by one knowing (or having the means of such knowledge in his power) all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again on account of such payment having been made under an ignorance of the law, although the party paying expressly declared, that he paid without prejudice. And, as an objection made by a drawer or indorser to pay the Bill, on the ground of the want of notice, is stricti juris, and frequently does not meet the justice of the case, it is to be inferred from the same cases, and it is, indeed, now clearly established, that even a mere promise to pay, made after notice of the facts, and laches of the holder, would be binding, though the party making it misapprehended the law. Therefore, where the drawer of a Bill of Exchange, knowing, that time had been given by the holder to the acceptor, but apprehending, that he was still liable upon the Bill in default of the acceptor, three months after it was due, said, 'I know I am liable, and, if the acceptor does not pay it, I will,' it was adjudged, that he was bound by such promise; and the Court said, that the cases, above referred to, proceeded on the mistake of

§ 363. But, although a promise to pay the Note, with a full knowledge of all the facts and the laches of the

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the person paying the money under an ignorance or misconception of the facts of the case, but that, in the principal case, the defendant had made the promise with a full knowledge of the circumstances, three months after the Bill had been dishonored, and could not now defend himself upon the ground of his ignorance of law, when he made the promise." Chitty on Bills, ch. 10, p. 536, 537, (8th edit. 1833); Story on Bills, § 320, and note, (1.) The difficulty of maintaining the doctrine, that a promise to pay after full knowledge of all the facts, but without any new consideration to support, has been very powerfully exhibited in the opinion of the Irish Court of Exchequer in 1833, in Donelly *v.* Howie, Hayes & Jones, R. 436, where the very question arose, and it was decided, that the new promise, not being founded upon any new consideration, although made with a full knowledge of the facts, was a nudum pactum, and not binding. Joy, C. B., on that occasion said: "Either the Judges have been inaccurate in the language they have used, or they have been inaccurately reported, or there has been a fluctuation of opinion upon this subject. But in one of the latest cases on the subject, Standage *v.* Creighton, Denman, C. J., held, that a promise to make a part payment was not sufficient evidence that all was rightly done; and he nonsuited the plaintiff, though such promise would, according to what is now contended for, be a waiver, and entitle the plaintiff to recover. I confess, I cannot conceive what is the meaning to be attributed to the word 'waiver,' when used in a case like the present, where the defendant has been absolutely discharged by the neglect of the plaintiff. He may waive the communication of the fact; but I do not understand how he can waive the existence of the fact. The law requires that the Bill should be presented to the acceptor when it becomes due, even though the acceptor be a bankrupt; and, in my opinion, it would be very prejudicial to the mercantile interests of the country, were we to fritter away the known rules of law by establishing this new-fangled doctrine of waiver. The tendency of modern decisions of Courts of Justice is, to avoid introducing new distinctions, or extending those which have been already introduced; and to decide cases according to the old well known rules of the law. Nor is there any pretence for saying, that there is a moral obligation on the defendant to pay this Bill — whereby the promise might be supported; for the plaintiff, by his own neglect, has discharged every person except the acceptor of the Bill." Smith, B.: "I agree in opinion with other members of the Court. The promise of the indorser is of this benefit to the indorser; that, by proving it, he gives primâ facie evidence that those acts have been done, which it is necessary he should show were done, in order to charge the defendant." Pennefeather, B.: "We are all of opinion, that our judgment upon this point holder, may thus be held, in point of law, to amount to a waiver of the right to notice, and be obligatory upon the indorser, although no new consideration intervenes; yet this must be understood with some qualifications and limitations. The promise, to be obligatory, must be deliberately made, in clear and explicit language, and amount to an admission of the right of the holder, or of a duty and willingness of the indorser to pay; or, if it is implied from the conduct or acts of the indorser, it must as clearly import a like admission or duty; such, for example, as a part payment of the note.[1] If, therefore, the conduct or acts of the indorser be equivocal, or if the language used be of a qualified or uncertain nature, the indorser will not be held responsible; at least not, unless it was such as must necessarily mislead, and was intended to mislead the holder into a false belief and security, that the Note would be duly paid by the indorser.[2] And if the offer be conditional or qualified,

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should be for the defendant. In no case has the Court held, — when the declaration contained an averment, that the Bill was duly presented for payment, which allegation was disproved, — that the plaintiff was entitled to recover, upon proof of a subsequent promise to pay by the defendant. The cases only go this length, that if a subsequent promise by the defendant to pay the Bill be proved, it is evidence that the presentment of the Bill was rightly made. As, therefore, we are not bound by any decided cases, and as principle does not require us to go the length sought by the plaintiff in this case, I am of opinion, that we ought not to extend the departures which have hitherto been made from the strict rules of law." Verdict set aside, and nonsuit entered.

[1] Story on Bills, § 320; Bayley on Bills, ch. 7, § 2, p. 291, 292, (5th edit.); Chitty on Bills, ch. 10, p. 539, 540, (8th edit.); Fletcher *v.* Froggatt, 2 Carr. & Payne, 569.

[2] Chitty on Bills, ch. 10, p. 456, 539, 540, (8th edit.); Story on Bills, § 320, and note; Id. § 373; Ante, § 272, 287. Mr. Chitty (p. 539, 540) says; "The conduct, however, of the party insisting on the want of notice must, in general, be unequivocal, and his promise must amount to an admission of the holder's right to receive payment; and therefore, where a foreigner only said, 'I am not acquainted with your laws; if I am

it must be accepted, as made, otherwise it will not be obligatory upon the indorser.[1]

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bound to pay it I will,' such promise was not considered a waiver of the objection of the want of notice; and it has been considered, that if the promise were made on the arrest, it shall not prejudice; but this doctrine seems questionable. If an indorser propose to the holder to pay the Bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice. So it was decided, that if the drawer or indorser, after having been arrested, upon being asked what he had to propose, by way of settlement, said, 'I am willing to give my Bill at one or two months,' but which was rejected, this does not obviate the necessity of proving notice; and Lord Ellenborough observed, 'This offer is neither an acknowledgment nor a waiver to obviate the necessity, of expressly proving notice of the dishonor of the Bill. He might have offered to give his acceptance at one or two months, although being entitled to notice of the dishonor of the former Bill, he had received none, and although, upon this compromise being refused, he meant to rely upon this objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made.' But an offer to the holder of a Bill of a general composition of so much in the pound on all a party's debts, although not accepted, has been considered as dispensing with proof of notice of dishonor." This last case seems of very questionable authority, as the offer was conditional, and not accepted. See Ex parte Bynold, 1 Deacon, R. 728; Standage *v.* Creighton, 5 Carr. & Payne, 406.

[1] Mr. Chitty (on Bills, ch. 6, p. 466, 8th edit.) says; "Even an express verbal agreement between all the parties to a Bill or Note, that it should not be put in suit till certain estates had been sold, although it misled and induced the holder not to give regular notice of non-payment when the Bill or Note fell due, constitutes no excuse for such neglect, because, in point of law, no such parol agreement was available to the party as a defence to an immediate action, so, as it was inoperative for one purpose, it ought not to have any effect, and, therefore, notwithstanding it, notice should have been given. And although there are some exceptions excusing the omission to give notice, yet they are so qualified, that it is very imprudent in any case to rely on them, and every cautious holder should, immediately after he has received notice of the dishonor of a Bill or Note, give a separate and distinct notice thereof, not only to his immediate indorser, but to every other party to the instrument, whether by indorsement or transfer by mere delivery or by guaranty, or otherwise responsible for the payment, for although the want of effects may in some cases excuse the neglect, or a notice from any party to a Bill may inure to the use of the holder, yet these are mere accidents in his favor, on which no prudent person should rely."

§ 364. And this leads us, secondly, to the consideration, what will amount to, and be a sufficient proof of, a waiver. And here it may be stated, (as has just been intimated,) that a part-payment of the Note, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of a waiver of due notice.[1] In like manner, it is not necessary, that an

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[1] Chitty on Bills, ch. 10, p. 533, 534, (8th edit.) Mr. Chitty (p. 535) adds: "And in some of the cases upon this subject the effect of such partial payment, or promise to pay, has been carried still further, and been considered not merely as a waiver of the right to object to the laches, but even as an admission that the Bill or note had in fact been regularly presented or protested, and that due notice of dishonor had been given; and this even in cases where the party who paid or promised, afterwards stated, that in fact, he had not had due notice, &c.; because it is to be inferred, that the part-payment or promise to pay would not have been made, unless all circumstances had concurred to subject the party to liability, and induce him to make such payment or promise. Thus, where an indorsee, three months after a Bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said, that he had not had regular notice, but as the debt was justly due he would pay it; it was held that the first conversation, being an absolute promise to pay the Bill, was primâ facie an admission that the Bill had been presented to the acceptor for payment in due time, and had been dishonored, and that due notice had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonor to the defendant went, which objection he then waived. So, where the drawer of a foreign Bill, upon being applied to for payment, said, 'My affairs are at this moment deranged, but I shall be glad to pay it as soon as my accounts with my agent are cleared,' it was decided that it was unnecessary to prove the averment of the protest of the Bill. And in an action by the indorsee against the drawer of a Bill, the plaintiff did not prove any notice of dishonor to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer, after the Bill became due, which recited that the defendant had drawn, amongst others, the Bill in question, that it was over-due, and ought to be in the hands of the prior indorser, and that it was agreed the latter should take the money due to him upon the Bill by instalments; it was held, that this was evidence that the drawer was at that time liable to pay the Bill, and dis-

express promise should be made absolutely to pay the Note, *in totidem verbis.* It will be sufficient if, by reasonable intendment and interpretation, the language imports, or naturally implies, a promise to pay it. Therefore, a declaration of the indorser, after full knowledge of the facts, that he will "see it (the Note) paid," or an acknowledgment that "it must be paid," or a promise that "he will set the matter to rights," have been held sufficient proof of a waiver of notice.[1] So, where the indorser said, that he should pay the Bill (or the Note) and should not avail himself of the informality of the notice, it was held to be sufficient evidence, from which the jury might infer a regular notice.[2] *A fortiori*, if the indorser should say, "He will certainly pay the Note the day after"[3] or, "He had not the cash by him, but if the clerk would call in a day or two, and bring the account (of the expenses) he would pay it";[4] or, "I suppose there will be no alternative but my taking up the Bill (or Note) and if you will bring it to me on Tuesday, I will pay the money";[5] or, "If the acceptor

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pensed with other proof of notice of dishonor. Again, where, in an action against the drawer, in lieu of proof of actual notice, the defendant's letter was proved, stating, 'that he was an accommodation drawer, and that the Bill would be paid before next term,' though not saying 'by defendant,' Lord Ellenborough said, 'The defendant does not rely upon the want of notice, but undertakes that the Bill will be duly paid before the term, either by himself or the acceptor. I think the evidence sufficient." Margetson *v.* Aitken, 3 Carr. & Payne, 338; Horford *v.* Wilson, 1 Taunt. R. 12.

[1] Chitty on Bills, ch. 10, p. 533, 534, (8th edit.); Hopes *v.* Alder, 6 East, R. 16; Rogers *v.* Stevens, 2 Term R. 713; Anson *v.* Bailey, Bull. N. Prius, 275; Reynolds *v.* Douglass, 12 Peters, R. 497, 505.

[2] Brownell *v.* Bonney, 1 Adolp. & Ellis, New R. 39.

[3] Whitaker *v.* Morris, cited in Chitty on Bills, ch. 10, p. 533, note from MSS. 8th edit. See Gibbon *v.* Coggon, 2 Camp. R. 188.

[4] Lundie *v.* Robertson, 7 East, R. 231.

[5] Pickin *v.* Graham, 1 Cromp. & Mees. 725; S. C. 3 Tyrw. R 923.

(or the maker) does not pay, I must; but exhaust all your influence with the acceptor (or the maker) first";[1] in each of these cases, the declaration would amount to just proof of a waiver. So, if the indorser should, before the maturity of the Note, state to the holder, on his saying, that he had no confidence in the other party, that he would pay the Note, if, at maturity, it were not paid by any other party;[2] or telling the holder, before the maturity of the Note, "to give himself no uneasiness about it, he would see him paid"; these would in like manner be satisfactory proof of a waiver of all notice. So, where the indorser of a Note applied to a bank to have it discounted, and promised to attend to the renewal of it, and to take care of it, and directed, that a notice to the maker should be sent to his care, and such notice was sent accordingly; it was held to be a waiver, on his part, of a regular demand and notice, or, at least, that from these facts a jury might legally infer a waiver.[3] [So, a writing from an indorser to a holder of a Note, saying, "You need not protest T. B. C.'s Note, and I will waive the necessity of protest thereof," has been held a sufficient waiver of notice.[4]]

§ 365. On the other hand, vague, or indeterminate, or hypothetical language, will not be deemed sufficient to establish a waiver of notice. Thus, if the indorser

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[1] Hicks *v.* Duke of Beaufort, 4 Bing. New Cas. 229; S. C. 5 Scott, R. 598.

[2] Boyd *v.* Cleveland, 5 Pick. R. 527. See also, Russell *v.* Buck, 11 Verm. R. 166.

[3] Taunton Bank *v.* Richardson, 5 Pick. R. 437. As to whether one partner can, after dissolution of the partnership, waive demand and notice of the dishonor of a Note, see Darling *v.* March, 22 Maine R. 184, (9 Shepley) where the affirmative is held.

[4] Coddington *v.* Davis, 3 Denio, R. 17; S. C. 1 Comstock, R. 186.

should say, "If I am bound to pay it, (the Note) I will," it will not be sufficient to found an inference of a waiver of notice.[1] Neither will it be any waiver of notice, if the indorser, on the day of the maturity of the Note, should say to the holder, that he hoped it would be paid, that he would see what he could do, and endeavor to provide effects.[2] So, if the indorser, after hearing of the dishonor of the draft, (or the Note) of which he had not received due notice, should say, that if the draft was presented to him, duly protested, he would pay it, it is not a promise, which would amount to a waiver, but is a mere expression of opinion.[3] Neither will the taking of security by the indorser, after the Note has been dishonored, believing himself bound to pay the same, although he had not received due notice, be sufficient to establish a waiver of his right to notice;[4] nor his using exertions to obtain payment from a prior party on the Note;[5] nor his offering to indorse a new Note for the same amount, which offer is not accepted.[6]

§ 366. So, equivocal circumstances or agreements will not be construed to extend beyond the plain and clear import of the acts done, or terms used. An agreement to waive notice of the dishonor of a Note will not be deemed to be a waiver of due presentment of it to the maker for payment; but the holder must at his peril

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[1] Dennis *v.* Morrice, 3 Esp. R. 158; Chitty on Bills, ch. 10, p. 539, 540, (8th edit.); Ante, § 275, 287, 364, note; Story on Bills, § 320, and note, § 373.

[2] Prideaux *v.* Collier, 2 Starkie, R. 57; Ante, § 289.

[3] Penn *v.* Poumeirat, 14 Martin, R. 541.

[4] Tower *v.* Durrell, 9 Mass. R. 332.

[5] Hussey *v.* Freeman, 10 Mass. R. 84.

[6] Laporte *v.* Landry, 17 Martin, R. 359.

make due presentment. Thus, where the indorser, upon indorsing a Note, wrote over it, "Good to A. (the holder) or order, without notice," this was held not to be a good waiver of a due presentment of the Bill for payment to the maker, but simply to be a waiver of due notice of the dishonor, if not paid upon such presentment.[1]

§ 367. Let us, in the next place, consider what will not constitute a sufficient excuse for the want of due notice of the dishonor of the Note. And here, again, as the same doctrines apply, as in cases of the want of due presentment for payment, we shall very briefly glance at this subject in this connection. It is, then, no excuse for not giving due notice of the dishonor, (1.) That the party, to whom the notice is to be given, is bankrupt, or insolvent.[2] (2.) Or, that the indorser knows, that the Note, when presented at its maturity, will not be paid by the maker.[3] (3.) That the indorser, under apprehension that the Note will be dishonored, has lodged security in the hands of a subsequent indorser to secure him conditionally, if he is obliged to pay the Note, but not otherwise.[4] (4.) That the maker, in contemplation of his inability to pay the whole Note at maturity, has lodged money with the indorser for part payment thereof when due.[5] (5.) That the indorser knows, at the time of his indorsement, that the maker

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[1] Lane *v.* Steward, 2 Appleton, Maine R. 98; Ante, § 272; Burnham *v.* Webster, 17 Maine (Shepley's) R. 50.

[2] Ante, § 203, 204, 241; Story on Bills, § 234, 279, 307, 318, 319, 326, 375.

[3] Ante, § 286; Bayley on Bills, ch. 7, § 2, p. 303-305, (5th edit.); Chitty on Bills, ch. 10, p. 483, 484, (8th edit.); Story on Bills, § 375; Caunt *v.* Thompson, 7 Manning, Gr. & Scott, R. 400.

[4] Ante, § 287.

[5] Ante, § 288.

is insolvent, and will not be able to pay it at its maturity.[1] (6.) That the holder has mislaid or lost the Note, and is unable to give it up, even if the indorser be ready upon due notice, to pay it.[2] (7.) That the maker and indorser are both accommodation parties for the benefit of a subsequent indorser.[3] (8.) That there was an agreement between the original parties, known to the indorser at the time of the indorsement, that payment thereof should not be demanded until certain estates were sold; for it would vary the legal effect of the Note.[4] (9.) That the Note is given by one firm, and in-

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[1] Ante, § 286 – 288. [2] Ante, § 290. [3] Ante, § 292.

[4] Ante, § 148, 364, and note; Story on Bills, § 317, and note, § 371; Free *v.* Hawkins, 8 Taunt. R. 92. On this occasion, Mr. Justice Dallas said; "It is then said, that, at the time when these Notes were made and indorsed, it was mutually understood, that payment should not be enforced until Sir Robert Salisbury's effects were brought to sale, and that the plaintiffs entered into this contract with the defendant, with a full knowledge of all these circumstances. One thing is to be observed; if such were meant to be the understanding, it ought to have been expressed on the instrument; but it is not expressed; and, taking the instrument as it stands, it is a common Promissory Note, and requires that notice of dishonor should be given to the defendant in order to give the plaintiffs a right to recover against him. But it is said, notice was dispensed with by the understanding which existed between the parties; to which the answer is, that if parties mean to vary the legal operation of an instrument, they ought to express such variance; if they do not express it, the legal operation of the instrument remains. The effect of the evidence tendered would be to vary the Note in question, and to control its legal operation; and such evidence, I think, is inadmissible. The case of Hoare *v.* Graham is similar to the present case, and ought to govern it. It was there held, that a party should not be permitted to give evidence of a collateral or concomitant circumstance; namely, that though the Note was expressed to be payable on a certain day, payment was not to be called for on that day. If the clear principle, that what is expressed in writing, and that which is the best evidence of a contract, should alone constitute the contract, require any authority, the case of Hoare *v.* Graham confirms that principle." Mr. Justice Park said; "I was of counsel in the case of Hoare *v.* Graham, and was assisted by a very learned man. We took the same objections, which the counsel for the plaintiffs in this case have

dorsed by another firm, in each of which the same person is one of the partners.[1]

§ 368. In concluding this part of our subject, it is proper to remark, that all these various decisions proceed upon the same general principle. The commercial law having required due presentment and due notice of the dishonor of the Note, as conditions attached to the obligations of the indorser, these acts are ordinarily deemed indispensable to be performed before the indorser is charged with absolute responsibility. Still, however, the doctrine is subject to equitable exceptions and reasonable qualifications, whenever circumstances absolutely prevent a due compliance therewith, or the holder has a reasonable excuse for his non-compliance, or the indorser by his acts or language has dispensed with a strict compliance, or he has, upon full knowledge of all the circumstances, waived his strict rights as to due presentment or due notice. What constitutes sufficient equitable grounds for such exceptions, it is not, perhaps, *a priori*, in all cases, easy to decide. But it may be justly said, that the general rule, as well as the

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taken; but we felt, that we could not answer the question put by my Lord Ellenborough, 'What is to become of Bills of Exchange, and Promissory Notes, if they may be cut down by a secret agreement, that they shall not be put in suit?' It has been observed in favor of the plaintiffs, that they sought not, by the evidence tendered at the trial, to contradict the Note, or limit the written contract; but, if I issue a Promissory Note payable at two months, and enter into a parol agreement, that the Note shall not be put in suit till the end of five years, or till the uncertain period of the sale of an estate, can it be contended, that such a parol agreement does not contradict and limit the written contract into which I have entered? I am of opinion, that the defendant in this case was entitled to notice of the non-payment of the Note; and, that the evidence tendered by the plaintiffs as a waiver of such notice was properly rejected." Mr. Justice Burrough adopted the same doctrine.

[1] Ante, § 294.

exceptions to it, which have been thus far established, are entirely consonant with sound policy and reciprocal justice.

§ 369. We have already seen, that the same fatal consequences do not absolutely follow in the French Law from the laches or neglect of the holder in not making due presentment, or in not giving due notice of the dishonor of Notes, as flow from ours. In our law the indorser is absolved from all responsibility; but in the French Law a different rule prevails, and the indorser is exonerated only, when he suffers damage or loss from the laches or neglect of the holder, and then only to the extent and measure of such damage or loss.[1] The same rule seems to pervade the general law of continental Europe.[2]

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1 Pothier, De Change, n. 156, 157; Pardessus, Droit Comm. Tom. 2, art. 435; Story on Bills, § 478, and note; Kemble *v.* Mills, 1 Mann. & Grang. R. 762, note; Ante, § 285, 318.

2 Casaregis, Discur. de Comm. 54, n. 38, 40, 42, 49; Baldasseroni, De Camb. Pt. 2, art. 10, § 35; Story on Bills, § 478; Kemble *v.* Mills, 1 Mann. & Grang, 762, note; Ante, § 285, 318.

CHAPTER IX.

MATTERS OF DEFENCE AND DISCHARGE OF PARTIES TO PROMISSORY NOTES.

§ 370. Having thus ascertained the rights and duties of the holder, and also of the antecedent indorsers, upon the dishonor of a Promissory Note by the non-payment thereof at maturity, let us now proceed to the consideration of the matters of defence and discharge, which may be set up by any of the parties to such a Note, in order to exonerate themselves from all liability to pay the same. In other words, let us now consider, what will amount to a bar or extinguishment of the rights and demands of the holder against any or all of the prior parties on the Note; and also what will amount to a like bar or extinguishment of the rights of any indorser, or other prior party on the Note, against those, who are ordinarily liable to reimburse and indemnify him for payment of the Note.

§ 371. We have already had occasion to consider, what will constitute a sufficient consideration, or not, in point of law, to support a promise to pay a Promissory Note, by the maker thereof, or by an indorser thereof upon a transfer, and by and between what parties, and under what circumstances, the consideration may be inquired into, and what other infirmities and defects constitute a good defence to a suit by the holder to enforce any Promissory Note against the antecedent parties thereon.[1]

[1] Ante, § 181 – 197, 203, 204, 241, 286 – 296.

Upon these objections it is therefore unnecessary to dwell. When good, they properly apply to the original concoction of the Note, or to the original validity of the transfer thereof. We have also had occasion to consider, what omissions or neglects of duty on the part of the holder will absolve the indorser from his responsibility under and in virtue of his indorsement, the due performance of such duty being a condition precedent to the due attachment of any rights in the holder against the indorser. Upon these also it is not our purpose to dwell. Our attention will be mainly drawn to such matters of defence and discharge as arise from facts, which occur after the maturity of the Promissory Note, and when the rights of the holder have become fully vested and absolute.

§ 372. In the first place, then, whatever will discharge the maker of a promissory Note will ordinarily amount to a perfect extinguishment of the claim of the holder against all other parties thereon. Thus, for example, if the maker makes due payment of the Note to a *bonâ fide* holder, that will amount to a complete discharge of all other parties to the Note. The reason is, that the maker is the primary debtor in contemplation of law, and is absolutely bound to the payment thereof; whereas all the other and subsequent parties are only conditionally bound to pay the same, when the maker does not pay the same upon due presentment, and they have received due notice of the dishonor.[1] So that payment by the maker is ordinarily a complete bar and extinguishment of all the rights of the holder against all the parties to the Note.

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[1] Chitty on Bills, ch. 9, § 2, p. 425, 426, (8th edit.); Bayley on Bills, ch. 8, p. 318 – 323, (5th edit.); Story on Bills, § 410; Pardessus, Droit Comm. Tom. 2, art. 399, 401; Pothier, De Change, n. 168, 169.

§ 373. But, although payment of the Note by the maker is ordinarily a discharge of all the other parties thereto, yet this doctrine is to be understood with its proper limitations and qualifications; for there are many cases, in which such a payment will be inoperative and void, even to discharge the maker himself; and unless he is discharged, the collateral liability of the other parties will or may remain in full force. Now, a payment by the maker may be invalid, (1.) because it is made by a wrong person, not entitled to make it; (2.) or to a wrong person, not entitled to receive it; (3.) or at a time which is premature, and will not bind a subsequent holder; (4.) or it may be a payment made under circumstances, which take away from it all legal obligation and force. We will briefly consider each of these objections, in the order in which they are above stated.

§ 374. In the first place, by whom can payment be made, so as to be obligatory and conclusive? The general answer to be given is, that it must be by some person, who has a competent right, capacity, and authority to make it.[1] If made by a married woman, who is the maker of the Note, it will not be valid, unless made with the consent or authority of her husband.[2] If made by an infant, who is the maker of the Note, the payment is revocable by him, and, if revoked, it will cease to be of any validity.[3] If made by a bankrupt out of his assets, after an act of bankruptcy committed by him, it will be void and of no effect, unless it is protected by some statute, which imparts to it a binding force.[4] If

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[1] Ante, § 85, 87, 88; Bayley on Bills, ch. 2, § 3, p. 314, (5th edit.)

[2] Bayley on Bills, ch. 5, § 2, p. 135, (5th edit.); Id. ch. 8, p. 315.

[3] Ante, § 77, 78.

[4] Chitty on Bills, ch. 9, p. 426, 427, (8th edit.); Bayley on Bills, ch. 8, p. 325, (5th. edit.)

made by a person under duress or coercion, or by fraud or imposition, the payment is qually open to be avoided. If made by an agent after the death of his principal, but the fact is unknown to the agent, it may be open to the like objection, and be liable to be recalled as a payment by mistake.[1]

§ 375. In the next place, to whom may payment be made, so as to be obligatory and conclusive? The general answer here to be given is, that the payment should be made to the true proprietor of the Note, or to his authorized agent or personal representative.[2] It becomes, therefore, of the highest importance for the maker to ascertain, whether, when the Note is presented to him for payment, the party demanding it is such proprietor, or his authorized agent or representative.[3] If the Note is payable to A. or order, for the use or benefit of B., payment should be made to A., who is the legal holder although a trustee, and not to B., who is a mere *cestui que trust*, or beneficiary.[4] If payment be made to a person, who assumes to be duly authorized, but in fact is not so, as if made to a person acting as agent, but not in fact an agent, or to a person purporting to be the personal representative, or the executor or administrator of a party, supposed to be dead, but who is in reality still

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[1] Story on Agency, § 488, 491, 492, 493, 494. But see Pothier, De Change, n. 168; Pothier, De Mandat, n. 103, 106, 108.

[2] See Chitty on Bills, ch. 9, § 2, p. 425, 426, (8th edit.); Bayley on Bills, ch. 8, p. 314, (5th edit.); Pothier, De Change, n. 164, 168, 169; Story on Bills, § 412, 413.

[3] Ibid.; Pothier, De Change, n. 166.

[4] Chitty on Bills, ch. 9, p. 428, (8th edit.); Bayley on Bills, ch. 5, § 2, p. 134, (5th edit.); Evans *v.* Cramlington, 2 Vent. R. 307; Skinner, R. 264; Carth. R. 5. But see Marchington *v.* Vernon, 1 Bos. & Pull. 101, note *c*; Smith *v.* Kendall, 6 Term R. 123; Story on Bills, § 414.

living, the payment is invalid and a mere nullity.[1] So, if made to a married woman, who is the payee or indorsee of the Note, without the consent of her husband,[2] or to a bankrupt, after an act of bankruptcy, without the consent of his assignees,[3] or to a person, who is an infant, *non compos*, without the consent of his guardian, when he is under guardianship, it is equally invalid.[4] At least, in the latter case, it is invalid, if the guardianship is known, whatever may be the case, where the guardianship is unknown.[5]

§ 376. The same principles will be found generally recognized in the French law; and, indeed, they seem, from their intrinsic equity and good sense, to belong to the doctrines of universal jurisprudence.[6] They all proceed upon the general propriety of the rule promulgated by Julian, and established in the Roman Law, in cases of agency. *Si nullo mandato intercedente debitor falsò existimaverit voluntate meâ pecuniam se numerare, non liberabitur.*[7] And those, who are known to be incapable, by law, of giving a valid consent, or of doing a valid act,

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1 Ibid.; Story on Bills, § 413; Bayley on Bills, ch. 8, p. 323, 324, (5th edit.); Pardessus, Droit Comm. Tom. 2, art. 197; Pothier, De Change, n. 169.

2 Bayley on Bills, ch. 5, § 2, p. 135, (5th edit.); Ibid. ch. 8, p. 314, 315; Connor *v.* Martin, 1 Str. R. 516, cited 3 Wils. R. 5. See Pothier, De Change, n. 166, 167.

3 Chitty on Bills, ch. 9, § 2, p. 425, 426, (8th edit.); Bayley on Bills, ch. 8, p. 314, 315, (5th edit.); Ante, § 102; Sowerby *v.* Brooks, 4 Barn. & Ald. 523; Story on Bills, § 412, 413.

4 Ante, § 82, 83, 85, 88, 101; Bayley on Bills, ch. 8, p. 314, 315, 325, (5th edit.); Pothier, De Change, n. 160; Chitty on Bills, ch, 9, p. 428, (8th edit.)

5 Story on Bills, § 413; Pothier, De Change, n. 166.

6 Pardessus, Droit Comm. Tom. 2, art. 196, 197, 354; Pothier, De Change, n. 166, 167; Nouguier, De Change, Tom. 1, p. 342-344.

7 Dig. Lib. 46, tit. 3, l. 34, § 4.

to bind themselves or others, are deemed in law to be in the same situation, as if they had given no consent, or done no act; and in each case the proceeding is a mere nullity. In short, although the maxim is not of universal application, *Qui cum alio contrahit debet esse gnarus conditionis ejus, cum quo contrahit*; yet the only admitted exceptions seem to be, where the party contracting has been misled by the negligence, or omission of duty, or fault of the party, against whom the contract is sought to be enforced.[1]

§ 377. Pothier admits, that payment to a minor, having a tutor, and taking the Note by succession, upon the death of his parent, is not good, unless it has been turned to his profit; but that payment ought to be made to his tutor. But, if the Note be made payable by the payee thereof to a minor, he holds, that payment made to him by the maker is good, according to the maxim, *Quod jussu alterius solvitur, perinde est, ac si ipsi solutum esset.*[2] He holds the same rule to be true, where a Note is payable to a single woman, who afterwards marries, if her marriage is unknown to the maker; but, if known, he can safely pay only to the husband.[3] If a Note be payable to A. or order, for the use of B., payment should be made to A., or to his order, and not to B., who is merely the *cestui que trust.*[4]

§ 378. Where payment is made to an agent of the holder, whose authority has been revoked by the act of the holder, but the revocation of the authority is un-

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[1] See Pothier, De Change, n. 167.

[2] Pothier, De Change, n. 166; Dig. Lib. 50, tit. 17, l 180.

[3] Pothier, De Change, n. 166;

[4] Chitty on Bills, ch. 9, p. 427, (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 134, (5th edit. 130); Evans v Cramlington, 2 Vent. R. 307; Skinner, R. 264; Story on Bills, § 414; Ante, § 375.

known to the maker, there, the payment will be held good, and binding upon the holder.[1] But it will be otherwise, if the revocation is, at the time of the payment, known to the maker, or if the revocation is not by the act of the party, but by mere operation of law; as, for example, if the revocation is by the death of the holder, although the death is unknown to the maker.[2] This, at least, seems to be the clear result of our law; but Pothier holds, that if the death is unknown, the payment *bonâ fide* made will be good and valid.[3]

§ 379. But cases of more frequent occurrence, and which require on the part of the maker a more scrutinizing care, are cases of forgery of the signature of the payee, or other indorser of the Note. 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.[4] The old French Law was the same; but it has, in the modern Code of Commerce, undergone some modifications.[5] However, if the maker does pay the Note, he may (as we shall presently see [6]) recover back the money. The reason is, that the maker, by the payment of the Note, does not

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1 Pothier, De Change, n. 168; Story on Bills, § 417.

2 Story on Bills, § 413; Story on Agency, § 495 – 499; Pothier, De Change, n. 168; Galt *v.* Galloway, 4 Peters, R. 332, 344; Aertson *v.* Cage, 2 Humph. Tenn. R. 350. See Burrill *v.* Smith, 7 Pick. R. 291.

3 Pothier, De Change, n. 168.

4 Chitty on Bills, ch. 9, § 2, p. 425, 426, (8th edit.); Story on Bills, § 262, 263, 412, 450; Bayley on Bills, ch. 8, p. 318 – 321, (5th edit.); Id. ch. 11, p. 464, 465; Post, § 380.

5 Pothier, De Change, n. 169; Locré, Esprit de Code de Comm. art. 145, Tom. 1, p. 457 – 465.

6 Post, § 387.

positively affirm the genuineness of the signatures of the payee, or of any subsequent indorser, (as the acceptor does the signature of the drawer of a Bill, by accepting it,[1]) for he is not presumed to know them ; and if he pays the Note under a supposition that the signatures are genuine, he pays under a mistake of fact, and he is not bound thereby ; nor will he, or any other party to the Note, be exonerated thereby from the liability, which otherwise attaches to him.[2]

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[1] Story on Bills, § 411, 412 ; Chitty on Bills, Pt. 1, ch. 7, p. 336, 337, (8th edit.) ; Id. ch. 9, p 425, 426 ; Id. Pt. 2, ch. 5, p. 625, 628, 629, 635 ; Bayley on Bills, ch. 8, p. 318, 320, 322, (5th edit.) ; Id. ch. 11, p. 464 ; Smith *v.* Chester, 1 Term R. 654 ; Carrick *v.* Vickery, 2 Doug. R. 530, 653, note.

[2] Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287 ; Coggill *v.* American Exchange Bank, 1 Comstock, N. Y. R. 113 ; Chitty on Bills, ch. 8, p. 425, 426, 428, 430, (8th edit.) ; Id. ch. 9, p. 463, 464. Upon this subject, Mr. Chitty says ; " With respect to payment, by mistake, of Bills or Notes, where there has been forgery, the decisions and opinions have been contradictory. It seems, however, clear, on principle, as well as authority, that a drawee of a Bill, or a banker acting for his customer, cannot, in case he pays a Bill, where the drawer's signature has been forged. or, where the sum has been fraudulently enlarged, without the fault of the drawer, debit the drawer with the sum so paid, without his authority, or recover the amount from him. But there are many conflicting decisions upon the question, Whether the party paying shall be allowed to recover back the money from the person, whom he has inadvertently paid. It has been contended, that, if the party paid was a bonâ fide holder ignorant of the forgery, then he ought not to be obliged to refund, under any circumstances, although he could not have enforced payment, and although he had immediate notice of the forgery, because the drawee was bound to know the handwriting of the drawer, and the genuineness of the Bill ; and because the holder, being ignorant of the forgery, ought to have the benefit of the accident of such payment by mistake, and not to be compelled to refund. But, on the other hand, it may be observed, that the holder, who obtained payment, cannot be considered as having altogether shown sufficient circumspection ; he might, before he discounted, or received the instrument in payment, have made more inquiries as to the signatures, and genuineness of the instrument, even of the drawer or indorsers themselves ; and, if he thought fit to rely on the bare representa-

§ 380. It is true, that every indorser of a Note, like the indorser of a Bill of Exchange, does, by his indorsement, impliedly admit the signatures of the antecedent indorsers to be genuine.[1] But this proceeds upon the

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tion of the party, from whom he took it, there is no reason, that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that, of late, upon questions of this nature, these latter considerations have influenced the Court in determining, whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that, upon attempting to reconcile them, they are not so contradictory, as might, on first view, have been supposed. It has been decided, that a drawee, who had accepted, and afterwards paid a Bill, and after waiting a considerable time, upon discovering that the drawer's name was forged, could not recover back the amount, for there, by his acceptance, he gave credit to the Bill, and thereby induced the plaintiff to take it, and he also delayed giving notice of the forgery. So, in another case, where bankers paid a forged acceptance, supposed to have been made by their customer, and payable at their bank, but did not discover or give notice of the forgery to the party they had paid, for a week afterwards, it was, held, that such delay precluded them from recovering back the amount, because thereby the means of resorting with effect to the prior parties was prejudiced, if not defeated; but the Court were not unanimous in that decision; Chambre, J., being of opinion that the case came within the general rule, of money, paid under a mistake of facts, being recoverable back, and that, therefore, the defendant was liable to refund; and Dallas and Heath, Justices, thinking otherwise, on the ground, that it was the plaintiff's duty to know their customer's hand, before they paid the Bill; and Gibbs, C. J., being the only Judge, who put the case on the true ground, namely, the plaintiff's delay in giving notice of the forgery, and having thereby destroyed the defendant's remedy over." Chitty on Bills, ch. 9, p. 463, 464, (8th edit. 1833.) See also Salem Bank *v.* Gloucester Bank, 17 Mass. R. 1; U. States Bank *v.* Bank of Georgia, 10 Wheat. R. 333; Levy *v.* U. S. Bank, 1 Binn. R. 27. See also Bayley on Bills, ch. 8, p. 325, 326, (5th edit. 1830); Id. ch. 11, p. 484.

[1] Story on Bills, § 111, 225, 412; Ante, § 135; Bayley on Bills, ch. 11, p. 465, (5th edit.); Robinson *v.* Yarrow, 7 Taunt. R. 455; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287; Lambert *v.* Pack, 1 Salk. R. 127;

intelligible ground, that every indorser undertakes, that he possesses a clear title to the Note, deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights, which

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S. C. 1 Ld. Raym. 443, 12 Mod. 244 ; State Bank *v.* Fearing, 16 Pick. R. 533 ; Central Bank *v.* Davis, 19 Pick. R. 373, 374 ; Burrill *v.* Smith, 7 Pick. R. 291. See Howell *v.* Wilson, 2 Blackf. R. 419. This seems to be the true doctrine of law upon the subject, and it was expressly held by Lord Ellenborough, in Critchlow *v.* Parry, 2 Camp. R. 182. See also Lambert *v.* Pack, 1 Salk. 127, (S. C. under the name of Lambert *v.* Oakes, 1 Ld. Raym. R. 443, 12 Mod. R. 244) ; Chitty on Bills, Pt. 2, ch. 5, p. 635, 536, (8th edit.) In Bayley on Bills, ch. 5, § 3, p. 170, (5th edit.) it is laid down, that "An indorsement is no warranty, that the prior indorsements are genuine." And for this position he relies solely on the case of The East India Company *v.* Tritton, 3 Barn. & Cressw. 280. But that case did not turn upon the point of the genuineness of the antecedent indorsement, but upon the question, whether the person making it by procuration had competent authority ; and the Court held that as the East India Company had seen the power, under which the procuration was made, before payment of the Bill, as acceptors, they were bound by their own act ; and therefore they had no good cause of action against the defendants, who had received the money as agents, and had paid it over to their principals, without notice of any defect of title. It is true that Mr. Justice Bayley, in that case, said ; "Nor am I prepared to admit, that every indorser warrants the genuineness of the prior indorsements." This was merely the expression of a doubt, not called for by any direct point in the case ; and he immediately added ; "But it is not necessary to decide or discuss that question." Mr. Justice Littledale intimated the same doubt ; but Lord Chief Justice Abbott, and Mr. Justice Holroyd said nothing on the point. In Smith *v.* Mercer, 6 Taunt. R. 83, Mr. Justice Chambre said, that an indorsement was a sort of warranty of the genuineness of the acceptance, that being on the Bill at the time of the indorsement, and making a part of the instrument. It seems, indeed, difficult to perceive the ground upon which the opposite doctrine is maintainable. Every indorsement presupposes, that the indorser has a good title to convey the same to the indorsee, so that he necessarily warrants a good title from the prior parties under and through whom he claims. And it would be equally clear, that he impliedly warrants to the indorsee, that, in case of a dishonor, he may have a rightful recourse, not only to himself, but to all the other parties, who stand as prior indorsers on the Note, and are therefore liable to be sued in that character. See also Story on Bills, § 110, and note, § 111, 225, 262, 263, 412.

by law attach to a regular and genuine indorsement, against himself and all the antecedent indorsers. It is in this confidence, that the holder takes the Note, without further explanation; and if each party is equally innocent, and one must suffer, it should be he who has misled the confidence of the other, and, by his acts, held out to the holder, that all the indorsements are genuine, and may be relied on as an indemnity, in case of the dishonor thereof. So, that the indorser stands in a very different predicament from that of the maker, as the latter binds himself only to pay the true, *bonâ fide* owner or holder, whose title he has no adequate means to ascertain; and payment to any person, not truly such owner or holder, is a payment, which cannot exonerate him from the duty to pay it again to the true owner or holder. The indorser cannot, on the other hand, have any reason to complain, if he is called upon to repay the money, which he has received from the holder, upon an indorsement of a title, which turns out to be void, or ineffectual, against the maker; for then there is a total failure of the consideration, on which the transfer was made.

§ 381. In ordinary cases, where a Note is in all respects genuine, 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 possession is *primà facie*, or presumptive evidence, that he is the proper owner or lawful possessor of the Note;[1] [and that he

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[1] Chitty on Bills, ch. 9, § 2, p. 425, 428, 429, (8th edit. 1833); Story on Bills, § 193, 194; Aspinwall *v.* Meyer, 2 Sandford, Superior Ct. N. Y. R. 180; Smith *v.* Runnels, Waldo, Mississippi R. 144; Smith *v.* Prestige, 6 Smedes & Marshall, R. 478.

had received it before it became due, for a valuable consideration, and without notice of usury.[1]] And, indeed, if this doctrine did not prevail, the maker would, in many cases, pay at his peril, where the true owner or holder is unknown to him; and endless embarrassments would grow out of the negotiations of Notes, which, in a vast variety of cases, pass by mere delivery from hand to hand, when 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 title, before the maker will be bound to pay the note; and they may be *bonâ fide* purchasers and holders by mere delivery, without the knowledge, or means of knowledge, of the persons, through whose hands the note has passed by delivery after such a blank indorsement.[2]

§ 382. Hence it is, that if the maker pays the Note, which has been indorsed in blank, and is afterwards lost or stolen, and then gets into the hands of a *bonâ fide* holder, for a valuable consideration, the payment to such holder will be perfectly valid, and protected by law.[3] But, if paid under circumstances, which establish a want of good faith on the part of the maker, the payment will be nugatory.[4] It was formerly thought, that, if payment was made to a holder under circumstances of

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1 Smedberg *v.* Whittlesey, 3 Sandford, Ch. N. Y. R. 320; Smedberg *v.* Stimpson, 2 Sandford, Superior Ct. N. Y. R. 87.

2 Story on Bills, § 415.

3 Chitty on Bills, ch. 9, p. 429, 430, (8th edit. 1833); Pothier, De Change, n. 168; Bayley on Bills, ch. 5, § 2, p. 130, 131, (5th edit. 1830); Id. ch. 12, p. 524, 531; Anon. 1 Ld. Raym. 738; Miller *v.* Race, 1 Burr. R. 452; Grant *v.* Vaughan, 3 Burr. R. 1516.

4 Ibid.

suspicion, or which might properly put the maker upon further inquiry, that would take away his right to be protected by such payment.[1] This doctrine has been since qualified, and, indeed, overruled, as having a direct tendency to obstruct the negotiation of all Notes, payable to bearer, or negotiated by delivery, after a blank indorsement, since their circulation would be materially affected thereby, if not, in a great measure, stopped.[2] But the reasonable doctrine, now established, is, that nothing short of fraud, not even gross negligence, if unattended with *mala fides*, on the part of the maker, or other party paying a Note, will invalidate the payment, so as to take away the rights founded thereon.[3]

§ 383. But here, again, the doctrine already stated must be understood to apply solely to cases, where the indorsement is in blank; for if the indorsement on the Note should be in full, payable to a particular person, as to A. or his order, and the Note should be lost or stolen, and the finder should go to the maker, and represent himself to be the person designated in the indorsement, (A.,) and the maker, trusting to his representation, should pay the Note to him, that would be no discharge, or payment thereof, against A.; for in such a case, the maker pays at his peril, and is bound to ascertain the identity of the party, to whom he pays, before he makes payment. Pothier has discussed the same

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1 Chitty on Bills, ch. 9, p. 429, 430, (8th edit. 1833); Bayley on Bills, ch. 12, p. 524–531, (5th edit. 1830.)

2 Down *v.* Halling, 4 Barn. & Cressw. 330; Gill *v.* Cubitt, 3 Barn. & Cressw. 466; Story on Bills, § 193, 194.

3 Crook *v.* Jadis, 5 Barn. & Adolp. 909; Backhouse *v.* Harrison, 5 Barn. & Adolp. 1098; Goodman *v.* Harvey, 4 Adolp. & Ellis, 870; Usher *v.* Rich, 10 Adolp. & Ellis, R. 784; 1 Selw. Nisi Prius Dig. p. 347, (10th edit. 1842); Story on Bills, § 416. See Pothier, De Change, n. 169.

question, and finally arrived at the same conclusion, and he affirms, that merchants maintain it, as the invariable rule, in the usage and practice of business.[1]

§ 384. In the next place, as to the time of the payment of the Note by the maker. In order to make a payment by the maker good, and binding upon all the other parties to the Note, it should be made at the maturity of the Note, and not before; for, although, as between the real and *bonâ fide* holder and the maker, the payment, whenever made and however made, will be a conclusive discharge from the obligation of the Note; yet, as to third persons, it may be far otherwise; for payment means payment in due course, and not by anticipation.[2] If, therefore, the maker should pay a Promissory Note, before it is due to any holder, who should afterwards, and before its maturity, indorse or pass the the same to any subsequent *bonâ fide* indorsee, or other holder, the latter would still be entitled to full payment thereof from the maker at its maturity; for payment of the Note, before it becomes due, is no extinguishment of the debt, as to such persons.[3] The same doctrine prevails in the French Law;[4] and it will apply to the case, where the holder is a mere agent of the real owner, and his authority has been countermanded before the Note is due;[5] and, *a fortiori*, to the case, where the Note

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[1] Pothier, De Change, n. 169; Pardessus, Droit Comm. Tom. 2, art. 197. But see Code de Comm. art. 145, and the Commentary of Locré, Esprit du Code de Comm. art. 145, Tom. 1, p. 457-465.

[2] Chitty on Bills, ch. 9, p. 428, 431, (8th edit. 1833); Burbridge *v.* Manners, 3 Camp. R. 193.

[3] Chitty on Bills, ch. 6, p. 286, (8th edit. 1833); Bayley on Bills, ch. 8, p. 326, 5th edit. 1830,) citing De Silva *v.* Fuller, MSS.; Marius on Bills, p. 31.

[4] Pardessus, Droit Comm. Tom. 2, art. 401.

[5] Marius on Bills, p. 31; Bayley on Bills, ch. 8, p. 326, (5th edit. 1830.)

is presented and paid to a *mala fide* holder, before it is due.[1]

§ 385. In respect to partial payments, made by the maker to the holder, before, or at, or after, the maturity of the Note, they will in no respect discharge the obligations of the indorsers, except to the amount of the sums so paid, unless the payments are made upon some other stipulations, which are or may be injurious to the interests of the indorsers (which we shall have occasion presently to consider[2]); for, under other circumstances, they are for his relief, and diminish, *pro tanto*, his responsibility. Similar considerations will apply to the case of partial payments, received by the holder from any indorser, under the same circumstances.

§ 386. In the next place, as to the circumstances, which will take away from the payment, made by the maker, all obligation and force. These have been, for the most part, already brought under review, under the preceding heads. Payment by the maker will be valid as to third persons only, when it is *bonâ fide* made, without any knowledge of facts, which justly impair or destroy the rights of the holder.[3] If, therefore, the maker has notice at the time, that the holder has no title to receive the money, and, *a fortiori*, if he knows, that he is receiving it in violation of his known duty and trust, the payment will not be held to be valid or obligatory, as to the parties really interested. The like rule will apply to the case of an indorser, who pays the Note with full knowledge, that he is under no obligation to pay it; as, for example, if an indorser who has not received due notice of the dishonor of the Note, should pay

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[1] Story on Bills, § 417.

[2] Ibid. § 421, 422, 425.

[3] Ibid. § 430.

it, it would be at his own risk; and he would not be entitled to recover the same from any antecedent indorser, who might have been liable to him, if he had been legally chargeable therewith, but who would otherwise be discharged.[1] For no indorser can, by his mere voluntary and unnecessary payment, affect the rights of the antecedent indorsers, or charge them with liabilities, from which they have been already absolved by the principles of law.[2] It may also be laid down as a general rule, that payment by the maker to a holder, claiming under a forged indorsement, will not exonerate the maker from payment to the rightful owner.[3]

§ 387. When and under what circumstances, in case of a forgery or fraudulent alteration of a Promissory Note, a person who is a party to the Note, either as maker, or payee, or indorser, and pays it to a *bonâ fide* holder, will be entitled to recover back the money from the holder, has been a matter of much discussion, and has been already adverted to in a preceding section.[4] The question has most commonly occurred in cases of Bills of Exchange; but the same principles will often, by analogy, apply to cases of Promissory Notes. The maker of a Note does note, by implication, (as we have already seen,[5]) admit the genuineness of the signatures of the subsequent parties, either of the payee, or any subsequent indorser thereon, as the acceptor of a Bill does

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[1] Ante, § 334; Story on Bills, § 423; Chitty on Bills, ch. 9, p. 458, (8th edit.)

[2] Chitty on Bills, ch. 9, p. 426, 458–464, (8th edit.)

[3] Ibid.; Bayley on Bills, ch. 8, p. 318–323, (5th edit.); Id. ch. 11, p. 463, and note, § 464; Story on Bills, § 423. See Milnes *v.* Duncan, 6 Barn. & Cressw. 671; Ante, § 379.

[4] Ante, § 379; Story on Bills, § 451.

[5] Ante, § 379, 380.

the signature of the drawer;[1] but he stands in the same predicament as the acceptor does, as to indorsers on the Bill; that is, he does not admit the genuineness of their signatures.[2] Hence, a payment of the Note by the maker, where the signature of the payee, or any subsequent indorser, is forged, will not bind the maker, but he may recover back the money, which he has paid to the holder.[3] So, if the payee should pay the Note to the holder under a subsequent forged indorsement, he may, in like manner, recover back the amount.[4] But if a subsequent indorser should pay the amount to the holder, where the signature of the maker, or of a prior indorser is forged, he could not recover it back, because every indorser, in legal effect, warrants the genuineness of the signatures of the antecedent parties, of the indorsers, as well as of the maker.[5]

§ 388. From what has been already suggested, it is apparent of what great importance it is, that every indorser, who is called upon, by the holder, to take up a Note, should perfectly assure himself, not only, that the party applying for payment is the true and lawful holder of the Note, but, also, that there has 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 has been such laches, by which the prior parties on the Note have been discharged, any indorser who shall unnecessarily pay the Note, will

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1 Story on Bills, § 113, 262, 411, 448; Price *v.* Neal, 3 Burr. R. 1354; Ante, § 118.

2 Story on Bills, § 262, 411, 448, 451; Ante, § 135, and note, § 379.

3 See Bayley on Bills, ch. 11, p. 462-466, (5th edit.); Thomson on Bills, ch. 5, p. 373, 374, (2d edit.); Ante, § 379, 380.

4 Ante, § 379, 380.

5 Bayley on Bills, ch. 11, p. 462, 463, (5th edit.); Ante, § 135, 380.

not thereby revive the liability of the prior parties, or be entitled to recover against them.[1] Thus, if a Note has been dishonored at maturity, and due notice thereof has not been given by the holder, or other party to the Note, 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.[2] So, if the prior parties have not received due notice of the dishonor of the Note, and a subsequent indorser shall pay it to the holder, from which payment he is exonerated by the holder's laches, in giving him notice a day too late, such payment will not bind the prior parties; for he has no right, by such payment, to place them in a worse situation, than they would otherwise have been.[3]

§ 389. In the next place, as to the mode or manner in which payment is to be made by the maker, or received by the holder. And here the rule is, that payment should ordinarily be made in money or coin by the maker, according to its true value and denomination in the Note, and the holder is not bound to accept any thing but such money or coin, at its true and proper value.[4] Where the holder receives a Promissory Note, or Bill, in payment of a debt, it is not an absolute, but a conditional payment only, unless otherwise agreed by the parties; and it only suspends the right to recover the original debt, until the credit has

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1 Chitty on Bills, ch. 9, p. 426, (8th edit. 1833.) See Konig *v.* Bayard, 1 Peters, R. 262; Ante, § 334, 386.

2 Ibid.; Roscow *v.* Hardy, 12 East, R. 434; Ante, § 386.

3 Turner *v.* Leech, 4 Barn. & Ald. 451; Story on Bills, § 423. Chitty on Bills, ch. 9, p. 433, (8th edit. 1833); Ante, § 115.

expired.[1] If the holder be a mere agent, he has no right to accept payment in goods, in lieu of money, unless specially authorized so to do.[2] If the holder accepts a draft or a check on a bank or a banker, in payment of the Note, it has been said, that he is not obliged to give up the Note, before payment of the draft or check, and, if he does, the indorsers are discharged thereby.[3] If the holder accepts such draft or

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1 Sayer *v.* Wagstaff, 5 Beavan, R. 415; Ante, § 104; Post, § 438.

2 Chitty on Bills, ch. 9, p. 433, (8th edit. 1833); Howard *v.* Chapman, 4 Carr. & Payne, R. 508.

3 Chitty on Bills, ch. 9, p. 433, 434, (8th edit. 1833); Marius on Bills, p. 21, 22. See also Hansard *v.* Robinson, 7 Barn. & Cressw. 90. Mr. Chitty (p. 433, 434) says; "Payment is frequently made by a draft on a banker; in which case, if the person, receiving the draft, do not use due diligence to get it paid, the person, from whom he received it, and every other party to the Bill, will be discharged, but not otherwise, unless the holder expressly agreed to run all risks; for a banker's check is not money." From this language it might be inferred, that, if the holder took a draft on a banker, and presented it in due time, and it was dishonored, the drawer and indorsers, as well as the acceptor, would still remain liable on the Bill. There is no doubt, that the acceptor will. But, upon principle, the drawer and indorsers would be discharged; for, by their contract, payment should be made on the day of maturity, and in money. From a subsequent passage (p. 434) it would seem, that Mr. Chitty did not mean to inculcate a different opinion. He there says; "When payment is made by the drawee giving a draft on a banker, Marius advises the holder not to give up the Bill until the draft be paid. Till lately, the usage in London was otherwise, when the drawee was a respectable person in trade; and in one case it was decided, that a banker having a Bill remitted to him, to present for payment, is not guilty of negligence in giving it up, upon receiving from the acceptor a check upon another banker for the amount, payable the same day, although such check be afterwards dishonored. But in a late case at Nisi Prius, it was considered, that drawer and indorsers of a Bill would be discharged by the holder's taking a check from and delivering up the Bill to the acceptor, in case the check be not paid; because the drawer and indorsers have a right to insist on the production of the Bill, and to have it delivered up, on payment by them. If the holder of a draft on a banker receive payment thereof in the banker's notes, instead of cash, and the banker fail, the drawer of the check will be discharged. But if a creditor, on any other account than a Bill of

check, it will, ordinarily, discharge the indorsers, but it will operate, as to himself, as a conditional payment only, that is, if, upon presentment, the check is duly paid by the bank or banker. But, if the draft or check is not presented for payment within a reasonable time by the holder, and then the bank or banker fails, the holder himself must bear the loss.[1] If the holder receives bank-notes of a bank in payment, then the indorsers are discharged, and the maker also, if the bank had not then failed, but would, upon due presentment, have paid the same, although it should afterwards fail, and become utterly insolvent.[2] But if the bank had then actually failed, although unknown to both parties, the payment will not be deemed valid, unless the holder, upon receiving them, has agreed to run the risk of their dishonor, or of the insolvency of the bank.[3] But in this case, as in the former case, the indorsers will be discharged; although the maker will still be liable to pay the amount to the holder. The reason of the distinction is this, that the indorsers are entitled to have the Note immediately paid in cash, and if the holder receives bank-notes in payment, he gives credit for the time to the maker, *pro tanto*, and this he is not at liberty to do at the risk of the indors-

Exchange, is offered cash in payment of his debt, or a check upon a banker, from an agent of his debtor, and prefer the latter, this does not discharge the debtor, if the check is dishonored, although the agent fails, with a balance of his principal in his hands to a much greater amount."

[1] Bayley on Bills, ch. 7, § 1, p. 236 – 244, (5th edit. 1830); Id. ch. 9, p. 364 – 369; Chitty on Bills, ch. 9, p. 434, (8th edit. 1833); Story on Bills, § 109, and note; Ward *v.* Evans, 2 Ld. Raym. 930; Vernon *v.* Boverie, 2 Show. R. 296.

[2] Ibid.; Story on Bills, § 111, and note, § 225, and note; Fogg *v.* Sawyer, 9 New Hamp. R. 365.

[3] Story on Bills, § 419; Fogg *v.* Sawyer, 9 New Hamp. R. 365; Ante, § 119; Thomas *v.* Todd, 6 Hill, N. Y. R. 340.

ers.[1] But, as between the maker and the holder, the payment in bank-notes is but a conditional payment, to be void, if the bank is then insolvent, or if, being then solvent, the holder demands payment within a reasonable time, and payment is refused.[2]

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[1] See Thomson on Bills, ch. 5, § 4, p. 388, 389; Chitty on Bills, ch. 9, p. 402, (8th edit.); Id. p. 434; Story on Bills, § 419, and note.

[2] Story on Bills, § 109, and note, § 225, and note; Ante, § 119; Fogg *v.* Sawyer, 9 New Hamp. R. 365; Chitty on Bills, ch. 6, p. 268 – 271, (8th edit. 1833); Story on Bills, § 108, 110, 111; Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Owenson *v.* Morse, 7 Term R. 64; Ex parte Blackbriar, 10 Ves. 204; Emly *v.* Lye, 15 East, R. 7, 13, per Bayley, J. This subject seems involved in some perplexity by the authorities, especially where the Bill, when taken, (as, for example, the Bill of a banker payable to bearer,) is the Bill of parties, who are insolvent, and unable to pay at the time of the transfer, and that fact is unknown to both parties. Under such circumstances, it has been held in Pennsylvania, in the case of the transfer of bank-notes, after the bank had failed, unknown to both parties, that the holder had no right to recover against his immediate transferrer. Bayard *v.* Shunk, 1 Watts & Serg. 92. The like doctrine seems to have been intimated in Young *v.* Adams, 6 Mass. R. 182, 185, and was held in Scruggs *v.* Gass, 8 Yerger, R. 175, and Lowry *v.* Murrell, 2 Porter, R. 282. But the opposite doctrine was maintained in Lightbody *v.* The Ontario Bank, 11 Wend. R. 1, and affirmed on error, in the Court of Errors, in 13 Wend. 101, and in Fogg *v.* Sawyer, 9 New Hamp. R. 365. Story on Bills, § 419. Harley *v.* Thornton, 2 Hill, So. Car. R. 509, is on the same side. After all, the point seems to resolve itself more into a question of fact, as to the intent, than as to law; and it must, and ought, to turn upon this, Whether, taking all the circumstances together, the Bill was taken as absolute payment by the holder, at his own risk, or only as conditional payment, he using due diligence to demand and collect it. Mr. Chitty has discussed the subject somewhat at large, and says; "It has been said, that a transfer by mere delivery, without any indorsement, when made on account of a preëxisting debt, or for a valuable consideration, passing to the assignor at the time of the assignment (and not merely by way of sale or exchange of paper), as, where goods are sold to him, imposes an obligation on the person making it, to the immediate person, in whose favor it is made, equivalent to that of a transfer by formal indorsement. But this expression seems incorrect; for the party, transferring only by delivery, can never be sued upon the instrument, either as if he were an indorser, or as having guaranteed its payment, unless he expressly did so. The expression should be, 'that, if the instrument

§ 390. It sometimes happens, that, between the date of a Promissory Note, and the time of its becoming due,

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should be dishonored, the transferrer in such case is liable to pay the debt, in respect of which he transferred it, provided it has been presented for payment in due time, and that due notice be given to him of the dishonor.' A distinction was once taken between the transfer of a Bill or check for a precedent debt, and for a debt arising at the time of the transfer; and it was held, that, if A. bought goods of B., and at the same time gave him a draft on a banker, which B. took without any objection, it would amount to payment by A., and B. could not resort to him in the event of the failure of the banker. But it is now settled, that, in such case, unless it was expressly agreed at the time of the transfer, that the assignee should take the instrument assigned, as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee, maintain an action against the assignor on the consideration of the transfer. And, where a debtor, in payment of goods, gives an order to pay the bearer the amount in Bills on London, and the party takes Bills for the amount, he will not, unless guilty of laches, discharge the original debtor. And, where a person obtains money or goods on a bank-note, navy bill, or other Bill or Note, on getting it discounted, although without indorsing it, and it turns out to be forged, he is liable to refund the money to the party, from whom he received it, on the ground that there is in general an implied warranty, that the instrument is genuine. And, though a party do not indorse a Bill or Note, yet he may, by a collateral guaranty or undertaking, become personally liable. But, as, on a transfer by mere delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, becoming such after the assignment by himself; and, consequently, no person, but his immediate assignee, can maintain an action against him, and that only on the original consideration, and not on the Bill itself. And, if only one of several partners indorse his name on a Bill, and get it discounted with a banker, the latter cannot sue the firm, though the proceeds of the Bill were carried to the partnership account. When a transfer by mere delivery, without indorsement, is made merely by way of sale of the Bill or Note, as sometimes occurs, or (by) exchange of it for other Bills, or by way of discount, and not as a security for money lent, or where the assignee expressly agrees to take it in payment, and to run all risks; he has, in general, no right of action whatever against the assignor, in case the Bill turns out to be of no value. But there can be no doubt, that, if a man assign a Bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compelled to repay the money he had received. And it should seem, that, if, on discounting a Bill or Note, the Promissory Note of country bankers be delivered after they a change in the value of the coin or currency, in which it is made payable, takes place in the same country. And the question may, under such circumstances, arise, whether such a change in the value of the coin or currency will have any effect upon the amount, which is to be paid.[1] Thus, for example, a Note may be given in England, for the payment of one hundred guineas therein at a future day, and, before that day arrives, by an act of Parliament, the standard value of a guinea, which is then twenty-one shillings sterling, may be raised to twenty-two shillings sterling, or it may be lowered to twenty shillings sterling; that is, a guinea may become increased in value, or depreciated in value. In such a case, whether the guinea be increased or depreciated in value, the Note will be discharged by a due payment in one hundred current guineas, or in any other coin, which in the currency of the country, is, at that time, of equivalent value, according to the act of Parliament. If the Note were, in like manner, for the payment of one hundred pounds sterling, payment of that sum in guineas, or other coin of the realm, of an equivalent value, at the rate prescribed by the act of Parliament, would be a full discharge and payment of the Note.[2]

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have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounter, because it must be implied, that, at the time of the transfer, the Notes were capable of being received, if duly presented for payment." Chitty on Bills, ch. 6, p. 268–271, (8th edit. 1833.) See Barnard *v.* Graves, 16 Pick. R. 41; Dennie *v.* Hart, 2 Pick. R. 204; Story on Bills, § 419; 3 Kent, Comm. Lect. 44, p. 86, note.

[1] Thomson on Bills, ch. 5, § 4, p. 386, 387, (2d edit.)

[2] Ante, § 168. This doctrine was much considered in The Case of Mixed Money, so called, reported in Sir John Davies's Reports, 28, [48]. That case was as follows. A bond had been given in England, in the 43d of Elizabeth, for £200, on condition that the obligor should pay the obligee

§ 391. A rule, somewhat more modified, has been promulgated in England, in respect to the drawee of a

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his executors, or assigns, "£100 sterling, current and lawful money of England," at a future day, at a certain place in Christ Church, Dublin; and, between the time of the giving of the bond, and its becoming due, Queen Elizabeth, by proclamation, recalled the existing currency or coinage, in Ireland, and issued a new and debased coinage, called mixed money, and declared it to be the lawful and current money of Ireland, and to be received at its value, fixed by the proclamation, in payment of all debts. When the bond became due, the obligor made a tender of the £100 in the mixed money of the new standard, in performance of the condition of the obligation. The question was, whether this was a good tender or not, and the Judges of Ireland were required, by the Lord Deputy of Ireland, to give their opinions thereon; and, accordingly, the Judges delivered their opinions upon the several points raised. The fourth point resolved was that the said mixed money, having the impression and inscription of the Queen of England, and being proclaimed for lawful and current money, within the kingdom of Ireland, ought to be taken and accepted for sterling money. Fifthly, it was resolved, that, although this mixed money was made to be current within the kingdom of Ireland only, yet it may well be said to be current and lawful money of England; (1.) because Ireland is a member of the imperial crown of England; (2.) because the place of coinage was in the Tower of London, in England. Sixthly, and lastly, (which is most important to our present purpose), "It was resolved, that, although at the time of the contract and obligation made in the present case, pure money of gold and silver was current within this kingdom, where the place of payment was assigned; yet the mixed money being established in this kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it; and if he refuses it, and waits until the money be changed again, the obligor is not bound to pay other money, of better substance, but it is sufficient, if he be always ready to pay the mixed money, according to the rate for which they were current at the time of the tender. And this point was resolved on consideration of two circumstances, namely, the time and the place of the payment; for the time is future, namely, that if the said Brett shall pay or cause to be paid £100 sterling, current money, &c., and therefore such money shall be paid, as shall be current, at such future time; so that the time of payment, and not the time of the contract, shall be regarded. Also, the future time is intended by the words 'current money,' for a thing which is passed is not in cursu; and, therefore, all the doctors who write de re nummaria, agree in this rule, Verba currentis monetæ tempus solutionis designant. And to this purpose are several cases ruled in our books. and 7 Ed. 6, Dyer, 81 *b*. After the fall and embasement of money, Bill of Exchange, when drawn in England upon, and payable in, a foreign country; for, in such a case, it has

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5 Ed. 6, debt was brought against the executors of lessee for years, for rent in arrear for two years, ending Mich. 2 Ed. 6, at which time the shilling (which, at the time of the action brought, was cried down to 6*d.*) was current for 12*d.*, the defendants pleaded a tender of the rent, on the days when it became due, in peciis monetæ Angliæ vocat. shillings, qualibet pecia vocat. shilling, adtunc solubili pro 12*d.*, and that neither the plaintiff nor any other for him, was ready to receive it, &c., and concluded, that they are still ready to pay the arrears, in dictis peciis vocat. shillings, secundum ratam, &c. On this plea, although the plaintiff demurred, yet he was content to take the money at the rate aforesaid, without costs or damages, To the same purpose is the case of Pollards, adjudged 29 Ed. 1, and reported by Dyer, 82 *b*, where, in debt on an obligation for payment of £24, at two several days, the defendant pleads, that at the days limited for payment of the debt in demand, currebat quædam moneta, quæ vocabatur pollards, loco sterlingi, &c., and that the defendant, at the first day of payment, tendered the moiety of the debt in the money called pollards, which the plaintiff refused, and that he is still ready, &c., and offered it in Court, which is not denied by the plaintiff; Ideo concessum est, that he recover one moiety in pollards, and the other in pure sterling money. See 9 Ed. 4. 49 *a*, a remarkable case on the change of money, where it is said, that if a man in an action of debt, demands £40, it shall be intended money, which is current at the time of the writ purchased. And there a case in time of Ed. 1 is put, which is directly to this purpose. In debt brought upon a deed for thirty quarters of barley, price £20, it was found for the plaintiff, and the jury was charged to inquire of the price at the time of the payment, and it was said, that, at the time of the payment, a quarter was at 12*s.*, but, at the time of the making of the deed, it was only at 3*s.*, and the plaintiff recovered £18 for the corn, according to the price of it at the time of the payment. To this purpose, also, Linwood hath a notable gloss on the constitution of Simon Mepham, lib. 3, de testamentis cap. Item quia. For where the constitution is such, Pro publicatione testamenti pauperis, cujus inventarium bonorum non excedit centum solidos sterlingorum, nihil penitis exigatur, he maketh this gloss; Hic solidus sumitur pro duodecim denariis Anglicanis, &c. Sed quæro, saith he, numquid circa hos centum solidos debeat considerari valor in moneta jam currente, vel valor sterlingorum, qui currebant tempore, statuti; and there he resolveth, Quod ubi dispositio surgit ex statuto, ut hic, licet moneta sit diminuta in valore, tamen debet considerari respectu monetæ novæ currentis, et non respectu antiquæ. Nam mutata moneta, mutari videtur statutum, ut scilicet intellegatur de nova, et non de veteri. See Regist. 50 *a*, and 54 *b*, where the king issues his writ, to be certified, of the value of a church; the words of the writ

been decided, that if, in the intermediate time between the drawing of the Bill and the presentment thereof for

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are Secundum taxationem decimæ jam currentis. And 31 Ed. 3, Fitz. H. Annuity 86, an annuity was granted to I. S. until he was promoted by the grantor to a sufficient benefice; I. S. brings a writ of annuity against the grantor, who pleads, that he had tendered to the plaintiff a sufficient benefice; and there issue was taken on the value of the benefice at the time of the tender." This case was commented on by Sir William Grant, in delivering the judgment of the Privy Council, in Pilkington *v.* The Commissioners for Claims on France, 3 Knapp, Rep. 7, 18, 19; S. C. 2 Bligh, R. 98, note. On that occasion he said; "Great part of the argument at the bar would undoubtedly go to show, that the commissioners have acted wrong in throwing that loss upon the French Government in any case; for they resemble it to a case of depreciation of currency, happening between the time that a debt is contracted, and the time that it is paid; and they have quoted authorities, for the purpose of showing, that, in such a case, the loss must be borne by the creditor, and not by the debtor. That point it is unnecessary, for the present purpose, to consider, though Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies's Reports. He takes the distinction, that, if, between the time of contracting the debt, and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as, if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more, as would make it equal to the sum he borrowed. But, he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as, if they were to make the guinea pass for 30*s.*, the debtor may liberate himself from a debt of £1 10s. by paying a guinea, although he had borrowed the guinea when it was but worth 21*s.* I have said, it is unnecessary to consider, whether the conclusion drawn by Vinnius, or the decision in Davies's Reports, be the correct one; for we think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government. Then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. It is assumed to be a wrong act, not only in the treaty but in the repealing decree. They justify it only with reference to that, which, as to this country, has a false foundation; namely, on the ground of what other governments had done towards them; they having confiscated the property of French subjects, therefore, they say, we thought ourselves justified, at the time, in retaliating upon the subjects of this country. That being destitute of foundation, as to this country, the Re-acceptance, the coin or currency is depreciated by the foreign sovereign, the Bill ought to be accepted and

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public themselves, in effect, confess that no such decree ought to have been made, as it affected the subjects of this country. Therefore, it is not merely the case of a debtor, paying a debt at the day it falls due, but it is the case of a wrongdoer, who must undo, and completely undo, the wrongful act he has done ; and, if he has received the assignats at the value of 50*d.*, he does not make compensation by returning an assignat, which is only worth 20*d.* ; he must make up the difference between the value of the assignat at different periods. And that is the case stated by Sir John Davies, where restitutio in integrum is stated. He says, two cases were put by the Judges, who were called to the assistance of the Privy Council, although they were not positively and formally resolved. He says, it is said, if a man, upon marriage, receive £1,000, as a portion with his wife, paid in silver money, and the marriage is dissolved, causâ precontractûs, so that the portion is to be restored, it must be restored in equal good silver money, though the State shall have depreciated the currency in the mean time. So, if a man recover £100 damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment-creditor cannot liberate himself by merely restoring £100 in the debased currency of the time ; but he must give the very same currency that he had received. That proceeds upon the principle, that, if the act is to be undone, it must be completely undone, and the party is to be restored to the situation, in which he was at the time the act to be undone took place. Upon that principle, therefore, undoubtedly, the French Government, by restoring assignats, at the end of thirteen months, did not put the party in the same situation, in which he was, when they took from him assignats, that were of a very different value." Lord Eldon, in delivering his opinion in the case of Cockerell *v.* Barber, 16 Ves. 461, 465, evidently supported the doctrine of the Judges, in the case reported in Davies's Reports. On that occasion, he said : "In all the cases reported upon the wills of persons, in Ireland, or Jamaica, and dying there, (and vice versâ in this country,) some legacies being expressed in money sterling, others in sums without reference to the nature of the coin, in which they are to be paid, the legacies are directed here to be computed according to the value of the currency of the country, to which the testator belonged, or where the property was ; and I apprehend, no more was done in such cases, than ascertaining the value of so many pounds in the current coin of the country, and paying that amount out of the funds in Court. On the other hand, I do not believe the Court have ever said, they would not look at the value of the current coin, but would take it as bullion. At the time of Wood's half-pence in Ireland, whatever was their actual worth, yet in payment England must paid, not in the current value at the time of the acceptance or maturity of the Bill, but in the true value at the time when the Bill was drawn. Thus, where a Bill was drawn in England, upon the drawees, who resided in Portugal, for 1,000 millrees, payable in thirty days after sight; and, after the Bill was drawn, the king of Portugal had lessened the value of the millrees £20 per cent., and the Bill was presented to the drawees for acceptance, with the advance of the £20 per cent., and the drawees refused acceptance, unless to pay at the current value, and thereupon the Bill was protested; upon a suit brought in England, against the drawer, to recover the amount, it was held, that the Bill ought to be paid according to the ancient value, or with the advance of £20 per cent., and not according to the current value at the time when the Bill became payable.[1]

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have been according to their nominal current value, not the actual value. So, whatever was the current value of the rupee, at the time when this legacy ought to be paid, is the ratio, according to which payment must be made here in pounds sterling. If twelve of Wood's half-pence were worth six pence in this Court, six pence must have been the sum paid; and, in a payment in this Court, the cost of remittance has nothing to do with it. So, if the value of 30,000 rupees, at the time the payment ought to have been made in India, was £10,000, that is the sum to be paid here, without any consideration as to the expense of remittance." See also, Story on Conflict of Laws, § 312, 313 *a*; Story on Bills, § 163; Warder *v.* Arell, 2 Wash. Virg. R. 359, 283; Searight *v.* Calbraith, 4 Dall. R. 325; Bartsch *v.* Atwater, 1 Connect. R. 409; Anon. 1 Brown, Ch. R. 376.

[1] Du Costa *v.* Cole, Skinn. R. 272; Chitty on Bills, ch. 9, p. 433, (8th edit.) The decision seems to have been made at Nisi Prius, by Lord Holt, who, upon that occasion, said: "That here there not being notice, the Bill ought to be paid according to the ancient value, for the king of Portugal may not alter the property of a subject of England; and, therefore, this case differs from the case of Mixed Moneys, in Davies's Reports; for there the alteration was by the king of England, who has such a prerogative, and this shall bind his own subjects." In this case, he also held the protest to be an evidence primâ facie, that the Bill was not accepted, and sufficient to put the proof on the other side.

§ 392. Now, this decision was necessarily made upon the supposition, that the drawees were bound to accept and pay the £20 per cent. advance; for, otherwise, there would have been no default on their part, and no liability on the part of the drawer for the supposed dishonor. It would certainly be difficult to sustain this decision upon the principles of international jurisprudence, recognized in our day in England and America; for, where a Bill is drawn upon a foreign country, payable in the currency of that country, it is payable in that currency at its true value at the maturity of the Bill, and not at the time when the Bill is drawn.[1] Pardessus, however, has, as we shall presently see, arrived at the conclusion, that the law of the place of payment is to govern; and yet he concurs in the doctrine asserted in the case before Lord Holt.[2]

§ 393. The question, whether, if the value of the money is increased or diminished between the time of making the contract, and the time when it is payable, the payment ought to be made according to the value at the time of the contract, or at the time when it is payable, has been much discussed by foreign jurists, and they are not agreed in opinion. Molinæus (Dumoulin), Hotomannus, and Donellus contend, that the value of the money at the time of the contract, and not at the time when it is payable, ought to be the governing rule. Thus, for example, if 100 pieces of gold are borrowed, when they are worth 50 *asses*, and they are to be repaid at a future day, when they are worth 55 *asses*, the debtor is to pay to the creditor only 90 pieces of gold, or, for every piece of gold, 50 *asses*; but, if, in the interval, the

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[1] Story on Conflict of Laws, § 312, 313, *a*, § 313, *b*, § 317.
[2] Post, § 395; Pardessus, Droit Comm. Tom. 5, art. 1495.

value has been diminished to the same extent, then the debtor is bound to pay 110 pieces of gold, or, for every piece of gold, 55 *asses*. Bartolus, Baldus, and Castro, on the contrary, are of opinion, that the value at the time when the money is payable ought to be the rule; that is, the value of the money being either increased or diminished, that amount in value ought to be paid, which is the value, not when borrowed, but when it is payable; and they say, that no other rule can be adopted, without injury to the creditor, or the debtor. Vinnius says, that he deems this latter opinion to be the truer and more equitable one; *Quæ sententia, ut mihi videtur, et verior et æquior est.* But he goes on to state, that, if the true rule be, that neither the creditor nor the debtor should suffer any injury, then, if the intrinsic goodness of the money is changed, we should look to the time of the making of the contract; but, if the extrinsic value only is changed, then we should look to the time when the money is payable. And he adds, that this has been very often adjudged.[1]

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[1] We have just seen, in the quotation of the opinion of Sir William Grant, cited in the note to a preceding section, (§ 391,) how he understands the opinion of Vinnius. But, perhaps, from the language used by him, he did not mean to express an absolute opinion on the point; and it is not a little difficult to feel the value of the distinction between a depreciation of the value of the coin of currency by adulteration, and depreciation by lowering the market value, as currency, without adulteration. The whole passage of Vinnius is as follows: "Atque hinc pendet decisio nobilissimæ quæstionis, si post contractum æstimatio nummorum creverit aut decreverit, utrum in solutione facienda spectare oporteat valorem, quem habebant tempore contractus, an qui nunc est tempore solutionis: intellige si nihil, de ea re expresse dictum sit, neque mora intervenerit. Molinæus, Hotomannus, Donellus contendunt, tempus contractus inspiciendum esse, id est, ea æstimatione nummos reddendos, non quæ nunc est, sed quæ initio fuit, cum dabantur. Nimirum nihil illi in pecunia numerata præter æstimationem considerandum putant, totamque nummi bonitatem in hac ipsa æstima-

§ 394. Pothier maintains the opinion, that the value at the time when the money is payable is the rule,

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tione consistere: ac proinde creditori non facere injuriam, qui eandem æstimationem, quam accepit, reddit: tantum enim reddere eum, quantum accepit, quod ad solutionem mutui sit satis. Itaque secundum horum sententiam, si 100. aurei mutuo dati sint, cum aureus valebat asses 50. reddantur autem, cum singuli valent asses 55. debitor reddens creditori aureos 90. aut in singulos aureos 50. asses reddit, quantum accepit, et liberatur: et vicissim si imminuta sit ad eundem modum aureorum æstimatio, non liberatur, nisi reddat aureos 110. aut in singulos aureos asses 55. Bartolus vero (in l. Paulus. 101. de solut.) Baldus (in l. res in dotem. 24. de jur. dot.) Castro, (in lib. 3. de reb. cred.) et DD. comm. ut videre est apud Boër. decis. 327. contra censent, spectandum esse in proposito tempus solutionis, id est, aucto vel deminuto nummorum valore, ea æstimatione reddi eos oportere, non quæ tunc fuit, cum dabantur, sed quæ nunc est, cum solvuntur; neque aliud statui posse sine creditoris aut debitoris injuria. Quæ sententia, ut mihi videtur, et verior et æquior est. Nam quod contrariæ sententiæ auctores unicum urgent, in nummis non materiæ, sed solius æstimationis imposititiæ atque externæ, quam ob id vulgo extrinsecam nummi bonitatem vocant, rationem duci, nummumque nihil aliud esse, quam quod publicè valet, vereor, ut simpliciter verum sit. Utique enim materia numismatis fundamentum est et causa valoris: quippe qui variatur pro diversitate materiæ: oportetque valorem hunc justa aliqua proportione materiæ respondere: neque in bene constituta repub. nummo ea æstimatio imponi debet, quæ pretium materiæ, ex qua cuditur, superat, aut superet ultra modum expensarum, quæ in signanda pecunia fiunt; quod ad singularum specierum valorem parum addere potest. Sed hoc ad actus et præstationes privatorum non pertinet. Illud pertinet, quod si dicimus, creditis nummis nihil præter æstimationem eorum creditum intelligi, necessario sequitur, creditorem teneri in alia forma aut materia nummos accipere contra definitionem Pauli in D. l. 99. de solut. etiamsi damnum ex eo passurus sit: nam, qui recipit, quod credidit, nihil habet, quod conqueratur. Sequitur et hoc, si contingat mutari nummorum bonitatem intrinsecam, id est, si valore veteri retentio percutiantur novi nummi ex deteriore materia, quam ex qua cusi, qui dati sunt, puta, si qui dati sunt, cusi fuerint ex puro auro, postea alii feriantur ex auro minus puro et mixto ex ære, debitorem restituendo tot mixtos ex contaminatos, quot ille puros accepit, liberari cum insigni injuria creditoris: et contra interpp. pene omnium doctrinam, qui hoc casu solutionem faciendam esse statuunt ad valorem intrinsecum monetæ, qui currebat tempore contractus, testibus Gail. 2, obs. 73, n. 6 & 7. Borcholt. de feud. ad cap. un. quæ sunt regal. num. 62. Illud enim maxime in hac disputatione considerandum est, quoniam hic finis nummi principalis est, ut serviat rebus necessariis comparandis, auctore Aristotele which ought to govern, whatever may have been, in the intermediate time between the making of the contract and the time when it is payable, the increase or diminution of the value of the money. The reason, he says, is, that, in money, we do not regard the coins, which constitute it, but only the value, which the sovereign has been pleased that they shall signify.[1]

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1. Polit. 6. quod mutata monetæ bonitate sive extrinseca, sive intrinsica, pretia rerum omnium mutentur, et pro modo auctæ aut imminutæ bonitatis nummorum crescant aut decrescant ; quod ipsa docet experientia : eoque facit l. 2. C. de vet. num. pot. lib. 11. Crescunt rerum pretia, si deterior materia electa, aut manente eadem materia valor auctus sit : decrescunt electu materiæ melioris, aut si eadem bonitate materiæ manente valor imminutus fuerit. Fallitur enim imperitum vulgus, dum sibi persuadet, ex augmento valoris aurei aliquid sibi lucri accedere. Hoc autem fundamento posito, siquidem neutri contrahentium injuriam fieri volumus, ita definiendum videtur, ut si bonitas monetæ intrinseca mutata sit, tempus contractus si extrinseca, id est, valor imposititius, tempus solutionis in solutione facienda spectari debeat. Atque ita sæpissimè judicatum est." Vinn. Ad. Inst. Lib. 3, tit. 15, § De Mutuo, n. 12.

[1] Pothier, De Vente, n. 416 ; Story on the Conflict of Laws, § 313 *b*. The remarks of Pothier, on this subject, are given in a passage, where he supposes the seller of an estate has reserved a right to redeem the same, upon paying back the price ; and the point is, whether he must, upon the redemption, pay back the value of the money at the time of the original contract, or at the time of the redemption. His language is, "It remains to be observed, in regard to the price, that it may be rendered in a money different from that in which it is paid. If it is paid to the seller in gold, the seller may repay it in pieces of silver, or vice versâ. In like manner, though subsequent to the payment of the price, the pieces, in which it is paid, are increased or diminished in value ; though they are discredited, and, at the time of the redemption, their place is supplied by new ones, of better or worse alloy ; the seller, who exercises the redemption, ought to repay in money, which is current at the time he redeems, the same sum or quantity, which he received in payment, and nothing more nor less. The reason is, that, in money, we do not regard the coins, which constitute it, but only the value, which the sovereign has been pleased that they shall signify ; Eaque materia forma publica percussa, usum dominiumque non tam ex substantia præbet, quam ex quantiate ; D. 18, 1, 1. When the price is paid, the seller is not considered to receive the particular pieces, so much as the sum or value, which they signify ; and, consequently, he ought to repay, and it is sufficient for him to repay, the same sum or value in pieces,

§ 395. Pardessus has inculcated a different doctrine, holding it equally applicable to cases of debts upon negotiable instruments, as well as to other contracts and debts. Accordingly he says, that where payment is stipulated to be made in the money of a foreign country, and in the interval between the date of the contract and the time of the payment thereof, the money of that country has undergone variation in its nominal value, if the contract is made exclusively between subjects of that country, it may bind them to pay only according to the value fixed by the laws thereof; but that, if either party be a subject of another country, the rule is otherwise, and that payment is to be made, not according to the value of the money at its legal denomination, either at the time of the contract, or of the payment, but according to its intrinsic value. Thus, he puts the case of a contract in Spain, between a Spaniard and a Frenchman, for the payment of 500 piastres at a future day; and he affirms, that in such a case, the Frenchman would be entitled to receive the amount in piastres of a certain weight, and containing a certain quantity of silver and a certain quantity of alloy, and that, although an offer to pay the sum in Spain in paper money, stamped as good for that sum, would be there held valid, yet it would be held bad in France, if the contract was sued upon in that country. The reason he gives is, that the Frenchman must be presumed to intend to employ his money out of Spain, where the stamped paper money would be without value.[1] Pardessus adds, that the same rule

which are current, and which have the signs, authorized by the prince, to signify that value. This principle being well established in our French practice, it is sufficient merely to state it. It cuts off all the questions made by the Doctors, concerning the changes of money."

[1] Pardessus, Droit. Comm. Tom. 5, art. 1495.

is applicable to negotiable paper; so that, if the money is payable in Spain, and payment can be there obtained only in a depreciated currency, (as if it be lowered in value 20 per cent.) the holder is not bound to receive it at that rate, as a full satisfaction; but if he does receive the depreciated currency, he may have recourse over against the prior parties, who have transferred the negotiable paper to him for the difference between the original and the nominal value. Yet, almost in the same breath, he arrives at the conclusion, that it necessarily results from what he has thus stated, that the law of the place, where the payment is to be made, is the rule to govern in all cases of offers of payment and of deposits.[1] The distinction here taken by Pardessus seems as little reconcilable with any sound interpretation of the principles of international law, as any, which could well be propounded, and it stands unsupported by any of the foreign jurists, whose opinions we have been considering.[2]

§ 396. But other questions of great practical importance may arise, and indeed do arise, in which the operation of the *Lex Loci Contractûs* enters as a material ingredient in the ascertainment of what is a due and sufficient payment of the note. Thus, where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country to recover for a breach of the contract, a question often arises, as to the manner in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the currencies of the

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[1] Ibid.; Ante, § 392; Story on Bills, § 418.

[2] See Story on the Conflict of Laws, § 265, 272 *a*, § 308, 309, 310, 312, 313, *a*; Anon. 1 Brown, Ch. R. 376.

two countries, or according to the rate of exchange at the particular time existing between them. In all cases of this sort, the place, where the money is payable, as well as the currency, in which it is promised to be paid, are (as we shall presently see) material ingredients.[1] For instance, a debt of £100 sterling is contracted in England, and is payable there; and afterwards a suit is brought in America for the recovery of the amount. The present par fixed by law between the two countries is, to estimate the pound sterling at four dollars and forty-four cents.[2] But the rate of exchange, on bills drawn in America on England, is generally at from eight to ten per cent. advance on the same amount. In a recent case, it was held by the King's Bench, in an action for a debt, payable in Jamaica, and sued in England, that the amount should be ascertained by adding the rate of exchange to the par value, if above it; and so *vice versâ*, by deducting it, when the exchange is below the par.[3] Perhaps it is difficult to reconcile this case with the doctrine of some other cases.[4] In a late Ameri-

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[1] Story on the Conflict of Laws, § 308, 310; Post, § 398.

[2] This is the par for ordinary commercial purposes. But by the act of Congress of 1832, ch. 224, § 16, the par, for the purpose of estimating the value of goods, paying an ad valorem duty, and for that purpose only, is declared to be to estimate a pound sterling at four dollars and eighty cents. The still more recent Act of 27th of July, 1842, ch. 66, fixes the par at four dollars and eighty-four cents for the pound sterling, in all payments by and to the Treasury of the United States, and in appraising merchandise imported where the value is by the invoice in pounds sterling.

[3] Scott *v.* Bevan, 2 Barn. & Adolph. 78. — Lord Tenterden, in delivering the opinion of the Court in favor of the rule, said; "Speaking for myself personally, I must say, that I still hesitate as to the propriety of the conclusion." See Delegal *v.* Naylor, 7 Bing. R. 460; Ekins *v.* East India Company, 1 P. Will. 396.

[4] See Cockerell *v.* Barber, 16, Ves. 461; Story on the Conflict of Laws, § 308, 312.

can case, where the payment was to be in Turkish piastres, (but it does not appear from the Report, where the contract was made, or was made payable,) it was held to be the settled rule, where money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial.[1] It is impossible to say, that a rule laid down in such general terms ought to be deemed of universal application; and cases may easily be imagined, which may justly form exceptions.

§ 397. The proper rule would seem to be, in all cases, to allow that sum in the currency of the country, where the suit is brought, which should approximate most nearly to the amount, to which the party is entitled in the country, where the debt is payable, calculated by the real par, and not by the nominal par, of exchange.[2] This would seem to be the rule, also, which is adopted by foreign jurists.[3] In some countries there is an established par of exchange by law, as in the United States, where the pound sterling of England is now valued at four dollars and forty-four cents for all purposes, except the estimation of the duties on imported goods

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1 Lee *v.* Wilcocks, 5 Serg. & Rawle, 48. — It is probable, that in this case the money was payable in Turkey; Story on the Conflict of Laws, § 308.

2 In Cash *v.* Kennion, 11 Vesey, R. 314, Lord Eldon held, that, if a man in a foreign country agrees to pay £100 in London, upon a given day, he ought to have that sum there on that day. And if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed. J. Voet says: "Si major, alibi minor, eorundem nummorum valor sit, in solutione faciendâ; non tam spectanda potestas pecuniæ, quæ est in loco, in quo contractus celebratus est, quam potius quæ obtinet in regione illâ, in quâ contractûs, implementum faciendum est." Voet, Ad. Pand. Lib. 12, tit. 1, § 25; Henry on Foreign Law, 43, note. See also Story on the Conflict of Laws, § 281, 309; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771–773.

3 Story on the Conflict of Laws, § 281.

paying *ad valorem* duty.[1] In other countries the original par has, by the depreciation of the currency, become merely nominal; and, there, we should resort to the real par. Where there is no established par from any depreciation of the currency, there, the rate of exchange may justly furnish a standard, as the nearest approximation of the relative value of the currencies. And where the debt is payable in a particular known coin, as in Sicca rupees, or in Turkish piastres, there the mint value of the coin, and not the mere bullion value, in the country, where the coin is issued, would seem to furnish the proper standard, since it is referred to by the parties in their contract by its descriptive name as coin.[2]

§ 398. But, in all these cases, we are to take into consideration the place where the money is, by the original contract, payable; for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it, to that country.[3] Thus, if a note were made in England, for £100 sterling, payable in Boston, (Mass.), if a suit were brought in Massachusetts, the party would be entitled to recover four hundred and forty-four dollars and forty-four cents, that being the established par of exchange by our laws. But, if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for, so as to bring the sum to the real par, instead of the nominal par.[4] But, if a

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[1] Story on the Conflict of Laws, § 308, note 2.

[2] Story on the Conflict of Laws, § 309.

[3] See 1 Chitty on Comm. and Manufact. ch. 12, p. 650, 651. See Story on the Conflict of Laws, § 281, 308, 310.

[4] Paul Voet has expressed an opinion upon this subject in general terms. "Quid, si in specie de nummorum aut redituum solutione difficultas incidat, si forte valor sit immutatus; an spectabitur loci valor, ubi contractus erat

like note were given in England for £100, payable in England, or payable generally, (which in legal effect would be the same thing); there, in a suit in Massachusetts, the party would be entitled to recover, in addition to the four hundred and forty-four dollars and forty-four cents, the rate of exchange between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. And if the exchange were below par, a proportionate deduction should be made; so that the party would have his money replaced in England at exactly the same amount, which he would be entitled to recover in a suit there.[1]

§ 399. This distinction may, perhaps, reconcile some of the cases, between which there might seem, at first view, to be an apparent contrariety. It was evidently acted on in an old case, where money, payable in Ireland, was sued for in England; and the Court allowed Irish interest, but directed an allowance to the debtor for the payment of it in England, and not in Ireland.[2] It is presumable, that the money was of less value in Ireland, than in England. A like rule was adopted in a later case, where money payable in India was recovered in England; and the charge of remitting it from India was directed to be deducted.[3]

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celebratus, an loci, in quem destinata erat solutio? Respondio ex generali regulâ, spectandum esse loci statutum, in quem destinata erat solutio." P. Voet, De Stat. § 9, ch. 2, § 15, p. 271; Id. p. 328, edit. 1661. And he applies the same rule, where contracts are for specific articles, the measures whereof are different in different countries. Id. § 16, p. 271; Id. p. 328, edit. 1661.

[1] Story on the Conflict of Laws, § 310.

[2] Dungannon *v.* Hackett, 1 Eq. Cas. Abr. 288, 289.

[3] Ekins *v.* The East India Company, 1 P. Will. 396; S. C. 2 Bro. Parl. Cas. 382, edit. Tomlins; Story on the Conflict of Laws, § 308-311. The American authorities upon the points stated in these four last sections are not in entire harmony with each other. They underwent a full discus-

§ 400. Hitherto we have been principally considering, how and in what manner payment is to be made by

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sion, and were commented upon in the recent case of Grant *v.* Healey, 3 Sumner, R. 523; S. C. 2 Chandler, Law Reporter, 113. On that occasion the Judge, who delivered the opinion of the Court, said: "I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country, where it ought to have been paid, with interest for the delay; for then, and then only, is he fully idemnified for the violation of the contract. In every such case the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted, from the amount, as the case may require, in order to replace the money in the country, where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and advances, the object is to ascertain, where, according to the intention of the parties, the balance is to be repaid. In the country of the creditor, or of the debtor? In Lanusse *v.* Barker, 3 Wheat R. 101, 147, the Supreme Court of the United States seem to have thought, that where money is advanced for a person in another state, the implied understanding is to replace it in the country, where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales at Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining, where the balance is reimbursable, whether where the creditor resides, or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that advances ought to be deemed reimbursable at the place, where they are made, and sales of goods accounted for at the place where they are made, or authorized to be made. Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be, to hold the consignee bound to pay the balance there, if due from him; and if due to him, on advances there made, to receive the balance from the consignor there. The case of Consequa *v.* Fanning, 3 John. Ch. R. 587, 610, which was reversed in 17 John. R. 511, proceeded upon this intelligible ground, both in the Court of Chancery, and in the Court of Errors and Appeals, the

the maker of the Promissory Note, and the circumstances under which it will be a due and full discharge

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difference between these learned tribunals not being so much in the rule, as in its application to the circumstances of that particular case. I am aware that a different rule, in respect to balances of account and debts due and payable in a foreign country, was laid down in Martin *v.* Franklin, 4 John. R. 125, and Scofield *v.* Day, 20 John. R. 102; and that it has been followed by the Supreme Court of Massachusetts, in Adams *v.* Cordis, 8 Pick. R. 260. It is with unaffected diffidence, that I venture to express a doubt, as to the correctness of the decisions of these learned Courts upon this point. It appears to me, that the reasoning in 4 John. R. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly, that the Court have nothing to do with inquiries into the disposition, which the creditor may make of his debt, after the money has reached his hands; and the Court are not to award damages upon such uncertain calculations, as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is, whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who, by the breach of this contract, has occasioned the loss. The loss, of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows, that the very same sum of money, paid in the one country, is not an indemnity or equivalent for it, when paid in another country, to which, by the default of the debtor, the creditor is bound to resort. Suppose a man undertakes to pay another $ 10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth, at the very moment, 20 per cent. more than it is in Boston; what compensation is it to the creditor to pay him the $ 10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place, where the contract is to be performed, except it be the very same, on which a like claim may be made as to the principal, viz. that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation, as if he had punctually complied with his contract there. It is suggested, that the case of Bills of Exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain, what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard, dependent upon the daily rates of exchange; exactly for the same reason, that the rule of and extinguishment of the debt. But there may have been a dishonor on the part of the maker, and the payment may have been made by a prior indorser to the

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deducting one third new for old is applied to cases of repairs of ships, and the deduction of one third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of Bills of Exchange, drawn between countries, where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that, which is sought to be applied in the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum, which he ought to have received in that country. That is sufficiently clear from the case of Mellish *v.* Simeon, 2 H. Black. R. 378, and the whole theory of reëxchange. My brother, the late Mr. Justice Washington, in the case of Smith *v.* Shaw, 2 Wash. Cir. R. 167, 168, in 1808, which was a suit brought by an English merchant on an account for goods shipped to the defendant's testator, where the money was doubtless to be paid in England, and a question was made whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held, that the debt was payable at the then rate of exchange. To which Mr. Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, of counsel for the defendant, assented. It is said, that the point was not started at the argument, and was settled by the Court suddenly, without advancing any reasons in support of it. I cannot but view the case in a very different light. The point was certainly made directly to the Court, and attracted its full attention. The learned Judge was not a Judge accustomed to come to sudden conclusions, or to decide any point, which he had not most scrupulously and deliberately considered. The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on account by Virginia debtors to British creditors, which were sued for during the period, in which he possessed a most extensive practice at the Richmond bar. The circumstance, that so distinguished a lawyer as Mr. Ingersoll assented to the decision, is a farther proof to me, that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say, that the cases in 4 John. R. 125, and 20 John. R. 101, 102, do not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle; and no authorities were cited. The arguments and the opinions contain little more than a dry statement and decision of the point. The first and only case, in which the question seems to have been considered upon a thorough argument, is that in 8 Pick. R. 260. I regret, that I am not able to follow its authority with a satisfied assent of mind."

holder; and then, it is obvious, that such a payment, if duly and properly made, will not ordinarily discharge the Note, but it will simply reinstate such indorser in all his orignal rights against the antecedent parties thereon. If, indeed, any of those parties, either as maker or indorser, be such merely for his accommodation, then his claim is ended; for the payment has been already made by the very party, who is ultimately bound to indemnify and reimburse all the others; and the law, to avoid circuity of action, will treat it as a direct extinguishment.[1]

§ 401. In respect to indorsers, also, another material consideration is to be borne in mind. When payment or satisfaction is duly made by any indorser to the holder, he will still retain his right to recover over against all the antecedent parties upon the Note, (not being parties for his accommodation,) until he has received a full indemnity. But, by such payment or satisfaction, the Note will be effectually discharged, as to all the subsequent indorsers, as well against the holder, as against himself, so that neither can sue thereon; not the holder, for he has already received payment; and not such prior indorser, so paying, even if the Note were indorsed to him in blank by the holder, for he himself is, as to all the subsequent indorsers, the very party bound to indemnify them; and therefore, to avoid circuity of action, the law deems the Note extinguished, as to the latter.[2]

§ 402. In the next place, as to the satisfaction of a Note, otherwise than by payment, strictly so called.

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1 Story on Bills, § 421, 422, 425; Sargent *v.* Appleton, 6 Mass. R. 85, 88.

2 Bayley on Bills, ch. 9, p. 345, (5th edit.); Smith *v.* Knox, 3 Esp. R. 46; English *v.* Darley, 2 Bos. & Pull. 62.

Generally speaking, whatever is a satisfaction as to the maker of the Note, is a satisfaction as to all the other parties thereto, who are collaterally liable.[1] Therefore, credit given by the maker of a Note (being the party ultimately liable) to the holder, with his consent, is tantamount to payment; but not credit by any party, not ultimately liable.[2] So, satisfaction made by one partner of a firm, which are either the makers or the indorsers of a Note, will discharge all the partners. The same rule will apply, where a person is a partner in two firms, one of which are the makers, and the other the indorsers, of the Note; for a satisfaction by one firm, or a partner therein, will discharge both.[3] The reason is, that the act of one partner, within the scope of the partnership business, is deemed to be the act of all, and binding upon all, not only jointly, but individually. Therefore, if A. and B. be partners in one firm, and A. and C. be partners in another firm, and the first firm be the makers of the Note, and the last the indorsers, and either A., or B., or C., pays the Note, it will, at law, discharge both firms, and the payment will be deemed a partnership payment, since each partner is a party, as well as a privy, to the transactions of the partnership, in which he is interested. If A. or B. pays the Note, as maker, that, of course, discharges the indorsers. If A. or C. pays the Note, as indorser, that equally discharges the makers; for the firm of A. and C. cannot, at law, sue the firm of A. and B. therefor, since there is a merger of the

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1 Bayley on Bills, ch. 9, p. 334, 347, 348, (5th edit.); Jacaud *v.* French, 12 East, R. 317; Mason *v.* Hunt, 1 Doug. R. 297; Bolton *v.* Puller, 1 Bos. & Pull. 539.

2 Ibid.; Atkins *v.* Owen, 4 Nev. & Mand. 123.

3 Ibid.

debt, and A. cannot sue himself.[1] In this respect, our law differs from the Roman Law, and the Law of France, and other countries deriving their jurisprudence from the Roman Law; for, by the law of the latter, each firm would be deemed a *quasi* corporation, capable of suing and being sued by each other.[2] And, in equity, the same result is obtained in our law, by treating the debt, as between the different firms, as a subsisting debt, *æquo et bono*, for the purposes of liquidating the claims of the different firms against each other.[3]

§ 403. But here it should constantly be borne in mind, that there is a difference in our law between extinguishment of the debt and satisfaction of the debt. Every satisfaction amounts, in point of law, to an extinguishment of the debt; but every extinguishment is not a satisfaction thereof. The claim of the holder, upon a Note, may be extinguished, as to some parties, and remain entire as to others. But, if his claim is satisfied as to any, it is satisfied as to all.[4] Hence, it becomes important to ascertain, what are matters of discharge and extinguishment, and between what parties they are operative. This subject will occur in other connections hereafter, and therefore need not, at present, be further examined.[5]

§ 404. Promissory Notes, either of the maker him-

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1 Jacaud *v.* French, 12 East, R. 317; Bolton *v.* Puller, 2 Bos. & Pull. 539.

2 Story on Partnership, § 221, and note; Pothier, De Societé, n. 135, 136; 2 Bell, Comm. B. 7, p. 619, 620, (5th edit.)

3 Story on Partnership, § 221, 222; 1 Story, Eq. Jurisp. § 679 - 682.

4 Bayley on Bills, ch. 9, p. 335, (5th edit.); Id. p. 347. See Terrell *v.* Smith, 8 Connect. R. 426.

5 Post, § 409.

self, or of a third person, are often received by the holder, or the creditor, in payment of the original Note or debt, due by the maker. And the question often arises, when, and under what circumstances, the receipt of a substituted Note will be deemed a due and absolute extinguishment or satisfaction of the original debt or Note, or not. In general, by our law, the receipt of a Promissory Note of the maker, or of a third person, will be deemed a conditional satisfaction or extinguishment only of the original debt or Note of the maker, (that is, if the substituted Note, so received, is regularly paid,) unless otherwise agreed between the parties.[1] It is, at most, therefore, only *primâ facie* evidence of satisfaction, rendering it necessary, that the party, receiving the substituted Note, should account for it, before he will be entitled to recover upon the original debt or Note. But, if it is agreed between the parties, as it well may be, that the substituted Note shall be an absolute payment of the original debt or Note, then it will operate as an absolute satisfaction and extinguishment thereof.[2]

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[1] Ante, 104, 105, 117; Bayley on Bills, ch. 9, p. 363-367, (5th edit.); Puckford *v.* Maxwell, 6 Term R. 52; Owenson *v.* Morse, 7 Term R. 64; Kearslake *v.* Morgan, 5 Term R. 513; Sayer *v.* Wagstaff, 5 Beavan, R. 415; Clark *v.* Young, 1 Cranch, R. 181, 192; Sheehy *v.* Mandeville, 6 Cranch, R. 253, 264; Tobey *v.* Barber, 5 John. R. 68; Murray *v.* Gouverneur, 2 John. Cas. 438; Herring *v.* Sanger, 3 John. Cas. 71; Schermerhorn *v.* Loines, 7 John. R. 311; Johnson *v.* Weed, 9 John. R. 310; Hoar *v.* Clute, 15 John. R. 224; Holmes *v.* De Camp, 1 John. R. 34; Pintard *v.* Tackington, 10 John. R. 104; Burdick *v.* Green, 15 John. R. 247; Putnam *v.* Lewis, 8 John. R. 389; Thomson on Bills, ch. 4, § 3, p. 163-168, (2d edit.); Canfield *v.* Ives, 18 Pick. R. 253; Post, § 438.

[2] Ibid.; Cornwell *v.* Gould, 4 Pick. R. 444; Hare *v.* Alexander, 2 Met. R. 157; Ante, 104; Post, § 405, 408, 438; Maillard *v.* Duke of Argyle, 6 Mann. & Grang. R. 40; Sheehy *v.* Mandeville, 6 Cranch, R. 253, 264.

§ 405. But where the substituted Note is received as conditional payment only, it will amount to an absolute satisfaction or extinguishment of the original debt or Note under certain circumstances.[1] Thus, the holder or creditor will be precluded from recovering upon the original debt or Note, if it appear, that the substituted Note, being the negotiable Note of a third person, is not paid in consequence of the laches of the holder or creditor, and is lost by his neglect;[2] or if it was originally received as cash, and the holder or creditor took upon himself the risk of its being paid;[3] or if it was transferred to him by way of sale;[4] or if, being the negotiable Note of the maker himself, it has since been transferred by the holder or creditor, and is outstanding, in the hands of a third person.[5]

§ 406. Let us, in the next place, proceed to the consideration of other matters, which will amount to a discharge or extinguishment of the rights of the holder of a Promissory Note, as against the maker, or as against any of the other parties thereto, who are ordinarily liable to him for the due payment thereof. And first, as to matters of discharge, or extinguishment of the rights of the holder against the maker. These may be re-

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[1] Bayley on Bills, ch. 9, p. 364-367, (5th edit.); Thomson on Bills, ch. 1, § 3, p. 166-174, (2d edit.); Sheehy *v.* Mandeville, 6 Cranch, R. 253, 264; Ante, § 104; Post, § 483.

[2] Bayley on Bills, ch. 7, § 2, p. 286-289, (5th edit.); Id. ch. 9, p. 364-367; Thomson on Bills, ch. 1, § 3, p. 168-172, (2d edit.); Owenson *v.* Morse, 7 Term R. 64; Bridges *v.* Berry, 3 Taunt. R. 130; Bishop *v.* Rowe, 3 Maule & Selw. 362.

[3] Bayley on Bills, ch. 9, p. 365, (5th edit.); Owenson *v.* Morse, 7 Term R. 64; Fenn *v.* Harrison, 3 Term R. 759; Ex parte Shuttleworth, 3 Ves. 368; Wiseman *v.* Lyman, 7 Mass. R. 286.

[4] Ibid.; Fydell *v.* Clarke, 1 Esp. R. 447.

[5] Black *v.* Zachary, 3 Howard, Sup. C. Rep.

solved into the two following heads. (1.) Those, which arise by mere operation of law. (2.) Those, which arise from the express act, or implied agreement, of the parties themselves.[1]

§ 407. And first, in relation to matters of discharge, or extinguishment of the debt, as to the maker, by operation of law. Among these we may enumerate, (1.) The discharge of the maker of the Note, under a bankrupt act or insolvent act of the state, where the contract is made, and is payable.[2] (2.) The merger of the Note in a judgment thereon, by the holder against the maker.[3] (3.) The appointment of the maker to be the executor of the holder.[4] (4.) The bequest of the Note to the maker by the holder, in his last will and testament.[5] (5.) The infancy of the maker, when it is a valid discharge by the local law.[6] (6.) The marriage of the payee with the holder of the Note,[7] when it has the like validity and effect;[8] and other defences, of a

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1 Story on Bills, § 265.

2 Ante, § 168; Bayley on Bills, ch. 9, p. 336, 346, (5th edit.); Story on the Conflict of Laws, § 331, 332; 2 Bell, Comm. B. 8, ch. 3, p. 688, (5th edit.); 3 Burge, Comm. on Col. & Foreign Law, Pt. 2, ch. 21. § 7, p. 884 – 886; Id. ch. 22, p. 924, 929; Story on Bills, § 161, 163; 2 Kent, Comm. Lect. 39, p. 459, (5th edit.) But a discharge of one joint maker of a Note by mere operation of law, and without any act done by the creditor, will not discharge the other maker. Ward *v.* Johnson, 13 Mass. R. 148.

3 Bayley on Bills, ch. 9, p. 335, (5th edit.); Norris *v.* Aylett, 2 Camp. R. 329; Claxton *v.* Swift, 2 Shower, R. 441; S. C. Lutw. R. 882.

4 Story on Bills, § 443; Freakley *v.* Fox, 9 Barn. & Cressw. 130; Pothier on Oblig. by Evans, n. 286; Bacon, Abridg. *Extinguishment*, D; Com. Dig. *Release*, A. 2.

5 Hobart *v.* Stone, 10 Pick. R. 215.

6 Ante, § 168; Story on Bills, § 163; Thomson *v.* Ketcham, 8 John. R. 189; Male *v.* Roberts, 3 Esp. R. 163.

7 Com. Dig. *Release*, A. 2.

8 Bacon, Abridg. *Extinguishment*, D.

like nature, which, by the local law, dissolve or discharge the contract;[1] such, for example, as compensation or set-off, by the Roman and Foreign Law.[2]

§ 408. Secondly, in relation to matters of discharge or extinguishment by the voluntary act or agreement of the holder. Among these we may enumerate, (1.) An accord and satisfaction, by the receipt of some collateral thing from the maker, in discharge of the Note. (2.) A release, under seal, by the holder to the maker,[3] or, (as we shall presently see) if there be joint makers, a release of one or more of them.[4] (3.) An agreement and substitution of another or higher security, in lieu of the Note;[5] such, for example, as taking a bond, under seal, for the debt due by the Note, or taking another negotiable Note therefor, and in lieu thereof.[6] (4.) A covenant never to sue the maker on the Note; for it will operate as a release of that party, by way of extin-

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[1] See Story on Bills, § 363 - 165, 440; Story on the Conflict of Laws, § 331 – 351 *d*, (2d edit.); Id. § 575.

[2] 2 Story Eq. Jurisp. § 1438 – 1444; Pothier on Oblig., by Evans, n. 587 – 603, (622 – 642, of French editions); Dig. Lib. 16, tit. 2. l. 21; Pothier, Pand. Lib. 16, tit. 2, n. 1, 3.

[3] Commercial Bank *v.* Cunningham, 24 Pick. R. 270; Chandler *v.* Herrick, 19 John. R. 129.

[4] American Bank *v.* Doolittle, 14 Pick. R. 123; Averill *v.* Lyman, 18 Pick. R. 346; Tuckerman *v.* Newhall, 17 Mass. R. 581; Goodnow *v.* Smith, 18 Pick. 414, 415; Carnegie *v.* Morrison, 2 Metc. R. 381, 407; Rowley *v.* Stoddard, 7 John. R. 207; Ward *v.* Johnson, 13 Mass. R. 148; 1 Story, Eq. Jurisp. § 112; Abat *v.* Holmes, 3 Miller, Louis. R. 352; Stewart *v.* Eden, 2 Caines, R. 121; Cheetham *v.* Ward, 1 Bos. & Pull. 630; Nicholson *v.* Revill, 4 Adolp. & Ellis, 675; Thomson on Bills, ch. 6, § 5, p. 532, 533, (2d edit.); Lynch *v.* Reynolds, 16 John. R. 41.

[5] Thomson on Bills, ch. 6, § 5, p. 532 – 537, (2d edit.) See Sampson *v.* Thornton, 3 Metc. R. 275; Sexton *v.* Wood, 17 Pick. R. 110; Bruen *v.* Marquand, 17 John. R. 58.

[6] Bacon, Abridg. *Extinguishment*, D.; U. States *v.* Lyman, 1 Mason, R. 482, 505; Bayley on Bills, ch. 9, p. 334, 335, (5th edit.); Id. p. 363 – 366; Ante, § 104, 404.

guishment, to avoid circuity of action.[1] (5) Any other arrangement, of a similar nature, founded upon a fair consideration between the parties; such, for example, as an agreement between the holder and the maker, and a third person, that the latter shall take upon himself the sole and exclusive payment of the debt.[2]

§ 409. Some of the foregoing cases may serve to illustrate the distinction already alluded to, between the satisfaction and the extinguishment of the claim of the holder upon the Note.[3] Thus, for example, taking a security of a higher description, such as a bond or judgment, for the money due on the Note, will extinguish the claim of the holder upon the Note against the party giving the security: but it will not amount to a satisfaction thereof, so as to discharge the other parties upon the Note.[4] Nay, even the taking of the judgment debtor in execution, and afterwards discharging him from imprisonment upon a letter of license, will not operate as a satisfaction, as to any of the antecedent parties upon the Note; although it will be an extinguishment thereof, as to the party committed on execution, and,[5] also as to all subsequent parties upon the

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1 Com. Dig. *Release*, A. 1; Fitzgerald *v.* Trant, 11 Mod. R. 254; Lacy *v.* Kinaston, 1 Ld. Raym. 688; S. C. 12 Mod. 551; Dean *v.* Newhall, 8 Term R. 168, 171; Shed *v.* Pierce, 17 Mass. R. 623, 628; Cuyler *v.* Cuyler, 2 John. R. 186; Harrison *v.* Close, 2 John. R. 448; Clarke *v.* Bush, 3 Cowen, R. 151.

2 See De la Torre *v.* Barclay, 1 Starkie, R. 7; Bayley on Bills, ch. 9, p. 344, (5th edit.)

3 Ante, § 403.

4 Bayley on Bills, ch. 9, p. 334, 335, (5th edit.); Claxton *v.* Swift, 2 Shower, R. 441; Lutw. R. 882.

5 Bayley on Bills, ch. 9, p. 335, (5th edit.); Hayling *v.* Mullhall, 2 W. Black. 1235; Chitty on Bills, ch. 9, p. 451, (8th edit.); Michael *v.* Myers, 7 Jurist, 1156.

Note,[1] although not, perhaps, to a joint maker.[2] So, although a covenant never to sue the maker will operate as an extinguishment of the debt, as to the maker;[3] yet, it is not a satisfaction thereof, as to other parties on the Note. And, therefore, such a covenant will not operate as a discharge or release of a joint maker.[4] Similar principles have been thought to apply to a judgment against one joint maker; and that it will be no bar to a joint suit against both the makers,[5] or to a several suit against the other maker. But this seems exceedingly doubtful.[6]

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[1] Bayley on Bills, ch. 9, p. 344, (5th edit.); Smith *v.* Knox, 3 Esp. R. 46; English *v.* Darley, 2 Bos. & Pull. 62.

[2] Porter *v.* Ingraham, 10 Mass. R. 88, 90. But see Hyde *v.* Long, 4 Vermont, R. 531.

[3] Fowell *v.* Forrest, 2 Saund. R. 47, S. Williams's note, (1); Lacy *v.* Kinaston, 1 Ld. Raym. 688; S. C. 12 Mod. 551; Dean *v.* Newhall, 8 Term. R. 168.

[4] Thomas *v.* Courtnay, 1 Barn. & Ald. 1, 8, per Holroyd, J.; Story on Bills, § 431; Chitty on Bills, ch. 9, p. 449, (9th edit.); Dean *v.* Newhall, 8 Term R. 168; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Mallet *v.* Thompson, 5 Esp. R. 178; Shed *v.* Pierce, 17 Mass. R. 623, 628. But see Catskill Bank *v.* Messenger, 9 Cowen, R. 37; Chandler *v.* Herrick, 19 John. R. 129; Cuyler *v.* Cuyler, 29 New R. 186; Harrison *v.* Close, 2 John. R. 448. See also, Terrell *v.* Smith, 8 Connect. R. 426; Post, § 421.

[5] Sheehy *v.* Mandeville, 6 Cranch, 253; Higgins's Case, 6 Co. R. 45, 46 *a*. This case was questioned in Ward *v.* Johnson, 13 Mass. R. 148, and in Robertson *v.* Smith, 18 John. R. 459. It was also commented on in The United States *v.* Cushman, 2 Sumner, R. 426, 438, 439. In King *v.* Hoare, 8 Jurist, (Eng.) 1844, p. 1127, 13 Mees. & Welsb. 494, the Court of Exchequer held the judgment against one joint contractor to be a bar to a suit against the other. There is a very able judgment by Mr. Baron Parke in that case. See also, Lechmere *v.* Fletcher, 1 Cromp. & Mees. 623; Siddell *v.* Rancliffe, 1 Mood. & Rob. 263; Dyke *v.* Mercer, 2 Shower, R. 395.

[6] Higgins's Case, 6 Co. R. 45, 46 *a*; Porter *v.* Ingraham, 10 Mass. R. 88, 90: Supra, note 3; King *v.* Hoare, 8 Jurist, (Eng.) 1844, p. 1127; S. C. 13 Mees. & Wels. 494.

§ 410. But a mere parol release of the maker, without payment, will be no discharge or satisfaction thereof, even as to himself; for, by our law, a release to be effectual must be under seal.[1] Neither will it be any discharge or release of a joint maker, or joint indorser, that the other maker or indorser has paid his share of the Note, and thereupon he has been by parol discharged by the holder from any further payment thereof.[2]

§ 411. The taking of collateral security by the holder from the maker of the Note, for the payment of the same, will not be any defence against a suit brought upon the same Note unless payment has been received of some part thereof, and then it will extinguish the claim on the Note only *pro tanto*.[3] And it has been held, that, if the holder should give up the collateral security, which he has received from an antecedent party, as, for example, from the first indorser, after the dishonor of the Note, it will not exonerate the subsequent indorsers from liability to the holder.[4] The ground of this decision was, that the holder had not thereby given time or credit to the party, from whom the secu-

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1 Shaw *v.* Pratt, 22 Pick. 305; Smith *v.* Bartholomew, 1 Metc. R. 276; Dezeng *v.* Bailey, 9 Wend. R. 336; Jackson *v.* Stackhouse, 1 Cowen, R. 122; Crawford *v.* Millspaugh, 13 John. R. 87; Fitch *v.* Sutton, 5 East, R. 230, 231; Co. Litt. 212 *b*.

2 Ruggles *v.* Patten, 8 Mass. R. 480; Harrison *v.* Close, 2 John. R. 447; Dezeng *v.* Bailey, 9 Wend. R. 336; Catskill Bank *v.* Messenger, 9 Cowen, R. 37; Chandler *v.* Herrick, 19 John. R. 129; Steinman *v.* Magnus, 11 East, R. 390.

3 Cornwall *v.* Gould, 4 Pick. R. 448; Beckwith *v.* Sibley, 11 Pick. R. 482; Clarke *v.* Devlin, 3 Bos. & Pull. 363; Rice *v.* Catlin, 14 Pick. R. 221; Whitwell *v.* Brigham, 19 Pick. R. 117; Croghan *v.* Conrad, 11 Martin, R. 555; Ligget *v.* Bank of Pennsylvania, 7 Serg. & Rawle, 218; Ripley *v.* Green, 2 Verm. R. 129.

4 Hurd *v.* Little, 12 Mass. R. 502; Ligget *v.* Bank of Pennsylvania, 7 Serg. & Rawle, 218.

rity was received, upon the footing thereof; and might, notwithstanding the collateral security, have immediately sued the party on the Note. But it may admit of question, whether the surrender of such security without the assent of the other parties, would not, in a Court of Equity, be held a discharge *pro tanto*.[1]

§ 412. In the next place, as to matters of discharge or extinguishment of the rights of the holder against the indorsers, or any of them.[2] We have already had occasion to consider the cases, in which the neglect to make a due presentment of the Note, at its maturity, to the maker for payment, or the neglect to give the indorsers due notice of the dishonor upon such presentment, will exonerate the indorsers from all responsibility to the holder; and, therefore, we need not, in this place, refer to that subject.[3] But there are others, again, which involve the rights and interests of the indorsers, and deserve attention in this place.

§ 413. First. If there be any valid agreement (that is, one founded upon a valuable consideration, and operative in point of law,) between the maker and the holder, whereby the holder agrees to give credit to the maker of the Note after it is due, or whereby the payment is postponed to a future day, and this agreement is made without the consent of the indorsers, they will be thereby absolved from all obligation to pay the same. And it will make no difference, whether the agreement was made before the maturity of the Note, or after its dishonor, or after the indorsers have been fixed by due

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1 See 1 Story, Eq. Jurisp. 326; Haslett *v.* Ehrick, 1 Nott & McCord, R. 116.

2 See Thomson on Bills, ch. 6, § 5, p. 532-549, (2d edit.)

3 Ante, § 299-355.

presentment, and due notice of the dishonor.[1] The rule is usually laid down in less broad and comprehensive terms, namely, that the holder's discharging, or giving time to any of the parties on the Note, will be a discharge of every other party thereto, who, upon payment of the Note, would be entitled to sue the party, to whom such discharge or time has been given, unless the right to sue in such a case result from facts out of the ordinary course, as from the signatures being accommodation signatures.[2] We shall presently see, whether the rule, as thus qualified, does not admit, or require, some farther expansion, so as to embrace all indorsers, although the Note may have been made for their own accommodation.[3]

§ 414. The reason of the rule, as thus qualified, is, (and it seems equally applicable to all cases,) that the holder, by such an agreement, undertakes, that he will give credit to the maker during the period of the delay, and thereby tacitly agrees, that the indorsers shall not be called upon to pay the Note in the mean time; since,

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[1] Chitty on Bills, ch. 9, p. 441–444, 451, 452, (8th edit.); Bayley on Bills, ch. 9, p. 338, 339, (5th edit.); Story on Bills, § 425, 426; Thomson on Bills, ch. 6, § 5, p. 537–541, (2d edit.); English *v.* Darley, 2 Bos. & Pull. 61; Gould *v.* Robson, 8 East, R. 576; Clark *v.* Devlin, 3 Bos. & Pull. 365; Price *v.* Edmunds, 10 Barn. & Cressw. 578; Smith *v.* Becket, 13 East, R. 187; Hubbly *v.* Brown, 16 John. R. 70; Wood *v.* Jefferson County Bank, 9 Cowen, R. 190; Noble *v.* His Creditors, 19 Martin, R. 9; Bank of United States *v.* Hatch, 6 Peters, R. 250; Lobdell *v.* Niphler, 4 Louis. R. 295; Millaudon *v.* Arnous, 15 Martin, R. 596; Hefford *v.* Morton, 11 Louis. R. 117; Browne *v.* Carr, 7 Bing. R. 508; Philpot *v.* Briant, 4 Bing. R. 717, 719–721; Bradford *v.* Hubbard, 8 Pick. R. 155; Burrill *v.* Smith, 7 Pick. R. 291; Weld *v.* Passamaquoddy Bank, 3 Mason, R. 505; Hewet *v.* Goodrick, 2 Carr. & Payne, 468.

[2] Bayley on Bills, ch. 9, p. 338–340, (5th edit.); Story on Bills, § 425; Sargent *v.* Appleton, 6 Mass. R. 85; Callibam *v.* Tanner, 3 Rob. Louis. R. 299.

[3] Post, § 418.

if they are called upon, and do so pay, they will instantaneously have a right of action over against the maker for their reimbursement, and thus the object of the agreement for delay would be frustrated.[1] On the other hand, the indorsers, by such an agreement for credit or delay for a prolonged period without their concurrence, would, if the doctrine were not as above stated, be held liable for a period beyond their original contract, and might suffer damage thereby; or, at all events, would be bound by a different contract from that into which they had entered.[2] The same result,

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[1] Ibid.; Thomson on Bills, ch. 6, § 5, p. 537-543, (2d edit.) In Gould *v.* Robson, 8 East, R. 576, 579, which was the case of time being given by the holder to the acceptor on a Bill of Exchange, Lord Ellenborough said; "How can a man be said not to be injured, if his means of suing be abridged by the act of another? If the plaintiffs, holders of the Bill, had called immediately upon the defendants for payment, as soon as the Bill was dishonored, they might immediately have sued the acceptor and the other parties on the Bill. I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the Bill at the time; he may make what arrangements he pleases with the acceptor; but he does that at his peril; and, if he thereby alter the situation of any other person on the Bill to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the Bill: but here the holder did something more: he took a new Bill from the acceptor, and was to keep the original Bill till the other was paid. This is an agreement, that in the mean time the original Bill should not be enforced: such is at least the effect of the agreement; and therefore I think time was given."

[2] Ibid.; Post, § 418. The general grounds of this doctrine are well stated by Mr. Chief Justice Best, in delivering the opinion of the Court, in Philpot *v.* Briant, 4 Bing. R. 717, 719-721. His language is; "A creditor, by giving further time of payment, undertakes, that he will not, during the time given, receive the debt from any surety of the debtor, for the instant that a surety paid the debt, he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety, would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the creditor had received from his debtor a consideration for the engagement to give the stipulated delay of payment of

(of discharging the indorsers) would follow, if the Note were a joint Note, and a like agreement for delay was made by the holder with one of the makers, without the consent of the indorser; for it would necessarily import a suspension of the rights of the holder against the other maker during the stipulated period of delay.[1] This whole doctrine has been long and fully etablished in Courts of Equity in all cases, where indorsers, or guarantors, or sureties, are concerned, and has been from thence transferred into the Commercial Law of England and America.[2]

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the debt, it would be injustice to him, to force him to pay it to any one before the day given. If, to prevent the surety from suing the principal, the creditor refuses to receive the debt from the surety, until the time given to the debtor for payment by the new agreement, the surety must be altogether discharged, otherwise, he might be in a situation worse than he was in by his contract of suretyship. If he be allowed to pay the debt at the time, when he undertook that it should be paid, the principal debtor might have the means of repaying him. Before the expiration of the extended period of payment, the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity, destroys the obligation of the sureties; and a Court of Equity will grant an injunction to restrain a creditor, who has given further time to the principal, from bringing an action against the surety. This equitable doctrine Courts of Law have applied to cases arising on Bills of Exchange. The acceptor of a Bill of Exchange is considered as the principal debtor; all the other parties to the Bill are sureties, that the acceptor shall pay the Bill, if duly presented to him, on the day it becomes due, and if he does not then take it up, that they, on receiving notice of its non-payment, will pay it to the holder. If the holder gives the acceptor further time for payment, without the consent of the drawer or indorsers, he discharges them from all the liability, that they contracted, by becoming parties to the Bill; but delay, in suing the acceptor, will not discharge the drawer or indorsers, because such delay does not prevent them from doing what, on receiving notice of non-payment by the acceptor, they ought to do; namely, pay the Bill themselves."

[1] See Kennard *v.* Knott, 4 Mann. & Grang. 476, and the note of the Reporters, cited Post, § 415, note.

[2] 1 Story on Eq. Jurisp. § 324–326; King *v.* Baldwin, 2 John. Ch. R. 554; 2 Story, Eq. Jurisp. § 883; Story on Bills, § 425, and notes.

§ 415. But, if the agreement be without any valid consideration,[1] or if, being for a valid consideration, it

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[1] Philpot *v.* Briant, Bing. 4 R. 717; Bayley on Bills, ch. 9, p. 339, 340, (5th edit.); Chitty on Bills, ch. 9, p. 442 – 447, (8th edit.); Bank of United States *v.* Hatch, 1 McLean, R. 93; McLemore *v.* Powell, 12 Wheat. R. 554; Planters' Bank *v.* Sellman, 2 Gill & John. R. 230; Story on Bills, § 426; Margesson *v.* Goble, 2 Chitty, R. 364. In the case of Philpot *v.* Briant, 4 Bing. R. 717, 719 – 721, Lord Chief Justice Best said: "The time of payment must be given by a contract, that is binding on the holder of the Bill; a contract, without consideration, is not binding on him; the delay in suing is, under such a contract, gratuitous; notwithstanding such contract, he may proceed against the acceptor, when he pleases, or receive the amount of the Bill from the drawer or indorsers. As the drawer and indorsers are not prevented from taking up the Bill, by such delay, their liability is not discharged by it; to hold them discharged, under such circumstances, would be to absolve them from their engagements, without any reason for so doing. In the case of the partners of The Arundel Bank *v.* Goble, which is to be found in a note to Chitty on Bills, (p. 296,) and the accuracy of which note is proved by my Brother's report to us, of what passed at the trial of the cause before him, that point is decided. The acceptor applied to the holders for indulgence of some months; they, in reply, wrote to the acceptor, informing him, that they would give him the time that he required, but that they should expect interest. On a motion for a new trial, the Court of King's Bench held, that, as no fresh security was taken from the acceptor, the agreement of the plaintiffs to wait was without consideration, and did not discharge the drawer. This is a stronger case than the present. In our case, there is no agreement for any particular time, nor any consideration for the giving the time, that was given to the acceptor." In McLemore *v.* Powell, 12 Wheat. R. 554, 556 – 558, the Supreme Court of the United States said: "The case, then, resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. And we are all of opinion, that it does not. We admit the doctrine, that although the indorser has received due notice of the dishonor of the Bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment

be of such a nature, that the maker can by law obtain, and entitle himself to the same delay, without

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the rights of any of the parties. In the present case, the jury have found, that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in English *v.* Darley, 2 Bos. & Pull. 61, that, 'as long as the holder is passive, all his remedies remain'; and we add, that he is not bound to active diligence. But, if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the Bill, for the stipulated period; and if the indorser were to pay the Bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him, as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him. The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652, where the action was by indorsees against the drawer of a Bill, it appeared, that, after the Bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account, from the indorser; and, to an application from the acceptor, stating, that it was probable he should be able to pay at a future period, they returned for answer, that they would not press him. The Court held it no discharge; and Lord Chief Justice Eyre, in delivering the opinion of the Court, said, that, if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the Bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in Arundel Bank *v.* Goble, reported in a note to Chitty on Bills. (Chitty, 379, note *c*, edit. 1821.) There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended, that this was a discharge of the drawer; but the Court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding, that interest should be paid by the acceptor, made no difference. So, in Badnall *v.* Samuel, 3 Price, Exch. Rep. 521, in a suit by the holder against a prior indorser of a Bill of Exchange, it was held, that a treaty for delay, between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place, during the consent of the holder, there, the agreement will not operate as a discharge of the indorsers, for the reason, that the indorsers cannot, under such circumstances, be injured by the delay, or, if injured, it is by operation of law, and not dependen tupon the act of the holder. Thus, for example, if, pending a suit on the Note against the maker, the holder should agree to give time to the maker for payment thereof, short of the time within which judgment could regularly be obtained against him, that would not be a discharge of the indorser.[1] So, if, under similar cir-

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the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor, at any time. Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning, upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion, that the stipulation for delay suspends the present rights and remedies of the holder."

[1] Kennard *v.* Knott, 4 Mann. & Grang. 474; Jay *v.* Warren, 1 Carr. & Payne, 532. See Lenox *v.* Prout, 3 Wheat. R. 520; Bank of United States *v.* Hatch, 6 Peters, Sup. Ct. R. 250, 258; Story on Bills, § 426. In Price *v.* Edmunds, 10 Barn. & Cressw. 578, 582, Mr. Justice Bayley, in delivering the opinion of the Court, said; "He (the defendant) contends that time was given to the principal debtor. Now it appears, that an action against the principal was about to be tried at the Spring assizes, 1828, and shortly before the assizes a cognovit was given, upon which the question of time depends. According to that cognovit, £70 was to be paid on the 28th of April, £70 in May, and the residue in June; and there was a proviso, that the plaintiff should be at liberty to issue execution for the whole sum, if any one of the instalments were not duly paid. Time was, at all events, to be given until the 28th of April, and if the first payment was then duly made, further indulgence was to be given. It turns out that, in fact, the first instalment was not paid on the 28th of April, so that the then defendant had not, by virtue of the cognovit, any further indulgence, but was then liable to an execution for the whole sum due. The case then stands thus; in March a bargain was made, that proceedings should be stayed until the 28th of April, but, according to the regular course of practice, the then defendant had power to keep the plaintiff out of his money until the 29th or 30th of that month, so that, in reality, he

cumstances, the holder were to take a cognovit to enter judgment against the maker, if the Note were not regularly paid by instalments, or otherwise, before the time when judgment in the suit could regularly be

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did not obtain any indulgence by the cognovit. This transaction clearly would not be within the rule as to giving time so as to discharge bail; for it is a well established rule, that a cognovit by the principal, without notice to the bail, does not discharge them, unless time be given to the former beyond that in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause. The present defendant, therefore, could not take advantage of it, even if the first point made by him were sustainable; the rule for entering a nonsuit must therefore be discharged." The doctrine was carried a step farther in Kennard *v.* Knott, 4 Mann. & Grang. 474, where the plaintiff had consented to a Judge's order, in an action brought against the acceptor, that, upon payment of the principal and interest on a certain future day, all further proceedings should be stayed, otherwise judgment to go; it not appearing, that such future day was posterior to that on which judgment could be obtained against the acceptor in the action. The learned Reporters, in a note (p. 476), remark, after referring to Price *v.* Edmunds, 10 Barn. & Cressw. 578; "In that case, B., principal, and C., surety, gave their Promissory Note to A. A. sued B., and took from him a cognovit payable by instalments, the first of which would become payable before the time at which A. could have signed final judgment, had no cognovit been given. The Court held that C. was not discharged, inasmuch as no longer time had been given to B. than he would have had if the suit had proceeded. It is, however, observable, that if the cognovit given by B. and accepted by A. did not discharge C., it would have been competent to A. to arrest C. on the very day on which the cognovit had been given, and if C. had paid the money, which it would be his interest as well as his duty to do, he might have arrested B. as soon as he could have issued a writ, and B., who had waived his defence to the action brought against him in order to purchase his liberty, at all events until the day appointed for the payment of the first instalment, might have found himself in custody at a much earlier period, precisely as if no cognovit had been given. It would therefore appear to be necessary, in order to enable A. to keep faith with B., that, until the first instalment became payable, A.'s right of action against C. should be suspended; and a right of action, if suspended, is destroyed. In Price *v.* Edmunds, B. and C., as joint makers, were both primarily liable on the face of the Note, though C. was, in fact, a surety; whereas, in the principal case, the drawer, being only liable in default of the drawee, was, ex facie, merely a surety."

obtained, the same result would follow.[1] It would be otherwise, if the postponement were beyond the period when judgment could be regularly obtained.[2]

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[1] Price *v.* Edmunds, 10 Barn. & Cressw. 578; Hall *v.* Cole, 4 Adolp. & Ellis, 577; Hallett *v.* Holmes, 18 John. R. 28; Story on Bills, § 426; Chitty on Bills, ch. 9, p. 447, 448, (8th edit.) See Lee *v.* Levi, 1 Carr. & Payne, 553; S. C. Barn. & Cressw. 390; Jay *v.* Warren, 1 Carr. & Payne, 532; Story on Bills, § 427; Bank of United States *v.* Hatch, 6 Peters, R. 250, 260; Kennard *v.* Knott, 5 Scott, R. 247; Michael *v.* Myers, 7 Jurist, (Eng.) p. 1156.

[2] See Bank of U. States *v.* Hatch, 6 Peters, R. 250, 258; Kennard *v.* Knott, 4 Mann. & Grang. R. 574; Story on Bills, § 427. In the case of The Bank of the U. States *v.* Hatch, the Court said: "It appears from the special verdict, that the contract with Pearson, for the continuance of the suit on this very Bill, without judgment, until the the next term of the Circuit Court, was for a valuable consideration, and not a mere voluntary and discretionary exercise of authority, on the part of the agents of the bank. What, then, is to be deemed the true construction of it? Did it amount to no more than an agreement, that that particular suit should stand continued, leaving the bank at full liberty to discontinue that on the morrow, at their discretion, and to commence a new suit, and new proceedings for the same debt? Or was it intended by the parties, to suspend the enforcement of any remedy for the debt, for the stipulated period, and rely solely on that suit for a recovery? We are of opinion, that the intention of the parties, apparent on the contract, was to suspend the right to recover the debt, until the next term of the Court. It is scarcely possible, that Pearson should have been willing to give a valuable consideration for the delay of a term, and yet have intentionally left avenues open, to be harassed by a new suit, in the interval. Indeed, no other remedy, except in that particular suit, seems to have been within the contemplation of either party. If the bank had engaged, for a like consideration, not to sue Pearson on the Bill, for the same period, there could have been no doubt, that it would be a contract suspending all remedy. What substantial difference is there between such a contract, and a contract to suspend a suit already commenced; which is the only apparent remedy for the recovery of the Bill during the same period? Is it not the natural, nay, necessary intendment, that the defendant shall have the full benefit of the whole period, as a delay of payment of the debt? It is no answer, that a new suit would be attended with more delay. That might or might not be the case, according to the different course of practice in different states; and, at all events, it would harass the party with new expenses of litigation. But the true inquiry is, whether the parties did, or did not, intend a surceasing of all legal proceedings, during the period.

§ 416. The fact, that there is a valid consideration passing between the maker and the holder, as, for example, a collateral security, given by the maker to the holder, will not affect the rights of the latter against the indorsers, unless accompanied with some stipulation to give time to the maker; for the holder is at full liberty to take any such security, and, indeed, it is for the benefit of the indorsers, that he should so do.[1] It is also material to state, that, as the ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorser, is solely this, that the holder thereby impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period; it can never apply to any case, where a contrary sti-

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We think, that the just and natural exposition of the contract is, that they did." The Court afterwards added: "There is a recent case in England, which approaches very near to the circumstances of the present case. We allude to Lee *v.* Levi, 1 Carr. & Payne, 553. In that case, the holder, after suit brought against the acceptor and the indorser, had taken a cognovit of the acceptor for the amount of the Bill, payable by instalments; and, at the trial of the suit against the indorser, Lord Chief Justice Abbott thought, that this was a giving time, which discharged the indorser, and the jury found a verdict accordingly. That case afterwards came before the whole Court, for revision; (6 Dowl. & Ryl. R. 475; S. C. 4 Barn. & Cressw. 390); and was then decided upon a mere collateral point, namely, that the defence having arisen after suit brought against the indorser, should have been taken advantage of by special plea, and could not be given in evidence, under the general issue; so that the ruling of the Lord Chief Justice was not brought directly into judgment. It was not, however, in any measure, overruled."

[1] Pring *v.* Clarkson, 1 Barn. & Cressw. 14; Ripley *v.* Greenleaf, 2 Verm. R. 129; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Thomson on Bills, ch. 6, § 5, p. 539, (2d edit.); Bayley on Bills, ch. 9, p. 344, 345, (5th edit.); Bedford *v.* Deakin, 2 Barn. & Ald. 210; Badnall *v.* Samuel, 3 Price, R. 521; Oxford Bank *v.* Lewis, 8 Pick. R. 458; Story on Bills, § 427; Ripley *v.* Greenleaf, 2 Verm. R. 129.

pulation exists between the parties.[1] Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the latter; for the very ground of the objection is removed, that it varies their rights, and subjects them to the disadvantage of having their own rights postponed against the maker if they should take up the Note.[2]

§ 417. Even a valid agreement to give time to the maker, or to a prior indorser, will not discharge a subsequent indorser, or affect the rights of the holder, where the indulgence is granted, or agreed to be granted, after such subsequent indorser has been fixed with a final judgment against him upon the Note, at the suit of the holder.[3] For, at law, such a judgment is completely operative against such subsequent indorser, and is not suspended or released by such an agreement.

§ 418. The doctrine, which we have been thus far considering, of the effect of the giving of time by the holder to the maker, or other antecedent party, is strictly applicable to all cases, where the indorsers stand in the relation of *bonâ fide* indorsers, holding

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[1] Ante, § 414; Story on Bills, § 425, and note; Philpot *v.* Briant, 4 Bing. R. 717, 719-721; Thomas *v.* Courtnay, 1 Barn. & Ald. 1; English *v.* Darley, 2 Bos. & Pull. 61.

[2] Stewart *v.* Eden, 2 Caines, R. 121; Nichols *v.* Norris, 3 Barn. & Adolp. 41, note; Wood *v.* Jefferson County Bank, 9 Cowen, R. 194; Tombeckbee Bank *v.* Stratton, 7 Wend. R. 429; Suckley *v.* Furse, 15 John. R. 338; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Ex parte Glendenning, 1 Buck, Cas. in Bankr. 517; Pring *v.* Clarkson, 1 Barn. & Cressw. 14; Ripley *v.* Greenleaf, 2 Verm. R. 129; Bedford *v.* Deakin, 2 Barn. & Ald. 210; S. C. 2 Stark. R. 178; Story on Bills, § 426; Bayley on Bills, ch. 9, p. 369, (5th edit.)

[3] Baker *v.* Flower, 5 Jurist (Eng.), 635; Bray *v.* Manson, 8 Mees. & Wels. 668.

the Note in their own right, for value, and incurring the ordinary obligations of that relation. But it has been said, that a different rule should prevail, where the Note is made for the accommodation of a particular indorser; and that he will not be discharged by the agreement of the holder with the maker, or with any antecedent indorser, to give time for payment upon a valid consideration for the delay; for, in such a case, the particular indorser can sustain no injury by such delay, or giving time, as the debt is his own, and he can at any time discharge it at his pleasure.[1] But there seems much reason to doubt, whether this doctrine is well founded; and the strong tendency of the more recent authorities is, to hold, that, in all cases, the holder has a right to treat all the parties to a Bill, as liable to him, exactly to the same extent, and in the same manner, whether he knows the Note to be an accommodation Note, or not; for, as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the Note, and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves.[2] If so, then it would seem to follow, that he is reciprocally bound to them in the same manner.

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[1] Bayley on Bills, ch. 9, p. 338–341, (5th edit.); Collott *v.* Haigh, 3 Camp. R. 281; Laxton *v.* Peat, 2 Camp. R. 185; Thomson on Bills, ch. 6, § 5, p. 545, 546, (2d edit.); Id. ch. 4, § 6, p. 364, 365; Chitty on Bills, ch. 9, p. 450–452, (8th edit.); Story on Bills, 425, 434; Ante, § 413.

[2] Raggett *v.* Axmorr, 4 Taunt. R. 730; Kerrison *v.* Cooke, 3 Camp. R. 362. See Rolfe *v.* Wyatt, 5 Carr. & Payne, 181; Fentum *v.* Pocock, 5 Taunt. R. 192; Nichols *v.* Norris, 3 Barn. & Adolph. 41, note; Harrison *v.* Courtauld, 3 Barn. & Adolp. 36; Ante, § 413; Post, § 422, note, § 423, note; Murray *v.* Judah, 6 Cowen, R. 484; Bayley on Bills, ch. 6, § 1, p. 166, 167, (5th edit.); Mallet *v.* Thompson, 5 Esp. R. 178; North

§ 419. It follows, from what has been already suggested, that, if the delay, or giving of time, is with the consent of the indorser, the latter is bound by his original liability; for then he waives the objection, or becomes party to the agreement.[1] So, if the delay, or giving of time, be merely voluntary on the part of the holder, and upon no agreement between him and the maker, or other antecedent parties, but is an indulgence, which he chooses to grant, *suâ sponte,* and during his own pleasure; there, however long it may be, it is no discharge of any of the indorsers, who have been fixed by due notice; for their rights are in no respect prejudiced by the conduct of the holder, since he is perfectly at liberty to sue any, and all of them, at his

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American Coal Company *v.* Dyett, 4 Paige, R. 9; Story on Bills, § 432; Commercial Bank *v.* Cunningham, 24 Pick. R. 270, 275. In Price *v.* Edmunds, 10 Barn. & Cressw. R. 578, 582, Mr. Justice Bayley, in delivering the opinion of the Court, said; "The first question raised in this case is, whether a party, who has in the ordinary mode joined in making a Promissory Note, is at liberty afterwards to insist, that he became a party to it as surety only, and not as principal. The defendant insists that he may do so; and, secondly, that he has been discharged from his liability, in consequence of time having been given to the principal debtor. If it were incumbent on us to decide that question, we should have to reconsider the cases of Laxton *v.* Peat, Collott *v.* Haigh, and the cases that are at variance with them; but here, the foundation of the argument, upon which the defendant must rely, entirely fails." In the same case, Mr. Justice Parke said; "I think that the decision in Fentum *v.* Pocock, where it was held, that the acceptor of an accommodation Bill was not discharged by giving time to the drawer, was good sense and good law." See Post, § 423, and note, where the same subject is considered with reference to a release or discharge.

[1] Bayley on Bills, ch. 9, p. 338-341, (5th edit.); Stevens *v.* Lynch, 12 East, R. 38; Bruen *v.* Marquand, 17 John. R. 58; Stewart *v.* Eden, 2 Caines, R. 121; Parsons *v.* Gloucester Bank, 10 Pick. R. 533; Smith *v.* Hawkins, 6 Connect. R. 444; Gloucester Bank *v.* Worcester, 10 Pick. R. 328; Chitty on Bills, ch. 9, p. 448, 449, (8th edit.); Clark *v.* Devlin, 3 Bos. & Pull. 363; Thomson on Bills, ch. 6, § 5, p. 541-543, (2d edit.)

pleasure, and is not bound to any diligence in seeking his reimbursement.[1] Nor can the indorser insist, that the holder should, upon his request, use any such diligence.[2] His remedy is to pay the Note, and thus to have his recourse over against the maker or other parties.[3]

§ 420. On the other hand, the giving time by the holder to a subsequent indorser, for a valuable consideration, will not discharge the antecedent parties to the Note from their liability; since the antecedent parties are not thereby deprived of any rights of recourse, which they may have against the party, who is otherwise liable to them.[4] They can have no claim against any subsequent indorser, unless in cases where they are accommodation parties for him; and that, if unknown to the holder, as we shall presently see,[5] will not affect his rights.[6]

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[1] Bayley on Bills, ch. 6, § 1, p. 166, 167, (5th edit.); Id. ch. 9, p. 341, 342, (5th edit.); Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652; Anderson *v.* Cleveland, 13 East, R. 430, note; Powell *v.* Waters, 17 Johns. R. 176; Stafford *v.* Yates, 18 John. R. 327; Lenox *v.* Prout, 3 Wheat. R. 520; Chitty on Bills, ch. 9, p. 442-446, (8th edit.); Philpot *v.* Briant, 4 Bing. R. 717; Story on Bills, § 426; Adams *v.* Gregg, 2 Stark. R. 531; Dingwell *v.* Dunster, 1 Doug. R. 235, 247.

[2] See Trimble *v.* Thorne, 16 John. R. 152; Sterling *v.* Marietta and Susquehanna Trading Company, 11 Serg. & R. 179; Beardsley *v.* Warner, 6 Wend. R. 610; S. C. 8 Wend. R. 194; Frye *v.* Barker, 4 Pick. R. 382; Hunt *v.* Bridgham, 2 Pick. R. 581, and note 3, p. 585, where the principal authorities are collected; Beebe *v.* West Branch Bank, 7 Watts & Serg. 375; Ante, § 115 *a*.

[3] Ibid.; Thomson on Bills, ch. 6, § 5, p. 542, 543, (2d edit.)

[4] Bayley on Bills, ch. 6, § 1, p. 166; Id. ch. 9, p. 338, 339, (5th edit.); Ellis *v.* Galindo, 1 Doug. R. 250, note; Smith *v.* Knox, 3 Esp. R. 46; Claridge *v.* Dalton, 4 Maule & Selw. 226; English *v.* Darley, 2 Bos. & Pull. 61; Thomson on Bills, ch. 6, § 5, p. 539, 540, (2d edit.); Calliham *v.* Tanner, 3 Louis. R. 299; Ante, § 419.

[5] Ante, § 418; Post, § 421, 423.

[6] Ibid.

§ 421. The question may also arise, Whether the giving of time by the holder to one joint maker, or indorser, will discharge the other joint parties to the Bill. Upon the same principle, as that which is applied to the case, where the holder covenants not to sue one joint contractor, it would seem, that it will not be a discharge; for it is a mere personal contract with him, for the breach of which a remedy may lie by him alone, but it will not be equivalent to a release.[1] So, it seems, that, where several persons are jointly and severally liable upon a contract, the giving of time to one, or proceeding in a suit against one even to judgment, but without any satisfaction, will be no discharge of the other.[2] Indeed, it has been thought, that it will make no difference, in such a case, at law, whatever might be the case in equity, (upon which some doubt may be entertained,) that one of the joint parties upon the Note is, in fact, a surety for the other, at least if he is not stated to be such, upon the face of the Note; for, under such circumstances, as to the holder, he may and should be treated as a joint principal, without any reference to his actual relation to the other joint contractor; since he chooses to place himself in that predicament, as jointly liable, as principal, upon the Note.[3]

§ 422. Secondly, *a fortiori*, the receiving of part pay-

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[1] Ante, § 409.

[2] See United States *v.* Cushman, 2 Sumn. R. 310, 426; Lechmere *v.* Fletcher, 1 Cromp. & Mees. R. 623; Pothier on Oblig. n. 271, 272; Price *v.* Edmunds, 10 Barn. & Cressw. 578. But see Hall *v.* Wilcox, 1 Mood. & Rob. 58; Wilson *v.* Foot, 11 Metcalf, R. 285.

[3] Ibid.; Wilson *v.* Foot, 11 Metc. R. 285; Oxford Bank *v.* Haynes, 8 Pick. R. 423. But see Pitman on Principal and Surety, p. 167 – 192, where the principal authorities are collected. Mayhew *v.* Crickett, 2 Swanst. R. 185; Story on Bills, § 430, 432; Ante, § 418.

ment from the maker, or from any indorser, without any contract for delay, will not discharge any of the other parties to the Note; for, (as has been already suggested,) it is for the benefit, and cannot be for the injury, of any other party, to diminish his liability, after it has been once absolutely fixed.[1]

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[1] Bayley on Bills, ch. 9, p. 343, (5th edit.); Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652; James *v.* Badger, 1 John. Cas. 131; Kennedy *v.* Motte, 3 McCord, So. Car. R. 13; Hunt *v.* Bridgham, 2 Pick. R. 581; Post, § 423; Thompson on Bills, ch. 6, § 5, p. 542, (2d edit.); Chitty on Bills, ch. 9, p. 442, 451, 452, (8th edit.); Story on Bills, § 436; Gould *v.* Robson, 8 East, R. 576; Ayrey *v.* Davenport, 5 Bos. & Pull. 474; Bank of U. States *v.* Hatch, 6 Peters, R. 250; Ruggles *v.* Patten, 8 Mass. R. 480; Lobdell *v.* Niphler, 4 Miller, Louis. R. 294; Sargent *v.* Appleton, 6 Mass. R. 85; Pothier, de Change, n. 176–179; Commercial Bank *v.* Pickering, 24 Pick. 270, 275. But see Johnson *v.* Kennison, 2 Wils. R. 262; Hull *v.* Pitfield, 1 Wils. R. 46; Story on Bills, § 436; White *v.* Hopkins, 3 Watts, R. 99. In the Commercial Bank *v.* Cunningham, 24 Pick. R. 270, 275, the Court said: "This claim is undoubtedly well founded, as to all those notes and drafts, which were signed by said Parker & Co., as makers, or principal promisors; for the release to the principal promisor is equivalent to payment of the debt, and, consequently, discharges the indorser. But it is very clear, that the receiving part payment from the indorser, and releasing him, cannot operate as a discharge of the principal debtor from the balance due. It is, however, agreed, that some of the notes indorsed by W. Parker & Co. were made for their accommodation, and the proceeds thereof went to their use. But the demandants deny, that they had, at the time of the discount of such notes, or when the release was made, any notice of this fact. It has been argued, that, as to these notes, Parker & Co. are to be considered as the principal debtors, and that a discharge to them must operate as a discharge of the other parties to the notes. In support of this argument, the counsel for the tenant rely on the case of Laxton *v.* Peat, 2 Camp. 185, and on Collott *v.* Haigh, 3 Camp. 281. These cases were decided by Lord Ellenborough, at Nisi Prius; but the correctness of the decisions has been very much doubted; and they were overruled, in the case of Fentum *v.* Pocock, 5 Taunt. 192. In Kerrison *v.* Cooke, 3 Camp. 362, Gibbs, C. J., says: 'I am sorry the term accommodation bill ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiated paper.' In Price *v.* Edmunds, 10 Barn. & Cressw. 582, Bayley, J., suggests, though he does not decide

§ 423. Thirdly, the effect of a release or discharge of any party to the Note by the holder. If the holder should release or discharge any antecedent party upon the Note, that would operate as a discharge of all the subsequent parties or indorsers on the Note; for, otherwise, the remedy of the subsequent parties over against the released party would, upon payment by them, be

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the point, that a party, by signing a note, as joint maker, renders himself subject to all the liabilities of a joint maker. And Park, J., says, that the decision in Fentum *v.* Pocock, where it was held, that the acceptor of an accommodation bill was not discharged, by giving time to the drawer, was good sense and good law. From these cases, it appears that the weight of authority is against the decisions in Laxton *v.* Peat, and Collott *v.* Haigh. But it is not incumbent on us to decide between these conflicting authorities, in the present case. For we think there is no proof, that the plaintiffs had notice, that these notes were accommodation notes." Ante, § 413, 418. There may, however, be ground for a distinction between parties to an accommodation Bill or Note, and other parties, under peculiar circumstances. Thus, where both acceptor and indorser are accommodation parties to the same Bill, for the sole accommodation of the drawer, each being fully cognizant of all the facts, and the indorser, upon a dishonor of the Bill and due notice, takes it up, and then the drawer, becoming insolvent, assigns his property for the benefit of his creditors, and thereby provides a preference and indemnity for the indorser against his liability on the Bill, and the assignee has sufficient funds in his hands to pay the whole debt, if the indorser becomes a party to the assignment, he will thereby release the acceptor; for it is the same, as if the indorser had the funds in his own hands for the payment of the Bill. Story on Bills, § 433; Bradford *v.* Hubbard, 8 Pick. R. 155. See also Chitty on Bills, ch. 9, p. 450-452, (8th edit.) This same doctrine may also apply to Promissory Notes under certain circumstances, mutatis mutandis, where the maker and one or more of the indorsers are mere accommodation parties for another indorser. The case of Ruggles *v.* Patten, 8 Mass. R. 480, went further; and it was held, in that case, that the holder's receiving part payment from one joint maker of a Note, and thereupon agreeing to acquit all the other makers, did not operate as a discharge of the latter. This, probably, was upon the ground, that there was no sufficient consideration for the agreement, and it was not a release under seal; but no reasons are assigned by the Court. See Story on Bills, § 431, and cases there cited. Ante, § 414. See also Thomson on Bills, ch. 6, § 5, p. 541-543, (2d edit.)

gone, or, if they could recover the same, the release to the antecedent party would become virtually inoperative by the act of the holder.[1] But a release by the holder to the payee would not discharge the maker, nor a release to a subsequent indorser discharge a prior one, upon the plain ground, that the release does not change the rights of the maker or indorser, since, upon payment, neither of them could have recourse over against the released party.[2] Nor would it make any difference in the case, that the released party was, in point of fact, the party ultimately bound to pay the Note, and that the other party was a mere accommodation maker, payee, or indorser, for his benefit; or, at least, it would not make any difference, unless the fact of its being such accommodation Note were, at the time of receiving the Note, and not merely at the time of the release, known to the holder;[3] for, otherwise, he has a right to presume,

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[1] Ante, § 408; Bayley on Bills, ch. 9, p. 339-344, (5th edit.); Smith *v.* Knox, 3 Esp. R. 46; Thomson on Bills, ch. 6, § 5, p. 532-537, (2d edit.); Brown *v.* Williams, 4 Wend. R. 360; Tombeckbee Bank *v.* Stratton, 7 Wend. R. 429; Story on Bills, § 428; Chitty on Bills, ch. 9, p. 443, 445, 450-453, (8th edit.); Id. p. 454, 456; Claridge *v.* Dalton, 4 Maule & Selw. 232; Ellison *v.* Dezell, 1 Selw. N. P. 372; Commercial Bank *v.* Cunningham, 24 Pick. R. 270, 275.

[2] Bayley on Bills, ch. 9, p. 338-344, (5th edit.); Smith *v.* Knox, 3 Esp. R. 46; English *v.* Darley, 2 Bos. & Pull. 62; Chitty on Bills, ch. 9, p. 451-453, (8th edit.); Thomson on Bills, ch. 6, § 5, p. 539, 540, (2d edit.); Carstairs *v.* Rolleston, 5 Taunt. R. 551; Harrison *v.* Courtauld, 3 Barn. & Adolph. 37; Story on Bills, § 432, 433; Fentum *v.* Pocock, 5 Taunt. R. 192; Tombeckbee Bank *v.* Stratton, 7 Wend. R. 429; Bank of U. States *v.* Hatch, 6 Peters, R. 250; Bank of Ireland *v.* Beresford, 6 Dow, R. 234; Abat *v.* Holmes, 3 Miller, Louis. R. 351; Lynch *v.* Reynolds, 16 John. R. 41; Story on Bills, § 428; White *v.* Hopkins, 3 Watts & Serg. 99.

[3] Ibid.; Bayley on Bills, ch. 9, p. 338, 339, (5th edit.); Laxton *v.* Peat, 2 Camp. R. 185; Ex parte Glendinning, 1 Buck, Cas. in Bankr. 517; Story on Bills, § 428, 432, § 33; Hall *v.* Wilcox, 1 Mood. & Rob. 58; Collott *v.* Haigh, 3 Camp. R. 281; Chitty on Bills, ch. 9, p. 450-453,

that the liability of all the parties is precisely that, which is apparent upon the face of the Note.[1] Indeed, there is much reason to doubt, upon the recent authorities, whether the fact, that the Note is an accommodation Note, will, in any case, vary the rights of the holder; and whether he may not, in all cases, be entitled to treat all the parties as liable to him, according to their relative positions on the Note, although he may know it to be an accommodation Note.[2]

(5th edit.); Thomson on Bills, ch. 4, § 6, p. 364, 365, (2d edit.); Id. ch. 6, § 5, p. 546, 547; Commercial Bank *v.* Cunningham, 24 Pick. R. 270, 275; Ante, § 421.

[1] Ibid.; Harrison *v.* Courtauld, 3 Barn. & Adolp. R. 36; Nichols *v.* Norris, 3 Barn. & Adolp. R. 41, note; Bayley on Bills, ch. 6, § 1, p. 166, 167, (5th edit.); Ante, § 418, 421.

[2] See Ante, § 418, and note. In Bennett *v.* Maule, Gilmer, Virg. R. 305, the Court held, that where a Note was signed by the maker, for the accommodation of the indorser, and the holder, knowing the fact when he received the Note, released the indorser, the release did not discharge the maker. The same point was decided in Walker *v.* Bank of Montgomery County, 12 Serg. & R. 382; S. C. 9 Serg. & R. 229; Story on Bills, § 432, and note. Mr. Thomson (on Bills, ch. 6, § 5, p. 545–547, 2d edit.) seems to make a distinction between a case, where the subsequent parties might have recourse against the prior party, who has got a release or received indulgence from the holder, and a case, where they are the very parties for whose accommodation such prior party put his name to the Note, holding, in the former case, that they are discharged, and in the latter case, not. Thus, if the holder should release or give time to an accommodation maker, he holds, that it would not discharge the indorser, for whose accommodation the Note was given. But he immediately afterwards states, that the case would be different, if the holder should release or give time to the indorser, for whose accommodation the Note was made; for, in this latter case, the accommodation maker would not be discharged, although he knew the Note to be an accommodation Note. It seems difficult to find any satisfactory reason for such a distinction; for if the holder's rights are, in the one case, to depend upon the real state of the facts, and not upon the liability of the parties upon the face of the Note, there seems no ground to say, that the like rule should not apply to the other. Why should the accommodation maker be held bound, when the indorser, for whose accommodation he signed the Note, is discharged by the holder, and yet the indorser be held bound, when the accommodation maker is

§ 424. It follows, from the foregoing doctrine, that a release of the maker of the Note by the holder will re-

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discharged by the holder? In each case, the party, who is ultimately to pay the Note, is the indorser. Mr. Thomson seems to have struggled to reconcile the cases upon the subject. If the party, who is ultimately to pay, ought to be held liable, notwithstanding the discharge of the accommodation party, and thus we are to go behind the face of the instrument, the rule ought to be strictly followed out in both cases. Mr. Thomson (p. 545-547) says: "What has been now stated assumes, that the subsequent parties to a Bill or Note have recourse against the prior party, who has got a release, or received indulgence from the holder, and that their recourse is presumed to have been thereby injured. But when they have no such recourse, though entitled to it ex facie of the Bill or Note, they cannot plead that they are released, because the presumption of injury is then done away. For instance, the drawer of a Bill accepted merely for his accommodation, and without effects of his in the acceptor's hands, cannot plead that he is discharged by the holder giving time to the acceptor. It has been also found, that such a proceeding by the holder affords no objection against his proving for such a Bill on the drawer's estate. In another case, where the defendants had to pay the plaintiffs for the price of goods, drawn a Bill in their favor, on their own agent in London, who, though he accepted the Bill, did not pay it when due, as he had not then cash belonging to his constituents, but only goods, which he could not sell, it was found, that the plaintiffs did not discharge the defendants, by allowing him twice to renew the Bill, without notice to them, (although he at last failed, with funds of theirs more than sufficient to pay the Bill,) seeing that such renewal was in their favor, because he had no funds when the Bill became due, and was, therefore, truly a surety for them. Nor can such objections be pleaded by a subsequent indorser, for whose accommodation a Bill or Note has been accepted or granted, though release or indulgence be given to a prior party. The same rules are applicable on this subject, which have been explained as to notice or negotiation, in similar cases. But it does not follow, that because parties who are principal debtors ex facie, of a Bill or Note, may be sureties as to other parties, the holder therefore loses his claim against them, as principal debtors, by giving indulgence to the parties, for whose accommodation they are bound; for example, that the holder of a Bill or Note, accepted or granted for behoof of the payee, forfeits his claim against the acceptor or grantor, by giving indulgence, or a discharge, without his consent, to the payee. First, there is no ground for such a doctrine, if he is not aware of the true nature of the Bill or Note; because he is then only bound to look at the relations of the several parties, as they appear ex facie of it. Even in England, it must be proved, that his knowledge of these relations was different from lease all the other parties thereto from all liability thereon, and amount to a satisfaction of the Note; for the maker

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what they appeared to be; and in Scotland, no evidence would probably be admitted, to redargue that arising from the Bill, except his writ or oath. But, secondly, it appears to be now settled, that, although the payee should know the relative situation of parties inter se, he is entitled to rely on their characters, as they appear ex facie of the Bill or Note, and, therefore, preserves his claim at all times, against the acceptor or maker, as principal debtor, whether he has given indulgence or not to the other parties, for whose accommodation he became bound. Accordingly, where the holder of a Note, knowing that it was granted for the payee's accommodation, had become bound, on receiving a composition from the payee, not to molest him, it was decided, notwithstanding, that he had not thereby lost his claim against the maker. The same doctrine, as already shown, although at one time doubted, has been settled, regarding the holder's claim against the acceptor of an accommodation Bill, though he has given time to other parties on the Bill, who are liable in relief to the acceptor. In like manner, his releasing or giving indulgence to a subsequent indorser would not cut off his claim against a prior one, although he should be aware, that the former, as the party accommodated, was liable, in recourse, to the latter. In all these cases, the claim of recourse does not arise on the face of the Bill or Note, but from an agreement independent of it. But the holder's claim arises from the Bill or Note alone, and, therefore, though he should discharge this claim, or give time for the payment of it, he will not, thereby, discharge or fetter any other party, as to the time of enforcing a distinct claim of recourse, independent of the Bill or Note." In another place (ch. 4, § 6, p. 364) he again states; "It was once decided by Lord Ellenborough, at Nisi Prius, that, when the holder of a Bill knew that it was accepted for the drawer's accommodation, he lost his claim against the defendant, (acceptor,) by giving the drawer time, after a partial payment, to pay the balance, the case being held the same, with regard to him, as if the Bill had been drawn by the defendant, and accepted by the drawer. But this doctrine was repeatedly questioned, in subsequent cases; and, at last, it was unanimously overruled by the Court of Common Pleas, who found, that an acceptor is always primary debtor, with reference to the holder, whether the latter knew the Bill to be accepted for the drawer's accommodation, or not. The principle of this doctrine, as applied to accommodation Bills, appears to be, that the holder is entitled to rely on the different obligants, according to the several characters in which they sign the Bill, and, consequently, to regard the acceptor as primary debtor. It appears, indeed, to have been held, in a subsequent case at Nisi Prius, that, in such a case, the drawer is to be regarded as principal, and that, therefore, a discharge to him will release the acceptor, is the party primarily liable to all the subsequent parties; and if they were compellable to pay the Note they would have their remedy over against the maker for the amount, contrary to the true object and import of the release.[1] And, upon the principles which have been just alluded to, it would seem to be the better opinion, that his being an accommodation maker would not vary the case as to the indorser, for whose benefit he made the Note, but the latter would be equally discharged from liability as if the maker were the true and primary debtor.[2]

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who is only a surety. But this doctrine was only incidentally laid down, and the previous decision seems entitled to more weight. The same doctrine has since been confirmed. It was alluded to in a case, where one of two joint obligants in a Note, maintaining that he was surety for the other, pleaded, that he was released, because the plaintiff had given time to the other obligant, the Court being inclined to hold, that the plaintiff was a principal, and could not be released even by giving time, though they decided, that, under the circumstances, no time had been given. It has been also held, that the circumstance of a drawer of a Bill, accepted for his accommodation, paying part of it to the indorsee, and giving him a new Bill for the balance, but without getting up the former Bill, did not discharge the other Bill, or release the acceptor. There was here no giving of time on the old Bill, but, although there had, and though the holder had known that the Bill was an accommodation, this, according to the cases already noticed, would have made no difference. In another case, where the holder of an accommodation Bill did not know, when he took it, that it had been accepted for the drawer's accommodation, but was told afterwards, and thereafter made an agreement with the drawer's assignees, under which he discharged the drawer, on obtaining a certain assignment, &c., he was found, notwithstanding, to have a good action against the acceptor. The authority of a previous decision was here disputed, on the ground of a dictum of Lord Eldon, when he decided against that case, and reference was also made to another case, where the Court had waived the point. But, on the other hand, reference was made to another case, where the doctrine now stated was confirmed, although the holder of a Note knew all along that it had been stated as a security, and, on the whole, the Court held that the acceptor was not discharged."

[1] Ante, § 418, 421, 423.

[2] Ante, § 418, 421, 423. See Chitty on Bills, ch. 9, p. 452, (8th edit.); Maltby v. Carstairs, 7 Barn. & Cressw. 735.

§ 425. A release of one joint maker, or indorser, by the holder, whether they are accommodation parties or not, will discharge all the joint parties; for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such a case.[1] In short, when the debt is extinguished, as to one, it discharges all, whether the parties intended it or not.[2] The like rule applies to cases, where a satisfaction has been made by any one joint maker or indorser, or by any one partner in two firms, where each firm is bound upon the Note.[3] So, the taking of the separate security of one partner by the holder, in discharge of the joint debt,

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[1] Chitty on Bills, ch. 9, p. 449, 450, (8th edit. 1833); Bayley on Bills, ch. 9, p. 342 – 344, (5th edit. 1830); 1 Story, Eq. Jurisp. § 112; Westcott *v.* Price, Wightw. R. 220; Nicholson *v.* Revill, 4 Adolp. & Ellis, 675; Stirling *v.* Forrester, 3 Bligh, 575; Cheetham *v.* Ward, 1 Bos. & Pull. 630; Brooks *v.* Stuart, 10 Adolp. & Ellis, 854; American Bank *v.* Doolittle, 14 Pick. 123; Averill *v.* Lyman, 18 Pick. 346; Tuckerman *v.* Newhall, 17 Mass. R. 581; Goodnow *v.* Smith, 18 Pick. R. 414, 415; Wiggin *v.* Tudor, 23 Pick. 434; Carnegie *v.* Morrison, 2 Metc. R. 381; Ward *v.* Johnson, 13 Mass. R. 148; Rowley *v.* Stoddard, 7 John. R. 207; Harrison *v.* Close, 2 John. R. 448; Story on Bills, p. 431; Post, § 435.

[2] Ibid.

[3] Bayley on Bills, ch. 9, p. 322, (5th edit. 1830); Jacaud *v.* French, 12 East, R. 317; Pothier on Oblig. n. 261, 274; 1 Story, Eq. Jurisp. § 112; Nicholson *v.* Revill, 4 Adolp. & Ell. 675. In this case, Lord Denman, in delivering the judgment of the Court, said; "We give our judgment merely on the principle laid down by Lord Chief Justice Eyre in Cheetham *v.* Ward, as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Samuel Revill, to receive from him £100 in full payment of one of the three Notes, and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two Notes, and followed by the actual receipt of the £100, was in law a discharge of Samuel Revill. This view cannot, perhaps, be made entirely consistent with all that is said by Lord Eldon in the case Ex parte Gifford, where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was

will discharge the other partners.[1] But a mere agreement with one partner to give him time, taking his exclusive security for the payment of the Note, although founded upon a valuable consideration, will not discharge the other partners, if it be with an express reservation of the rights of the holder against the partnership, for the payment of the Note.[2] *A fortiori*, an agreement, not founded upon any valuable consideration, to take one partner as debtor for the whole debt due by the partnership, will not exonerate the latter.[3] Neither (as we have seen) will a covenant not to sue one joint contractor or partner on the Note operate as a discharge of the other co-contractors or partners; for this is a mere personal covenant, and does not, like a release, extinguish the debt.[4] We shall have occasion to see, that

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not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favor of the defendant." See also French *v.* Price, 24 Pick. R. 13. Hammatt *v.* Wyman, 9 Mass. R. 138.

1 Bedford *v.* Deakin, 2 Barn. & Ald. 210, 216; Evans *v.* Drummond, 4 Esp. R. 89; Reed *v.* White, 5 Esp. R. 122.

2 Chitty on Bills, ch. 9, p. 449, (8th edit. 1833); Bedford *v.* Deakin, 2 Barn. & Ald. 210; Lodge *v.* Dicas, 3 Barn. & Ald. 611; David *v.* Ellice, 5 Barn. & Cressw. 196; Pitman on Principal and Surety, p. 181, 182, where the cases are collected; Crawford *v.* Millspaugh, 13 John. R. 87.

3 Lodge *v.* Dicas, 3 Barn. & Ald. 611. See also David *v.* Ellice, 5 Barn. & Cressw. 196; Perfect *v.* Musgrave, 6 Price, R. 111.

4 Chitty on Bills, ch. 9, p. 449, (8th edit. 1833); Dean *v.* Newhall, 8

the doctrine of the French law, as to the effect of the release of one joint maker or indorser is, in its qualifications and modifications, somewhat different from our law.[1]

§ 426. Fourthly. Upon analogous grounds with those above stated, if the holder should make a valid composition with the maker, whereby he should agree to take a certain per cent. of the amount in discharge of the Note, upon his receiving collateral security from a third person for the composition money, and the security should be accordingly given, that would amount to a discharge of the Note in favor of the indorser, whether he was an accommodation indorser, or not; for, in contemplation of law, it would amount to an extinguishment and satisfaction of the Note as to all the parties thereto.[2] The same doctrine would apply to the case of a like composition made by the holder with a prior indorser; for he would thereby release all the subsequent indorsers, in the same manner as if such prior indorser had paid the Note to the holder, which would plainly be a satisfaction thereof in their favor.[3] But the indorsers of the Note, who stand prior on the Note to the compounding indorser, would remain liable, in the same manner as if no such composition had been made, since their rights are not affected thereby.[4]

Term R. 168; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Mallet *v.* Thompson, 5 Esp. R. 178; Ante, § 409, 421, 425.

1 Post, § 430–435.

2 Lewis *v.* Jones, 4 Barn. & Cressw. 506; Steinman *v.* Magnus, 11 East, R. 390; Margeston *v.* Aitken, 3 Carr. & Payne, 338; Story on Bills, § 429; Chitty on Bills, ch. 9, p. 455, 456, (8th edit.); Ex parte Wilson, 11 Ves. R. 410.

3 Ellison *v.* Dezell, 1 Selw. N. Prius, 372; Ante, § 423; Story on Bills, § 429; Chitty on Bills, ch. 9, p. 455, 456, (8th edit.)

4 Story on Bills, § 429; Chitty on Bills, ch. 9, p. 456, (8th edit.); Id. p. 452, 453; Maltby *v.* Carstairs, 7 Barn. & Cressw. 735.

§ 427. Perhaps it is questionable, even if the holder has the consent of the other parties, that he may accept the composition, and hold them liable without resorting to the compounding creditor, whether he will not still be deprived of his remedy against them, if the composition operates as a release of the debt, inasmuch as it will be a fraud upon the other creditors, if they have supposed, that they had contracted with each other on equal terms.[1]

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[1] Chitty on Bills, ch. 9, p. 454, 455, (8th edit. 1833) ; Ex parte Wilson, 11 Ves. 410 ; Lewis *v.* Jones, 4 Barn. & Cressw. 506 ; English *v.* Darley, 2 Bos. & Pull. 61 ; Ex parte Smith, 3 Bro. Ch. R. 1 ; Howden *v.* Haigh, 11 Adolp. & Ellis, 1033 ; Story on Bills, § 429. The learned Reporters have appended the following note to the case of Lewis *v.* Jones, 4 Barn. & Cressw. 515, note (*a*) ; — "Generally speaking, a creditor discharges a surety by giving time to, or compounding with, the principal debtor. The cases upon this subject may be divided into two classes ; the first, where the agreement with the principal may be considered as a fraud upon the surety, by altering his situation or increasing his risk. Such were the cases of Nisbet *v.* Smith, 2 Bro. Ch. R. 579 ; Ex parte Smith, 3 Bro. Ch. R. 1 ; Rees *v.* Berrington, 2 Ves. 540 ; Law *v.* East India Company, 4 Ves. 824 ; Eyre *v.* Bartrop, 3 Mad. 221. The second, where allowing the creditor to recover against the surety would operate as a fraud upon the principal, or any person joining with him in paying or securing the composition money, inasmuch as it would give the surety a right to proceed against the principal for that debt, from which the creditor had agreed to discharge him. English *v.* Darley, 2 Bos. & Pull. 61 ; Burke's Case, there cited by Lord Eldon ; Ex parte Gifford, 6 Ves. 805 ; Boultbee *v.* Stubbs, 18 Ves. 20 ; Ex parte Glendinning, Buck, Cas. in Bankr. 517. It is obvious, that the first ground of discharge is inapplicable, where the agreement between the creditor and principal debtor is made with the privity and assent of the surety ; and it seems, that the second is inapplicable, where the surety becomes a party to the transaction in such a manner as to deprive himself of any remedy over against the principal, in the event of his being called upon to pay the residue of the debt. Where a surety compels the creditor to sue, or prove under a commission of bankruptcy against the principal, he is considered as electing to stand in the situation of the creditor with respect to the remedy against the principal, and in order to do so must bring the debt into Court. Beardmore *v.* Cruttenden, Cook, Bankr. Laws, 211 ; Dictum per Lord Chancellor in Wright

§ 428. Fifthly. The discharge of a party, whether he be the sole or a joint maker or indorser of a Note, under

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v. Simpson, 6 Ves. 734. Hence it may follow, that, if a creditor, at the request of the surety, and for his relief, agrees to accept a composition from the principal, the surety would be considered as electing to stand in the situation of the creditor, and that he could not recover over against the principal upon being compelled to pay the residue of the debt. In Ex parte Glendinning, Buck, Cas. in Bankr. 517, the Lord Chancellor is reported to have said, that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear upon the face of the agreement, for that parol evidence cannot be admitted to explain or vary the effect of the instrument. If that observation is to be construed generally, it will greatly simplify questions upon this subject; for then, wherever a creditor and principal debtor have entered into an agreement for a composition, not containing a reservation of the remedy against a surety, and an action is afterwards brought against the latter, it will be unnecessary to inquire, whether he was or was not privy and consenting to the agreement, or whether he has or has not done any thing to deprive himself of the right to recover over against the principal; if he has not, he will be absolutely discharged by the agreement entered into between the creditor and the principal debtor. But the judgment in Ex parte Glendinning appears to be founded upon Burke's Case, which is also cited by the Lord Chancellor in Ex parte Gifford, 6 Ves. 809, as an authority for saying, that where the remedy against the surety is reserved, in the agreement for composition, a recovery against the surety cannot operate as a fraud upon the principal; for that if any demand out of that recovery arises against him, it is with his own consent. Perhaps, therefore, the observation in Ex parte Glendinning was intended to apply to those cases only, where, but for the reservation in the agreement, the proceeding against the surety would operate as a fraud upon the principal, and parol evidence may still be admissible to show, that the composition was made with the privity and at the request of a surety, and that he has deprived himself of any right to recover over against the principal; for such evidence would leave the written instrument (according to its import) a discharge to the principal, and would not contradict it, unless, indeed, it be so framed as to extinguish the debt. There is another large class of cases, in which it has been held, that a person joining other creditors in compounding with a debtor, or signing a bankrupt's certificate cannot lawfully stipulate for any benefit to himself beyond that, which the other creditors receive; whether that benefit be given by the debtor himself, or any third person for his relief. Smith *v.* Bromley, 2 Doug. 695; Cecil *v.* Plaistow, 1 Anstr. 202; Cockshott *v.* Bennett, 2 Term R. 763; Jackson *v.* Lomas, 4 Term R. 166; Feise *v.* Randall, 6 Term R. 146;

an insolvent or bankrupt act, will not operate to discharge any other party on the Note from his liability thereon; but it will merely operate as a bar or discharge of the insolvent or bankrupt personally.[1] The reason is, that it is an act of the law, and not of the holder, and operates upon him *in invitum*. And the holder's proving his debt, or receiving a dividend under such insolvent or bankrupt act, will operate only to discharge the other parties *pro tanto*, leaving in all other respects their liability in full vigor and efficacy.[2]

§ 429. Hitherto we have been considering, what will amount to an extinguishment, or satisfaction, or discharge of a Promissory Note, and between what parties it will be operative or not, according to the requirements of our law. But it may not be without some practical utility to examine, how these matters are treated in the foreign law, and especially in the French law, which may be presumed generally, on these points, to coincide with laws of the other commercial states of Continental Europe.[3] And here, as, indeed, in most other

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Jackman *v.* Mitchell, 13 Ves. 581; Leicester *v.* Rose, 4 East, 372; Wells *v.* Girling, 1 Brod. & Bing. 447; Jackson *v.* Davidson, 4 Barn. & Ald. 691. But all those decisions related to new securities given as a consideration for signing the composition deed or certificate, and proceeded on the ground, that the advantage gained by the particular creditor was a fraud upon the others, and they do not appear applicable to securities existing before the negotiation for a composition. See Thomas *v.* Courtenay, 1 Barn. & Ald. 1."

[1] Bayley on Bills, ch. 9, p. 336, 346, (5th edit.); Ante, § 407, and note; Thomson on Bills, ch. 6, § 5, p. 535-537, (2d edit.); McDonald *v.* Bovington, 4 Term R. 825; Tooker *v.* Bennett, 3 Caines, R. 3; English *v.* Darley, 2 Bos. & Pull. 62; Ward *v.* Johnson, 13 Mass. R. 148; Chitty on Bills, ch. 9, p. 454-456, (8th edit.); Stock *v.* Mawson, 1 Bos. & Pull. 286; Pothier, De Change, n. 179; Story on Bills, § 435.

[2] Bayley on Bills, ch. 9, p. 346, (5th edit.); Kenworthy *v.* Hopkins, 1 John. Cas. 107; Burrill *v.* Smith, 7 Pick. R. 291.

[3] See Thomson on Bills, ch. 5, § 4, p. 394, 395, (5th edit.)

cases, we are compelled to resort to the analogies furnished by Bills of Exchange; for the foreign writers rarely treat at any length the subject of Promissory Notes; but they leave us to infer the rules, which are to govern them, from the known doctrines applicable to Bills.

§ 430. In the first place, in respect to the maker of a Note. By the old law of France, as stated by Pothier, (and the doctrine on this point does not seem to have undergone any change since his day,) whenever the holder has discharged or released the maker of a Promissory Note from the debt, that will (as in our law) operate as an extinguishment thereof, as to him, whether it is done before or after the maturity of the Note.[1] If the discharge or release be by a letter, without a surrender of the Note, and the holder should nevertheless afterwards pass it by indorsement to a third person, *bonâ fide*, for a valuable consideration, the latter will be entitled to recover it against the maker, upon the ground, *certat de damno vitando.* Pothier proceds to put the case, (which has since arisen under another branch of our law,[2]) at what time a discharge or release, sent by a letter, takes effect, as between the parties; and he says, that, as it requires the consent both of the creditor (the holder) and the debtor (the maker) to give effect to the discharge or release by the acceptance of the letter, it follows, that, until the letter is received and the

[1] Pothier, De Change, n. 176; Story on Bills, § 437; Nouguier, De Change, Tom. 1, p. 353, 354.

[2] See Story on Contracts, § 84, and note; Adams *v.* Lindsell, 1 Barn. & Ald. 681; McCulloch *v.* Eagle Ins. Co. 1 Pick. R. 277; Mactier *v.* Frith, 6 Wend. R. 103; Averill *v.* Hedge, 12 Connect. R. 424; Story on Agency, § 493, and note.

acceptance given, the discharge or release is not effectual or absolute, but is revocable; and that, if either party should die before the letter is received, the discharge or release becomes a nullity.[1]

§ 431. In the next place, in respect to the indorsers of a Promissory Note, a discharge or release of the maker by the holder will, by the French law generally, (as it does by our law,) operate as a discharge and extinguishment of their liability upon their indorsements; for in such a case the indorsers would otherwise either be deprived of all their remedy over against the maker for repayment, or he would be deprived of the benefit of his discharge.[2] But in every such case the discharge or release must, to have this effect, be purely voluntary, and not be forced upon the holder by the operation of law.[3] If the discharge or release has been for a part only of the debt, then it will operate, as to the indorsers, as a discharge only *pro tanto*.[4]

§ 432. A distinction, however, seems to be taken in the French law between the case of a discharge or release, given before the maturity of the Note, and one given after the maturity, dishonor, and due protest and notice thereof, as to its effect upon the indorsers. In the former case, the indorsers are positively discharged, since the maker can never be deemed in default for not paying the Note, and it cannot be treated as dishonored; and therefore the indorsers cannot be liable on their indorsements.[5] In

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[1] Pothier, De Change, n. 176; Pothier, De Vente, n. 32.
[2] Pothier, De Change, n. 178; Story on Bills, § 437.
[3] Pothier, De Change, n. 179; Story on Bills, § 437.
[4] Pothier, De Change, n. 178–180; Story on Bills, § 437.
[5] Pothier, De Change, n. 177; Story on Bills, § 437.

the latter case, their liability will depend upon circumstances. If the maker is a mere accommodation maker, then the discharge or release will not operate to discharge any indorser, for whose accommodation the Note was given; but it will discharge the other indorsers.[1]

§ 433. In the next place, as to the release or discharge of the indorser by the holder. Pothier says, that, in such a case, the maker, if he be a mere accommodation maker for the indorser, will be discharged thereby; for otherwise, the indorser would be deprived of the benefit of the discharge, since, upon payment by the maker, the latter would have recourse for the amount against him.[2] But he seems to think, that there is more difficulty in the case, where the maker is the primary and real debtor; although he finally arrives at the conclusion, that in such a case the maker would not be discharged, but that it is a mere personal discharge of the indorser.[3] This latter position is the clear result in our law, as has been already stated.[4]

§ 434. Where a prior indorser is released or discharged by the holder, Pothier says, (in entire conformity with our law,) that this will discharge all the

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[1] Pothier, De Change, n. 178; Story on Bills, § 437. Pothier merely puts the case of a discharge of the acceptor of a Bill by the holder, and asserts that it will discharge the drawer only, when he has funds in the hands of the acceptor, and the latter is not a mere accommodation acceptor. But as to the indorsers, he holds them discharged generally.

[2] Pothier, De Change, n. 180; Story on Bills, § 437, 438. We have seen, that upon this very point there is some contrariety of opinion in the Common Law authorities. Ante, § 423; Thomson on Bills, ch. 4, § 6, p. 364, (2d edit.); Id. ch. 6, § 5, p. 545-547; Story on Bills, § 432.

[3] Pothier, De Change, n. 181; Story on Bills, § 438.

[4] Ante, § 423.

subsequent indorsers; for otherwise the prior indorser would be liable to the subsequent indorsers, and thus he would lose the benefit of his discharge by the holder.[1] On the other hand, a discharge of a subsequent indorser by the holder will not, where it is purely personal, discharge any of the antecedent indorsers, or the maker of the Note; since the holder, who has different rights against the different parties, may well, in such a case, discharge some, and hold the others bound to him.[2]

§ 435. In respect to a release or discharge of one joint debtor by the holder, how far it will discharge the others, Pothier holds the following doctrine:— That the release of the creditor to one of the debtors would also liberate the others, if it appeared, that the creditor intended thereby to extinguish the debt as to the whole. If it appeared, that his intention was only to extinguish the debt, as to the part, for which the person, to whom he gave the release, was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist, as to the residue, against the co-debtors.[3]

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[1] Pothier, De Change, n. 182; Story on Bills, § 438; Ante, § 423.

[2] Pothier, De Change, n. 183; Story on Bills, § 439; Ante, § 423.

[3] Pothier on Oblig. by Evans, n. 275. Pothier adds; "If the creditor, in the discharge, which he gave to his co-debtor, expressly declared, that he intended only to discharge the person of the particular debtor, and to retain his claim against the others; could he, by virtue of this declaration, require the whole from the other debtors, without deducting the part of him, who was discharged? I think he could not; the several debtors would not have bound themselves in solido, but would only have engaged for their own respective parts, if they had not considered, that, on paying the whole, they should have recourse against the others; and that, for this purpose, they would be entitled to a cession of the actions of the creditor for the other parts. It is only under the tacit condition of having this cession of the actions, that they are obliged, in solido; and, consequently,

We have already seen, that, by our law, a release or discharge by the holder of one joint party, whether he be the maker or the indorser of the Note, is a discharge of both, without any distinction, whether it be the intention of the holder to discharge one only or both; for, by our law, the debt, independent of any intention of the holder, is extinguished *ipso facto* as to both.[1]

§ 436. There are other modes of extinguishment of the debt due upon a Promissory Note, by the French law, which are either not recognized to the same extent, or have not precisely the same effect, under all circumstances, in our law, as they have in that law. Among

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the creditor has no right to demand from any of them the payment of the whole, without such cession. In this case, the creditor, having put it out of his power to cede his action against the debtor, whom he has discharged and consequently having incapacitated himself from performing the condition, upon which he has a right to demand the whole, it follows, that he cannot demand the whole from each of them. When there are several debtors in solido, and the creditor discharges one of them, can he proceed against each of the others in solido, subject only to a deduction of the share of the one, who is discharged, and of that proportion, to which the one, who is discharged, would be liable, as between themselves, for the share of any of the others, who were insolvent? For instance, supposing that I had six debtors in solido, that I discharged one, that there remained five, of whom one is insolvent; can I only proceed against each of the others for their sixth part? Or may I proceed against each of those who are solvent, for the whole, subject only to the deduction of the sixth, for which the person discharged was originally bound, and of his share in the portion of the one, who had become insolvent? I think I should be well founded in doing so; for the debtor, against whom I proceed, cannot claim from me any other deduction, than the amount of what he loses by not having a cession of actions against the one, whom I have discharged. Now, the cession of actions against him would only give a right of repetition as to his portion, and a right of contribution in respect to the share of the insolvent." Pothier on Oblig. n. 275, by Evans.

[1] Ante, § 425, and note; 1 Story, Eq. Jurisp. § 112; Nicholson *v.* Revell, 4 Adolp. & Ellis, 675, 682, 683.

these we may enumerate, (1.) Compensation; (2.) Novation; and, (3.) Confusion.

§ 437. By Compensation, in the French and foreign law, is meant, what we are accustomed to call the right of set off of one debt or claim against another.[1] And by a general rule of that law, (different in that respect from ours,[2]) where debts are reciprocally due from one person to another, they are treated as extinguished by mere operation of law, in the same manner as if payment thereof had been actually made.[3] This extinguishment by operation of law is altogether independent of the intention or knowledge of the parties; and it takes effect at the very instant of the concurrence of the reciprocal debts.[4] If the debts are equal, then the extinguishment is complete of both. If one is larger than the other, then the larger debt is extinguished *pro tanto* to the extent of the latter, which becomes thereby totally extinguished. Therefore, if at or after the time when a Promissory Note becomes due, the maker is a creditor of the holder of a debt, then also due, of an equal or larger amount, by the law of compensation the whole debt on the Note is extinguished; if a less sum is due to the maker, then the debt on the Note is extinguished *pro tanto*.[5] And any subsequent indorsement of the Note will affect the party, taking it in the same manner as if there had

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1 Pothier on Oblig. by Evans, n. 587; Thomson on Bills, ch. 5, § 4, p. 395, (2d edit.); Nouguier, De Change, Tom. 1, p. 356.

2 See Cary *v.* Bancroft, 14 Pick. R. 315, 317.

3 Pothier, De Change, n. 185; Nouguier, De Change, Tom. 1, p. 356.

4 Nouguier, De Change, Tom. 1, p. 356; Code Civil of France, n. 1290.

5 Pothier, De Change, n. 184, 185; Nouguier, De Change, Tom. 1, p. 356, 357.

been a real payment made by the maker or holder.[1] The same rule will apply to the case of an indorser, who has, by a due dishonor, and notice thereof, become liable to pay the amount of the Note to the holder; for if the holder then is indebted to him in an equal or larger amount, the debt due by the indorsement is extinguished.

§ 438. In the next place, as to Novation. This is, technically speaking, the substitution of a new debt for an old;[2] and it constitutes, by the Roman law, as well as by the law of France, an extinguishment of the old debt, by mere operation of law.[3] It is equally as applicable to debts arising from Promissory Notes, as to debts from other ordinary contracts.[4] Our law does not essentially differ from the law of France in this respect.[5] A negotiable Promissory Note will by our law operate as an extinguishment of a prior existing debt, if it is so intended between the parties. The only question is as to the proof of such an intention. In general, as we have already seen,[6] by the law of England and of most of the States of America, the receipt of a Promissory Note of the debtor for a debt is, in the absence of all other proof, treated as a conditional payment only of the debt, that is to say, if or when

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1 Pothier, De Change, n. 185, 186; Nouguier, De Change, Tom. 1, p. 356, 357.

2 Pothier on Oblig. by Evans, n. 546; Thomson on Bills, ch. 5, § 4, p. 395, 396, (2d edit.)

3 Ibid.; Ante, § 105.

4 Pothier, De Change, n. 189; Morgan, &c. *v.* Their Creditors, 1 Miller, Louis. R. 527.

5 Ante, § 104; Thomson on Bills, ch. 1, § 3, p. 165-168, (2d edit.); Id. ch. 5, § 4, p. 396; Id. ch. 6, § 5, p. 532.

6 Ante, § 104, 404, 408.

the Note is paid.[1] But if the Note is intentionally received as absolute payment, the original debt becomes thereby extinguished.[2] The receipt of the Promissory Note of a third person in payment of the debt will amount to a positive extinguishment of the original debt, by way of novation, as well by our law, as the foreign law, if so intended by the parties.[3]

§ 439. In the next place, as to Confusion. This is defined by Pothier, technically, to be the concurrence of two qualities in the same subject, which mutually destroy each other,[4] or, perhaps, as it might be more

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1 Ante, § 104, 389; Thomson on Bills, ch. 1, § 3, p. 165-168, (2d edit.); Swinyard *v.* Bowes, 5 Maule & Selw. 61; Chitty on Bills, ch. 5, p. 200-203, (8th edit.); Bayley on Bills, ch. 9, p. 334, (5th edit.); Id. p. 363, 364; Puckford *v.* Maxwell, 6 Term R. 52; Thomson on Bills, ch. 1, § 3, p. 165-172, (2d edit.); Shearm *v.* Burnard, 10 Adolp. & Ell. 593; Sayer *v.* Wagstall, 5 Beavan, R. 415; Story on Bills, § 419; Tobey *v.* Barber, 5 John. R. 68; Murray *v.* Gouverneur, 2 John. Cas. 433; Johnson *v.* Weed, 9 John. R. 310; Hoar *v.* Clute, 15 John. R. 224; Holmes *v.* D'Camp, 1 John. R. 34; Pintard *v.* Tackington, 10 John. R. 104; Burdick *v.* Green, 15 John. R. 247. In Massachusetts, a Note taken for a precedent debt is primâ facie deemed an absolute payment. But the presumption may be rebutted by showing, that it was received as a conditional payment only. In other respects the general rule prevails, which governs in other States. Therefore, a Promissory Note given to a creditor is not payment of a preëxistent debt, unless so intended by the parties. Baker *v.* Briggs, 8 Pick. R. 122; Watkins *v.* Hill, 8 Pick. R. 522, 523; Thacher *v.* Dinsmore, 5 Mass. R. 299; Greenwood *v.* Curtis, 6 Mass. R. 358; Johnson *v.* Johnson, 11 Mass. R. 389; Maneely *v.* McGee, 6 Mass. R. 143; Goodenow *v.* Tyler, 7 Mass. R. 36; Emerson *v.* The Hat Manufacturing Company, 12 Mass. R. 237; Jones *v.* Kennedy, 11 Pick. R. 125; Wood *v.* Bodwell, 12 Pick. R. 268; Van Cleef *v.* Therasson, 3 Pick. R. 12; Butts *v.* Dean, 2 Metc. R. 76; Ilsley *v.* Jewett, 2 Metc. R. 168, 173.

2 Ibid.; Bayley on Bills, ch. 9, p. 363, 364, (5th edit.); Ante, § 104.

3 Ante, § 404; Shearm *v.* Burnard, 10 Adolp. & Ellis, 593; Owenson *v.* Morse, 7 Term R. 64; Bayley on Bills, ch. 9, p. 363, 364, (5th edit.); Kearslake *v.* Morgan, 5 Term R. 513; Pothier on Oblig. by Evans, n. 548, 549; Johnson *v.* Weed, 9 John. R. 310.

4 Pothier on Oblig. by Evans, n. 605; Story on Bills, § 442; Thomson on Bills, ch. 5, § 4, p. 395, 396, (2d edit.); Nouguier, De Change, Tom. 1, p. 358.

exactly expressed according to our English idiom, it is the concurrence of two adverse rights to the same thing in one and the same person. This may occur in several ways; as, for example, when the creditor becomes the heir of the debtor, or, *vice versâ*, when the debtor becomes the heir of the creditor.[1] The same consequence ensues, when the creditor succeeds to the debtor by any other title, which renders him subject to his debts, as, for example, if he is his universal donatary or legatee; or where the debtor succeeds, by whatever means, to the rights of the creditor.[2] The reason given for the doctrine is, that it is impossible for a person to be at the same time both creditor and debtor. He cannot be his own creditor, and at the same time his own debtor.[3]

§ 440. Hence it is, that, by the French law, the extinction of the principal debt by confusion induces an extinction of the obligation of the sureties for the same debt, as it is a mere accessary obligation.[4] *Quum principalis causa non subsistit, ne ea quidem, quæ sequentur, locum habent.*[5] On the other hand, the extinction of the accessary obligation of the surety by confusion does not induce an extinction of the obligation of the principal. The reason of the difference is, that the accessary obligation cannot subsist without the principal obligation continues; but the principal does not in any degree depend for its existence upon the subsistence of the accessary.[6] In this respect, confusion differs from pay-

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[1] Pothier on Oblig. by Evans, n. 606; Story on Bills, § 442.
[2] Pothier on Oblig. by Evans, n. 606; Story on Bills, § 442.
[3] Pothier on Oblig. by Evans, n. 607.
[4] Pothier on Oblig. by Evans, n. 608.
[5] Dig. Lib. 50, tit. 17, l. 129.
[6] Pothier on Oblig. by Evans, n. 609.

ment; for by payment the thing is no longer due by any body; and the principal obligation is extinguished, as well as the accessary.[1]

§ 441. When the holder becomes an heir as to part of the debt or credit only, the law of confusion applies only to the extinguishment *pro tanto* of that part.[2] Accordingly, Pothier says: In order to induce a confusion of the debt, the characters, not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person. If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident, that the confusion and extinction can only take place, with respect to the part, for which he is creditor. *Vice versâ*, if the creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part. It is equally evident, that, if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction only take place in respect of the part, for which he is heir, and for which he is liable to all the other debts of the succession. The demand continues to subsist against the others, as to the parts, for which they are respectively liable to the debts of the deceased.[3]

§ 442. There is one exception to the doctrine of confusion, which is proper to be taken notice of in this place. When it is said, that, where the creditor becomes the heir of the debtor, his debt is extinguished, it is to be understood, that he is not only executor or administrator of the estate, but that he is the sole heir of the property, subject to other debts. And hence, if he ac-

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[1] Pothier on Oblig. by Evans, n. 609.
[2] Pothier, De Chang. n. 196.
[3] Pothier on Oblig. by Evans, n. 612; Story on Bills, § 444.

cepts the executorship, with the benefit of an inventory, no such confusion is introduced; because, it is said, that the beneficiary heir and the succession are then deemed different persons, and their respective rights are not confounded.[1]

§ 443. Without following out the doctrine of the French law into its more minute details, let us see, how it applies to Promissory Notes. If the holder of the Note becomes the heir of the maker, or, on the contrary, the maker of the Note becomes the heir of the holder, or a third person has the succession of both the holder and the maker devolved upon him, *ex necessitate*, a case of confusion arises; and the debt becomes extinguished.[2] And this extinguishment of the debt operates, not only between the holder and the maker, but in respect to the indorsers also.[3] If the confusion occurs between the holder and an indorser, it discharges the subsequent indorsers only, and not the prior indorsers.[4] When the confusion occurs between the holder and an antecedent indorser, not his immediate indorser, it extinguishes all the rights of the holder, not only as to that indorser, but as to all subsequent indorsers.[5]

§ 444. The English law is not exactly coincident with the law of France upon the subject of confusion; but it furnishes, in many cases, a doctrine founded on a striking analogy. Thus, if the creditor appoints his

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[1] Pothier on Oblig. by Evans, n. 606; Story on Bills, § 444.

[2] Nouguier, de Change, Tom. 1, p. 358; Pothier, De Change, n. 190; Story on Bills, § 445.

[3] Pothier, De Change, n. 190; Nouguier, De Change, Tom. 1, p. 359; Story on Bills, § 445.

[4] Nouguier, De Change, Tom. 1, p. 359; Pothier, De Change, n. 193, 194.

[5] Pothier, De Change, n. 195.

debtor to be his executor, that operates, at law, as a release or extinguishment of the debt.[1] And the law is the same, where the creditor appoints one of several joint, or joint and several debtors to be his executor; for the executor cannot sue himself.[2] But, by the English law, this extinguishment operates only, where there are other assets of the creditor to pay all his debts; for if there be not other assets, then the creditors of the testator have a right to payment out of the debt, as a part of the assets.[3] In case of the appointment of the debtor as administrator of the creditor's estate, as it is the mere act of law, and not of the creditor himself, the debt is not extinguished.[4] And in equity, in England, the same rule prevails, even in the case of executors, who are treated as having, in fact, paid the debt, by adding it to the assets.[5] In case of the appointment, by a debtor, of his creditor, to be his executor, no such merger or extinguishment takes place, unless the executor receives assets sufficient to pay the debt, and there is a right to appropriate the same to that purpose, and then he is presumed so to do.[6]

§ 445. Before concluding this head, it seems proper to take notice of another point of great practical importance, which has been already brought under discussion,[7] as to the duty of the holder, and the rights of the maker, or the indorser, upon the payment of a Promis-

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[1] Freakley *v.* Fox, 9 Barn. & Cressw. 130.

[2] Williams on Executors, Pt. 3, B. 3, ch. 11, § 9, p. 937–946, (2d edit.); Freakley *v.* Fox, 9 Barn. & Cressw. 130. See Pothier on Oblig. by Evans, n. 276.

[3] Ibid.

[4] Ibid.

[5] Ibid.; Carey *v.* Goodinge, 3 Bro. Ch. R. 111; Berry *v.* Usher, 11 Ves. 90; Simmons *v.* Guttridge, 13 Ves. 262.

[6] Story on Bills, § 443.

[7] Ante, § 106–112, 243–245.

sory Note. And that point is, whether the maker or the indorser, upon whom a due demand is made for payment of the Note, is bound to pay the same, unless, the Note is at the time produced and delivered up to him. It is obvious, that, if the Note is not produced, and delivered up, when it is paid, that the maker may, in case of its having been lost or transferred, and, coming into the possession of a *bonâ fide* holder, before its maturity, be liable to pay the same a second time; and he can have no positive security against such liability. At law, no such security can be required to be given. A Court of Equity, however, may, where the Note is asserted to be lost, give relief to the holder; but, then, it is always upon the terms, that he shows satisfactory proofs to establish the loss, and gives good security for the repayment of the money, if the maker shall be compelled to pay the same again to another holder.[1] Still, this is imposing some hardship upon the maker, as he may be obliged to contest the rights of the holder in a second suit, and the evidence, by which he can resist payment, may, in the mean time, be greatly changed by the witnesses to the supposed prior loss being dead, or having removed, and their place of residence being unknown; so that, without any default on his own part, he may be subjected to expensive and protracted litigation, in order to avoid a double payment; and, in the mean time, the original holder, to whom he had paid the amount, as well as his sureties, may have become insolvent.[2] The hardship would be still more glaring in respect to the indorser, for, not only may he

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[1] Macartney *v.* Graham, 2 Sim. R. 285; Daveis *v.* Dodd, 1 Wilson, Exch. R. 110; S. C. 4 Price, 176; Story on Eq. Jurisp. § 85, 86.

[2] Story on Bills, § 447; Ante, § 107, 108, 111.

remain liable to pay any other *bonâ fide* holder, who shall establish a good title to the Note; but his own right of recovery over against the antecedent indorsers, and also against the maker, may be materially obstructed, if not destroyed, by his inability to trace the various devolutions of the title to the Note through the hands of such indorsers, as well as to ascertain, who is the final holder entitled to payment thereof.[1]

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[1] See Bayley on Bills, ch. 9, p. 370, (5th edit.); Champion *v.* Terry, 3 Brod. & Bing. R. 295; Antè, § 107, 108, 111. In Smith *v.* Rockwell, 2 Hill, N. Y. R. 482 – 484, Mr. Chief Justice Nelson, in delivering the opinion of the Court, said; "If the makers had offered to pay the Note in question, but declined on finding that it was lost, or if the indorser had proposed to take it up on receiving notice of protest, with a view of calling upon his principals, the question would have been different from the one now presented. The Note being negotiable, neither was bound to make payment without receiving it as their voucher; or upon tender of ample indemnity against any future liability. This has been deliberately settled, and for the most satisfactory reasons. (Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Rowley *v.* Ball, 3 Cowen, 303; Chitty on Bills, 423; Chitty, Jun. 53.) An indemnity may be required in such cases, with a view to proceedings in a Court of Equity to compel payment notwithstanding the loss. Tender of indemnity should be made to both maker and indorser at the time of demand and notice; because, as the former is not bound to make payment without the production of the Note, or indemnity in case of loss, for that very reason, payment ought not to be required of the latter, till the proper steps have been taken to secure his immediate recourse against his principal. Besides, the indorser's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in a situation to pay the demand at any time after notice, and look to the maker. Any prejudice he might suffer by reason of neglect on the part of the holder to give the necessary indemnity in either case, would, no doubt, afford ground for refusing to enforce payment against him on application to a Court of Equity for that purpose. The holder, therefore, should take the necessary steps, with all reasonable diligence, to secure a speedy resort to that Court in behalf of the surety; as the consequences of delay would justly fall upon the holder, so far as the indorser or any other party standing in that relation upon the paper is concerned." See also 3 Kent, Comm. Lect. 44, p. 115, (5th edit.); Post, § 448.

§ 446. Considerations of this sort, have, (as has been already intimated,[1]) in England, led to the final establishment of the doctrine, (which, however, was formerly open to much doubt and diversity of opinion,) that there is, and should be, no remedy at law for the holder of a negotiable Promissory Note, which has been lost, to recover the contents from any antecedent party on the Note, whether he is the maker or the indorser thereof; but, that the sole remedy is and should be in a Court of Equity, where the relief will be granted upon the holder's proving the loss, and giving a suitable bond of indemnity.[2]

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[1] Ante, § 107, 108.

[2] Ante, § 108; Thomson on Bills, ch. 3, § 5, p. 323, (2d edit.); Bayley on Bills, ch. 9, p. 369–373, (5th edit.); Chitty on Bills, ch. 6, p. 291; 292, 295, (8th edit.); Id. ch. 9, p. 456, 458; Davis *v.* Dodd, 4 Taunt. R. 602; Ex parte Greenway, 6 Ves. 812; Mossop *v.* Eadon, 16 Ves. 430; Powell *v.* Roach, 6 Esp. R. 76; Pierson *v.* Hutchinson, 2 Camp. R. 211; Wain *v.* Bailey, 10 Adolp. & Ellis, 616; Poole *v.* Smith, Holt, R. 144; Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Ramug *v.* Crowe, 1 Welsby, Hurlstone & Gordon, 167. The doctrine was very thoroughly discussed by Lord Tenterden, in delivering the opinion of the Court in the case of Hansard *v.* Robinson, 7 Barn. & Cressw. 90, which was the case of a suit on a lost Bill of Exchange, brought by an indorsee against the acceptor. On that occasion his Lordship said; "Upon this question, the opinions of the Judges, as they are to be found in the cases quoted at the bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions, the proper course is, to revert to the principle of these actions on Bills of Exchange, and to pronounce such a decision as may best conform thereto. Now the principle, upon which all such actions are founded, is the custom of merchants. The general rule of the English law does not allow a suit, by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the Bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor, paying the Bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge, *pro tanto*, in

§ 447. The French law (as we have already seen[1]) adopts precisely the same rule, which is followed in Courts of Equity; and there is great reason to suppose that it constitutes the basis of the general law of the commercial nations of Continental Europe. Heineccius on this subject says: *Elegans quæstio est, an, amissis literis cambialibus, ipsum debitum cambiale exspiret? Id quod merito negatur. Quodsi debitor fateatur, se cambiales*

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his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the Bill, can it be doubted, that the acceptor might retract his offer, or retain his money? And, if this be the right of an acceptor, ready to pay at the maturity of the Bill, must not his right remain the same, if, though not ready at that time, he is ready afterwards? and, can his right be varied, if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher and his discharge towards the drawer, remain unchanged. As far as regards his voucher and his discharge towards the drawer, it will be the same thing, whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the Bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And, if the Bill should afterwards appear, and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost Bill, is he to seek for the witnesses to prove the loss, and to prove, that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence, or misfortune, to cast this burden upon the acceptor, even as a punishment for not discharging the Bill on the day it became due? We think the custom of merchants does not authorize us to say, that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and, if it be refused, he may enforce payment thereupon in a Court of Equity." Whether the like rule prevails, when a Bill has been destroyed, and proof of its destruction is made, as for example, of its being consumed by fire, seems to have been thought more doubtful. But, in such a case, the situation of the acceptor, as to the importance of possessing the voucher to establish his claim against the drawer, as well as his own personal security, may require the rule to be strictly adhered to. What evidence can the acceptor have, that the evidence of the destruction is not false, by mistake, or design? See also Stat. 9 & 10 Will. 3, ch. 17, § 3.

[1] Ante, § 110, 111.

litteras dedisse, index illum per exsequutionem cambialem adigere potest ad solvendum, modo actor prius cautionem de futura indemnitate præstiterit. Sin vero neget reus, probatione, adeoque processu ordinario opus est: victus tamen reus exsequutione cambiali ad solvendum compellitur.[1]

§ 448. In America there has been (as we have already seen) some diversity of judgment, whether a suit is maintainable at law, upon a lost Bill, against the maker or not. In some States, the doctrine has been maintained in the affirmative;[2] in others, it has been held in the negative.[3] In others, again, it has been held, that the holder is entitled to recover at law, provided he executes a suitable instrument of indemnity.[4] Which doctrine will ultimately prevail in America, it is not for the Commentator to conjecture. But it may be said, with great confidence, that it will be difficult to overturn, upon satisfactory grounds, the reasoning of Lord Tenterden, already referred to, in favor of the negative.[5]

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1 Heinnec. de Camb. cap. 6, § 11.

2 Meeker *v.* Jackson, 3 Yeates, R. 442; Lewis *v.* Petayvin, 16 Martin, R. 4; Miller *v.* Webb, 8 Louis. R. 516; Bullet *v.* Bank of Pennsylvania, 2 Wash. Cir. R. 172; Hinsdale *v.* Bank of Orange, 6 Wend. R. 378.

3 Rowley *v.* Ball, 3 Cowen, R. 303; Kirby *v.* Sisson, 2 Wend. R. 550; Smith *v.* Rockwell, 2 Hill, N. Y. R. 482. See Morgan *v.* Reintzel, 7 Cranch, R. 275; Renner *v.* Bank of Columbia, 9 Wheat. R. 581.

4 Ante, § 111.

5 Ante, § 446, and note. The reasoning in favor of maintaining a suit at law upon a lost Bill or Note is very fully given by Mr. Justice Washington, in delivering the opinion of the Court in Martin *v.* The Bank of the United States, 4 Wash. Cir. R. 253, 255. He there said; "The principles upon which this Court decided the case of Bullet *v.* The Bank of Pennsylvania (2 Wash. Cir. R. 172) were, that a bank, or any other promissory note, is the evidence of a debt due by the maker to the holder of it, and nothing more. It is also the highest species of evidence of such debt, and, in fact, the only proper evidence, if it be in the power of the owner of the note to produce it. But if it be lost or destroyed, or, by fraud or accident, has got into the possession of the maker, the owner does

But, when we come to the case of the indorser, who is called upon to pay the Note, in default of payment by

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not thereby lose his debt, but the same continues to exist in all its rigor, unaffected by the accident which has deprived the owner of the means of proving it, by the note itself. The debt still existing, the law which always requires a party, that he should produce the best evidence of his right of which the nature of the thing is capable, permits him, where such better evidence is lost, or destroyed, or not in his power, to give inferior evidence, by proving the contents of the lost paper; and if this be satisfactorily made out, he is entitled to recover. If the evidence be not lost, but is merely impaired by accident, or even by design, if such design be not to injure the maker or to cancel the debt, the principle of law is the same. Cutting a bank-note into two parts does not discharge the bank from the debt, of which the note was but the evidence, nor does it even impair the evidence itself, if, by uniting the parts, the contents of the entire note can be made out. If one of the parts should be lost, or destroyed, the debt would be no more affected, than if the entire parts had been lost, or destroyed. The evidence is impaired, indeed, not by the act of cutting the note, but by the same accident, which would have affected the entire note, had that been lost. In both cases, the owner must resort to secondary evidence, and is bound to prove, that the note did once exist, that it is lost or destroyed, and that he is the true, bonâ fide owner of the debt. If one part only of the note be lost, the difficulty which the real owner of it has to encounter in proving his right to the debt is diminished. For, if the entire note be lost, the owner of it at the time of the accident may not be entitled to the debt of which it was the evidence, at the time he demands payment, because the note, passing from hand to hand, by bare delivery, may have been found, and have got into the possession of a bonâ fide holder. But against the real owner of one half the note, there cannot possibly be an opposing right. The finder, or robber, of the other half part cannot assert a right to the debt, because he cannot prove that he came fairly to the possession of the evidence of it. I speak judicially, when I say that he cannot prove that fact, because he cannot do it without the aid of perjury, which the law does not presume, and can in no instance guard against it. If the lost half note gets fairly into the hands of a third person, he takes it with notice that there may be a better title in the possession of the other half, and consequently he looks for indemnity to the person from whom he received the half part, if it should turn out that he was not the real owner of the entire note. It is impossible, therefore, that the bank can be legally called upon to pay the note twice; and if the officers of the institution suffer themselves to be imposed upon by insufficient or false evidence, by which means the bank is brought into this predicament, she must abide the loss as being occasioned by an error of judgment in the officers of the bank, the maker, it will be difficult to find any solid reason, upon which the holder can be entitled to recover against him, without the Note being produced, upon any mere parol proof of the loss of it; since the indorser may or must thereby be put to great embarrassment in making out his own title against the maker, or against other parties, liable to him, without the production of the Note.

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or their want of due caution. The law cannot adapt its provisions to every possible case that may occur, and it therefore proceeds from necessity upon general principles applicable to all cases. If, upon any other ground than fraud, or perjury, the maker of the lost note may by possibility be twice charged, the law will not expose him to that risk by relieving the asserted owner of it; not because there may be imposition in the case, or because the debt ought not to be paid; but because the proof, that the claimant is the real owner of the debt is defective; for it by no means follows, that because the lost note did belong to him, that it may not then be the property of some other person. A Court of Law therefore will, in such a a case, dismiss the parties from a forum which has no means of securing the maker of the note against a double charge, and leave him to one where those who ask of it equity will be compelled to do equity. The case then resolves itself very much into a question of jurisdiction. For it is quite clear, that the real owner of a debt, the evidence of which is lost, is entitled to supply the want of a better evidence by that which is secondary, and this rule of evidence is the same in equity as at law. But whether the application for relief shall be in the one court, or in the other, must depend upon the particular case, and its fitness for the one jurisdiction or the other. Many difficulties were stated by the defendant's counsel, to which the practice of cutting the notes and transmitting them by mail exposes banking institutions in identifying the part of a note when produced for payment. That these difficulties do in a measure exist, must be admitted. But the bank knows, that there can be but one owner of the note, and who that one is must be satisfactorily proved, to entitle him to payment of it. The bank has a just right to call for such proof; and if it be truly and faithfully given, there can be no risk in paying it. The possessor of the other half part of the note, as already observed, by whatever means he acquired it, can never oblige the bank to pay the money over again to him. But, after all, the rule of law does not rest upon this circumstance. The maker of the note is bound to pay to the person, who proves himself to be the legal owner of it; and the difficulties complained of are not greater than those, which attend most litigated questions." See also Posey *v.* Decatur Bank, 12 Alabama, R. 802; Thayer *v.* King, 15 Ohio, R. 242.

What right can the holder have, to shift upon him the burden of proving the loss of the Note? Or, what adequate means can he have of preserving and commanding all the proof for future use in case of future litigation? The English doctrine must, under such circumstances, apply to the indorser with double propriety and force.[1]

§ 449. A distinction has sometimes been taken between the case of a Note's being lost, and the case of its being destroyed, and non-existent *in rerum natura* In the former case, (as we have seen,[2]) an action is not in England maintainable at law by the holder; but only in equity. In the latter case, it has been thought, that an action may be maintainable at law, since the destruction of the Note takes away the possibility of its getting into the possession of any subsequent *bonâ fide* holder.[3] But there is this remaining difficulty, that evidence, which is merely presumptive, may be offered, of the destruction of the Note, and then it may expose the maker to all the inconveniences of a subsequent second payment, if the Note should subsequently reappear. And there is no more hardship, in sending the holder into equity for redress in the case of the destruction of the Note, than there in is the case of the loss of the Note. In each case, however, the security of the maker in making payment is essentially promoted, and his lia-

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[1] See Chitty on Bills, ch. 9, p. 285, 291, 293, (8th edit.); Id. ch. 10, p. 532, (8th edit. 1833); Bayley on Bills, ch. 9, p. 369–373, (5th edit.); Story on Bills, § 449; Ante, § 107, 108, 111, 445.

[2] Ante, § 107.

[3] Pierson *v.* Hutchinson, 2 Camp. R. 211; Mayor *v.* Johnson, 3 Camp. R. 324; Champion *v.* Terry, 3 Brod. & Bing. 295; Thomson on Bills, ch. 3, § 5, p. 323, (2d edit.); Ante, § 107.

bility to future loss, founded upon new or varying evidence, is greatly diminished by the course adopted in equity.[1]

§ 450. There seems, also, formerly, to have been a distinction taken between the case of a loss of the Note before it was due, and the case of a loss after it was due, upon the ground, that if lost after it was

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[1] Mr. Bayley (on Bills, ch. 9, p. 369 – 372, 5th edit.) states the doctrine in the following summary manner: — "If a Bill or Note be destroyed by fire or other accident, an action may perhaps be brought thereon, as if it were in esse. But, if a Bill or Note be lost, there can be no remedy upon it at law, unless it was in such a state, when lost, that no person but plaintiff could have acquired a right to sue thereon. As, if it were specially indorsed to plaintiff, and had no indorsement from him upon it. Where it is so specially indorsed, an action may, perhaps, be brought thereon. If a man take a Bill or Note for an antecedent debt, and lose it before it is due, with a blank indorsement thereon, he cannot sue upon the Bill or Note; nor for the antecedent debt; unless he can show that the Bill has been actually destroyed, so that no claim can ever be made thereon against the person he sues. Nor even then, if such person could have sued upon the Bill on taking it up. But, if the Bill or Note were unindorsed, and no valid claim can be made thereon for want of such indorsement, the loser is not precluded from suing for the antecedent debt, or upon the Bill or Note; unless the defendant would have had a remedy over upon the Bill or Note, upon paying it. Where the person paying, is entitled to require an indemnity, the only remedy on a lost Bill is in equity; a Court of Equity can inquire into the sufficiency of an indemnity; a Court of Law cannot." Mr. Chitty (on Bills, ch. 6, p. 293, 8th edit.) says: "It seems, however, that if it can be distinctly proved, that the Bill has been destroyed, the party who was the holder may recover at law; so, if the Bill was not negotiable, or has not been indorsed at all; or, if it was only specially indorsed, the party who lost it may proceed by action on such Bill, and secondary evidence of the contents may be admitted. And, if the defendant has suffered judgment by default, and thereby admitted his liability to the action, the amount of the principal and interest may be referred to the master, on production of a verified copy of a lost Bill. But the mere circumstance of the statute of limitations having run on the Bill before the loss, will not enable the loser to sue." The reasoning of Lord Tenterden in Hansard *v.* Robinson, 7 Barn. & Cressw. 90, 94, 95, applies equally as strongly to cases of the destruction of a Note, as it does to the loss of a Note. Ante, § 446, and note.

due, no subsequent holder could recover upon the Note, except subject to all the equities between the antecedent parties. But it is now clearly settled in England, that whether the Note be lost before or after it becomes due, or after actual demand of payment, or even after an express promise to pay, still no action at law can be maintained thereon; but the sole remedy is in equity. The ground of the decision is, that in each case, the maker of the Note is equally entitled to have the Note surrendered up to him upon payment, as his voucher therefor. Besides; though he may have a good defence against a subsequent holder, he may be put to great risk, trouble, and expense in establishing it, and that without any default on his own part.[1] Losing a Note ordinarily implies negligence on the part of the loser, and the inevitable results of such negligence ought to fall upon him, rather than upon an innocent party.[2]

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1 Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Bayley on Bills, ch. 9, p. 373, (5th edit.); Chitty on Bills, ch. 6, p. 291, 292, 295, 296, (8th edit.); Thomson on Bills, ch. 3, § 5, p. 323-325, (2d edit.); Ante, § 107, note.

2 Ibid. Mr. Chitty (on Bills, ch. 6, p. 295, 296, 8th edit.), sums up the reasoning in these words: "It was urged that when a Bill, &c. has been lost before it was due, unless the party proceed under the statute 9 & 10 Will. 3, ch. 17, § 3, it may be proper that he should be confined to a Court of Equity for relief; for, as a transfer before a Bill is due, though made by a person not entitled thereto, may give a bonâ fide holder a right of action thereon; it is but just, that the parties called upon to pay should be previously sufficiently indemnified, and the sufficiency of an indemnity can be more correctly ascertained in a Court of Equity than at law. But it was contended, that where a Bill has been lost after it became due, and that fact be clearly proved, there seems to be no reason why the party who lost it should not be permitted to proceed at law, and, indeed, without offering an indemnity, inasmuch as the law itself would in such case indemnify all the parties to the Bill from any liability to a person who became holder of it after it was due; because, a person taking a Bill by transfer after it be-

§ 451. There seems to be a far better ground (although it is not without some inconvenience) for allowing a recovery on a lost or destroyed Note at law, where it is not negotiable; for, in such a case, the maker is not liable at law to pay the same to any other person than the original payee; and whoever derives title under the payee must sue in the name of the latter, and must take the Note subject to all the equities between the maker and the payee.[1] In this respect, our law is precisely coincident with the old law of France, which took a similar distinction between negotiable Notes and Notes not negotiable.[2] The same rule will apply, if it were originally nego tiable, where it has not been indorsed by the payee,

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comes due, holds it subject to all the objections, which affected it in the hands of the party, who first became wrongfully possessed of it, or who tortiously transferred it, and consequently, he could not sustain an action thereon against any of the parties to the Bill; and there is an additional reason, why this should apply as to the drawer and indorsers of a Bill, and the indorsers of a Note, namely, that they must have been discharged from liability to any subsequent holder by the want of notice from such holder of the default in payment by the drawee. But the answer to this reasoning is, that it is part of the contract of an acceptor of a Bill or maker of a Note, to pay on the presentment of the instrument to him for that purpose, and that he has therefore a right to have the instrument delivered to him as his voucher. Besides; though he may have a good defence against a subsequent holder, he may be put to risk, trouble, and expense, in establishing it."

1 Ante, § 106; Mossop *v.* Eadon, 16 Ves. 430; Chitty on Bills, ch. 6, p. 293, 294, (8th edit.); Thomson on Bills, ch. 3, § 5, p. 323, 324, (2d edit.); Wain *v.* Bailey, 10 Adolp. & Ellis, 616. In this last case it was held, that, if the Note was not negotiable, the maker could not insist upon its production and delivery up, when called upon to pay it; and that his refusal to pay it, because of such non-production and delivery, was no defence to an action brought for the recovery of the amount due thereon. But see Blackis *v.* Piddling, 6 Manning, Granger & Scott, 196.

2 Jousse, Comm. sur l'Ord. 1673, art. 18, 19.

or where it has been specially indorsed to a particular party, to whom it is to be exclusively payable.[1]

§ 452. It has been considered as doubtful, whether the maker of a Note, or other party paying a Note, is entitled, upon the payment of the Note, to insist upon a receipt from the holder.[2] It would now seem, upon general principles, that he is entitled to claim it as a matter of right.[3] In cases of Bills of Exchange, it is usual to give a receipt upon the back of the Bill; and, by parity of reason, it would seem, that the same course should be adopted in cases of Notes.[4] In cases of part payment, it would seem proper to indorse the amount paid on the back of the Note, otherwise, the maker may be liable to pay the amount again to a *bonâ fide* indorsee.[5] In cases of payment by indorsers, there seems a stronger ground to insist upon a receipt, because it may materially affect the proof of their right of recovery over against the antecedent parties to the Note.[6] It is said, that the production of a Note in the hands of a party, either as maker, or as indorser, is not evidence, that it has been paid by him, but proof *aliunde* should be given; and hence the importance

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1 Chitty on Bills, ch. 6, p. 291 – 293, (8th edit.); Bayley on Bills, ch. 9, p. 369 – 371, (5th edit.); Rolt *v.* Watson, 4 Bing. R. 273; Long *v.* Bailie, 2 Camp. R. 214; Ante, § 106, 107, 110.

2 Chitty on Bills, ch. 9, p. 456, (8th edit.); Id. p. 423, 424, (9th edit. by Chitty & Hulme); Ante, § 106, note.

3 See Cole *v.* Blake, Peake, R. 179, 180; Green *v.* Croft, 2 H. Bl. 30; Ante, § 106, note; Chitty on Bills, ch. 8, p. 436, (8th edit.); Id. p. 457, (9th edit.)

4 Ibid.

5 Chitty on Bills, ch. 9, p. 456, (8th edit.); Cooper *v.* Davies, 1 Esp. R. 463.

6 Chitty on Bills, ch. 9, p. 456, (8th edit.); Id. 423, 424, (9th edit. by Chitty & Hulme.)

of a receipt upon the back of the Note.[1] But there is much reason to contend, that the possession of a Note by the maker, or by the payee, or by any subsequent indorser, is *primâ facie* evidence, notwithstanding there are subsequent indorsements thereon, that he is the true and lawful owner thereof, and that he has reacquired the full title thereto. And, accordingly, this seems now to be the better opinion maintained in America, notwithstanding some early doctrine the other way.[2]

§ 453. In cases of Bills of Exchange, if the drawee of the Bill refuses to accept the Bill, any person may accept *supra* protest, for the honor of all or any of the antecedent parties; and, if the Bill should, at its maturity, be dishonored, and protested, the acceptor *supra* protest will, upon payment thereof, be entitled to recover the amount against any of the antecedent parties, for whose honor he has accepted the Bill.[3] In like man-

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[1] See Pfiel *v.* Vanbatenberg, 2 Camp. R. 439; Mender *v.* Carreroon, 1 Ld. Raym. 742; Chitty on Bills, ch. 9, p. 456, 457, (8th edit.); Id. p. 423, (9th edit. by Chitty & Hulme); Welch *v.* Lindo, 7 Cranch, R. 159; Ante, § 106, and note.

[2] Dugan *v.* U. States, 3 Wheat. R. 172. In this case, the Supreme Court of the U. States held, "That if any person, who indorses a Bill of Exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bonâ fide holder and proprietor of such Bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing the receipt or indorsement back from either of the indorsers, whose names he may strike from the Bill or not, as he may think proper." The Court thus overruled the earlier case of Welch *v.* Lindo, 7 Cranch, R. 159. The cases of The U. States *v.* Barker, 1 Paine, Cir. R. 156; Norris *v.* Badger, 6 Cowen, R. 449; Brinkley *v.* Going, 1 Breese, R. 288; Campbell *v.* Humphreys, 2 Scamm. 478, 479, and notes; and Bank of U. States *v.* U. States, 2 How. Sup. Ct. R. 711, are to the same effect as the case in 3 Wheat. R. 172. See also Mottram *v.* Mills, 1 Sandford, Sup. Ct. R. 37; Dollfus *v.* Frosch, 1 Denio, R. 367.

[3] Story on Bills, § 124, 125, 452; Chitty on Bills, ch. 8, p. 375-379,

ner, if, after the acceptance of the Bill, the drawee (who is then the acceptor) refuses to pay the Bill at its maturity, and it is then protested for non-payment, any person may in like manner pay the Bill *supra* protest, for the honor of all or any of the antecedent parties, and may, upon such payment, entitle himself to recover the amount so paid from the party or parties for whose honor the money has been paid.[1] It is only necessary, in this place, in order to guard against any mistakes, to state, that no such rule is, by the general commercial law, applicable to Promissory Notes. Whoever, therefore, not being a party to the Note, does undertake, upon the dishonor thereof, to pay it for the honor of the maker, or of any of the indorsers, does so at his peril; and does not, by the general commercial law, thereby acquire any right to repayment from any of the antecedent parties, for whose honor he paid it; but he can claim reimbursement only in virtue of some authority, express or implied, to make the payment, from the party on whose account he has paid it, or by suing, as an equitable assignee of the Note, in the name of the party, to whom he has paid it. The reason probably is, that the custom of merchants has never extended to cases of this sort, as Promissory Notes are not usually drawn payable in a foreign country, and the like necessity, therefore, does not ordinarily exist for the intervention of third persons to save the credit of the parties, or exempt them from damages, as does exist in cases of exchange and reëxchange.

(8th edit.); Pardessus, Droit. Comm. Tom. 2, art. 405; Nouguier, De Change, Tom. 1, p. 345, 346, 3 Kent, Comm. Lect. 44, p. 87, 88, (5th edit.)

[1] Pothier, De Change, n. 113; Ex parte Wackerbath, 5 Ves. 574; Code de Comm. art. 158.

CHAPTER X.

OF THE GUARANTY OF PROMISSORY NOTES.

§ 454. HITHERTO we have spoken of Promissory Notes, and of the rights, duties, obligations, and liabilities of the immediate parties thereto, either as maker, or payee, or indorser thereof. But persons, who are not immediate parties, in either of the characters above stated, may become liable for the payment of a Note, under a guaranty thereof. And it is our present purpose to inquire into the nature and effect of such a guaranty.

§ 455. The guaranty of Bills of Exchange is a well known contract, in free use among the different nations of Continental Europe. In France, it is known under the appellation of *Aval*, the origin of which word has been a matter of some difference of opinion among the French jurists, some of them holding, that it is derived from a word in the old French idiom (*à valle*,) signifying at the bottom, because it was commonly written at the foot or bottom of the Bill;[1] as we are accustomed to speak of an indorsement, from its being written on the back of the Bill (*in dorso*); others contending, that it is derived from the words *faire valoir*.[2]

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[1] Merlin, Répertoire, *Avalage*, *Avalcson*, *Avalison*; Walsh's Amer. Review, Vol. 2, p. 112, Appendix, note 53, (1811); Pothier, De Change, n. 50; Story on Bills, § 393-395; Savary, Le Parfait Negociant, Tom. 1, Pt. 1, Liv. 3, ch. 8, p. 205.

[2] Jousse adopts this latter derivation of the word, and says, that it signi-

§ 456. The like sort of guaranty may exist among the commercial nations of Continental Europe in respect to Promissory Notes; but it does not appear to be as well known, or as commonly used, as it is in cases of Bills of Exchange. The guaranty of Promissory Notes, however, is not uncommon in England or America; and in the latter country, especially, it is a contract of frequent occurrence. Let us then examine, (1.) The nature, obligation, and effect of a guaranty. (2.) The different forms, or modes, in which it may arise. (3.) When, and under what circumstances, a guaranty is negotiable or not. (4.) In what manner it is dissolved or extinguished.

§ 457. In the first place, then, as to the nature, obligation, and effect of a guaranty. A guaranty, in its legal and commercial sense, is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable to pay or

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fies "faire valoir"; and that it is a complete contract of guaranty, by simply writing at the bottom of the Bill the words "pour aval," with the signiture of the guarantor. Jousse (Comm. sur l'Ordon. 1673, art. 33), Bornier (Annot. sur. l'Ordon. 1673, art. 33), Savary (Le Parfait Nogociant, Tom. 1, Pt. 1, Liv. 3, ch. 8. p. 205), Locré (Esprit de Code de Comm. Tom. 1, art. 141, p. 445), and Nouguier, (Nouguier, De Change, Tom. 1, p. 311), give the same derivation. See Pardessus, Droit Comm. Tom. 2, art. 394-396. Heineccius gives the guaranty the Latin name "Avallum," and says: "Aut enim quis fidejubet separatim, tradito instrumento fidejussionis, et tunc juri cambiali adversus fidejussorem non est locus: aut in ipsis litteris cambialibus fidejussio latitat, et tunc fidejussor convenitur processu cambiali. Vocari hæc fidejussio solet avallum, idque fit sola subscriptione litterarum cambialium ab uno conscriptarum: tunc enim primus est debitor, reliqui pro fidejussoribus habentur." Heinecc. de Camb. cap. 3, § 26; Id. cap. 6, § 10; Chitty on Bills, ch. 6, p. 272, (8th edit.); Id. ch. 7, p. 352, 353; Story on Bills, § 454, 455; Id. § 372, 393, 396; Code de Comm. de France, art, 142; Codigo de Commercio (of Spain), 1829, art. 475-477.

perform the same.[1] It may be the guaranty of a prior debt, or prior contract or duty, or of a future debt, or future contract or duty; but in all these cases, it must be founded upon a sufficient and valid consideration. Three distinct classes of cases may be propounded on this subject, which require to be discriminated. (1.) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an assential ground of the credit given to the principal or direct debtor. Here, there is not, nor need be, any other consideration, than that moving between the creditor and original debtor. (2.) Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, although the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here, there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise. (3.) A third class of cases is, when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds; but the last is not.[2]

§ 458. In cases of guaranty, not only is it essential, that there should be a sufficient and valid consideration

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[1] 3 Kent, Comm. Lect. 44, p. 121, (5th edit.); Fell on Guar. 1; McLaren *v.* Watson's Ex'rs, 26 Wend. R. 425, 436; Dole *v.* Young, 24 Pick. R. 250, 252; Hull *v.* Farmer, 5 Denio, R. 484.

[2] Leonard *v.* Vredenburgh, 8 John. R. 29, 39; 3 Kent, Comm. Lect. 44, p. 122, 123, (5th edit.); Manrow *v.* Durham, 3 Hill, N. Y. R. 584; Hough *v.* Gray, 19 Wend. R. 202; Oakley, *v.* Johnston, 21 Wend. R. 588; D'Wolf *v.* Rabaud, 1 Peters, S. C. R. 476, 499, 501.

between the parties, but where they fall within the provisions of the statute of frauds of 29 Car. 2, cap. 3, § 4, it has been uniformly held in England, that the consideration must also appear by express words, or by just implication, upon the face of the instrument itself; and no parol proof is admissible to supply the defect.[1] We

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[1] Wain *v.* Warlters, 5 East, R. 10; Saunders *v.* Wakefield, 4 Barn. & Ald. 595; Jenkins *v.* Reynolds, 3 Brod. & Bing. 14; Morley *v.* Boothby, 3 Bing. R. 107; Newbury *v.* Armstrong, 6 Bing. R. 201: Allnutt *v.* Ashenden, 5 Mann. & Grang. 392. In Morley *v.* Boothby, 3 Bing. R. 107, 111–113, Lord Chief Justice Best expounded the whole doctrine, with admirable clearness and force, in delivering the opinion of the Court. He said: "The common law protected men against improvident contracts. If they bound themselves by deed, it was considered, that they must have determined upon what they were about to do, before they made so solemn an engagement; and, therefore, it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases, the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made was to suffer some inconvenience, in consequence of the one making, or the other accepting, such promise. If the contract was oral, the benefit or inconvenience, as well as the other parts of the contract, could only be proved by parol testimony. When the contract was reduced to writing, it was required, not only that the obligatory part, but that the inducement or consideration, should also be in writing, because it was always a rule in the law of evidence, that no parol testimony could be admitted, either to supply the defects, or explain the contents, of a written instrument. If the writing did not prove the consideration, it could not be proved in any other manner, and thus the contract failed, because the consideration, without which it was altogether inoperative, could not be shown. When the statute of frauds declared, that no person should be charged with the debt of another, except on an agreement in writing; if the clause in the statute had not expressed, (as I think it does,) that the whole agreement should be in writing, the law of evidence would have rendered it necessary the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony. Applying the principle of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in Saunders *v.* Wakefield, that, if I had never heard of Wain *v.* Warlters, I should have held that a consideration must appear on the face of the written instrument. It must also occur to any one, that, to attain the avowed object of the statute of frauds, (namely, the prevention of perjury,)

say, that the consideration should appear by express words, or by just implication; for it is sufficient, if, by reasonable intendment from the language of the instrument, the true consideration can be clearly made out;[1] and, upon this latter doctrine, there is no diversity between the English and the American authorities. The latter, indeed, have gone the length of holding, that, if the guaranty is stated on its face, to be "for value received," that alone, without further explanation, is a sufficient expression of the nature of the consideration.[2]

§ 459. But upon the point, whether the consideration should appear upon the face of the instrument of guaranty, there is a wide departure, in some of the American authorities, from the doctrine maintained in England, even where the statute of frauds has been adopted into the jurisprudence of the particular State.[3] In some States it has been held, that the promise only, and not

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it is more necessary to require, that the consideration of a bargain should appear in writing, than any other term or condition of it. That the consideration should appear on the instrument, not in any set, formal terms, but with clearness enough for the Courts to judge of its sufficiency, is now fully established by Wain *v.* Warlters, and Saunders *v.* Wakefield, in the King's Bench, and Jenkins *v.* Reynolds, in this Court."

[1] Stadt *v.* Lill, 9 East, R. 348; Warrington *v.* Furbor, 8 East, R. 242; Wain *v.* Warlters, 5 East, R. 10; Hawes *v.* Armstrong, 1 Bing. New Cas. 761; Russell *v.* Moseley, 3 Brod. & Bing. 211; Lysaght *v.* Walker, 5 Bligh, (N. S.) R. 1; Shortrede *v.* Cheek, 1 Adolp. & Ellis, 57; Jarvis *v.* Wilkins, 7 Mees. & Wels. 410; Newbury *v.* Armstrong, 6 Bing. R. 201; Emmott *v.* Kearns, 5 Bing. New Cas. 559; Stead *v.* Liddard, 1 Bing. R. 196.

[2] Douglas *v.* Howland, 24 Wend. R. 35; Watson *v.* McLaren, 19 Wend. R. 556; S. C. 26 Wend. R. 425; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Manrow *v.* Durham, 3 Hill, N. Y. R. 384; Foler *v.* Givens, 3 Hill, So. Car. R. 48; Post, § 464, 465; 3 Kent, Comm. Lect. 44, p. 122, note; Post, § 469.

[3] 3 Kent, Comm. Lect. 44, p. 121, 122, (5th edit.)

the consideration, need appear on the face of the instrument.[1] In others, the English doctrine, although recognized, has been qualified, and it has been held, that if the original contract and the guaranty are contemporaneous, there, no other consideration need be shown, than that which belongs to, or is found in, the original contract; and that parol proof is admissible to show, what that consideration is, without any distinction, whether the guaranty is on the same, or on a separate instrument.[2]

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1 Packard *v.* Richardson, 17 Mass. R. 122; Miller *v.* Irvine, 1 Dec. N. C. R. 103; Sage *v.* Wilcox, 6 Connect. R. 81.

2 Leonard *v.* Vredenburgh, 8 John. R. 29; Sears *v.* Brink, 3 John R. 210; 3 Kent, Comm. Lect. 44, p. 121, 122, (5th edit.); Bayley *v.* Freeman, 11 John. R. 220; D'Wolf *v.* Rabaud, 1 Peters, S. C. R. 476, 499, 501. See Stead *v.* Liddard, 1 Bing. R. 196. The ground of this doctrine was stated by Mr. Chief Justice Kent, in delivering the opinion of the Court, in Leonard *v.* Vredenburgh, 8 John. R. 29, 39. In that case, goods were sold on credit by Leonard to Johnson, and the latter gave his Promissory Note therefor, payable in sixty days, to Leonard, and Vredenburgh, at the same time, wrote on the back of the Note, "I guaranty the above." The learned Judge, after adverting to the fact, that the case was within the statute of frauds, said; "If there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in Wain *v.* Warlters did not stand in the way. The whole agreement between the plaintiff and defendant consisted in the promise to guaranty the debt of Johnson. To say, that the promise is void, for want of disclosing a consideration, is assuming what the plaintiff offered to show ought not to be assumed, for there was no distinct consideration passing between the plaintiff and the defendant. Johnson's Note, given for value received, and, of course, importing a consideration on its face, was all the consideration requisite to be shown. The paper disclosed, that the defendant guaranteed this debt of Johnson; and, if it was all one transaction, the value received was evidence of a consideration embracing both the promises. The writing imported, upon the face of it, one original and entire transaction; for a guaranty of a contract implies ex vi termini, that it was a concurrent act, and part of the original agreement. In Stadt *v.* Lill, 9 East, 348, the defendant gave a guaranty in this form; 'I guaranty the payment of any goods which Stadt delivers to Nichols;' and the King's Bench held, that 'the stipulated delivery of the goods to Nichols was a consideration ap-

Indeed, (as we shall presently see,) the doctrine in some of the American Courts, has gone farther; and it has

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pearing on the face of the writing, and when the delivery took place, the consideration attached.' The writing, in the present case, was of equivalent import and effect. Instead of saying, that he guaranteed the payment of goods delivered to Johnson, the defendant guaranteed the payment of the value received by Johnson. Upon the whole, we think that the plaintiff was entitled to recover, upon production and proof of the writing. But, if there was any doubt upon the face of the paper, whether the promise of Johnson and that of the defendant were or were not concurrent, and one and the same communication, the parol proof was admissible to show that fact." In D'Wolf *v.* Rabaud, 1 Peters, S. C. R. 476, 499–501, the subject was also discussed in the Supreme Court of the United States. It was a case originating in New York. On that occasion, the Court said; "The statute of frauds of New York is a transcript, on this subject, of the statute of 29 Charles 2, ch. 3. It declares, 'that no action shall be brought, to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by any one by him authorized.' The terms 'collateral' or 'original' promise do not occur in the statute, and have been introduced by Courts of Law, to explain its objects, and expound its true interpretation. Whether, by the true intent of the statute, it was to extend to cases, where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time between the parties; or, whether it was confined to cases, where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking; might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least in those states, where the English authorities have been fully recognized, and adopted in practice. If A. agree to advance B. a sum of money, for which B. is to be answerable, but, at the same time, it is expressed upon the undertaking, that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking; but rather, if one might use the phrase, a trilateral contract. The contract of B. to repay the money is not coincident with, nor the same contract with C., to do the act. Each is an original promise, though the one may be deemed subsidiary, or secondary, to the other. The original consideration flows from A., not solely upon the promise of B. or C., but upon the promise of both, diverso intuito, and each becomes liable to A., not upon a joint, but a several, original undertaking. Each is a direct, original promise, founded upon the same been held, that in cases of a written guaranty on the back of a Note, (whether contemporaneous or not,) not

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consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors, upon coexisting contracts, forming parts of the same general transaction. Of that very nature is the contract now before the Court; and if the intention of all the parties was, that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and, indeed, as part execution of it, to bind the defendant, not merely to George D'Wolf, but to the plaintiffs, (and so it has been established by the verdict,) then it is not very easy to distinguish the case from that which was put. But assuming that the true construction of the statute of frauds is as the authorities seem to support, and that such a promise would be within its purview, it remains to consider, whether the arguments at the bar do establish any error, in the opinion of the Circuit Court. In the first place, there is no repugnance between the terms of that letter, and the parol evidence introduced. The object of the letter was, to establish the fact, that there was a sufficient consideration for the agreement; and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import, that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed, by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher, and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time; there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said, with George D'Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms inter partes. If the parties intended, that it should express the joint assent of George D'Wolf and the defendant to the shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent, that it should be made upon the terms and in the manner stated in it, there is nothing, which contradicts its proper purport; and it is then precisely what the parties require it to be. It was for the jury to say, whether the evidence disclosed that as the true object of it; and to give it effect, accordingly, as proof of an agreement, in support of the declaration. The case of Sargent *v.* Morris, 3 Barn. & Ald. 277, furnishes no uninstructive analogy for its admission. In the next place, was the parol evidence inadmissible to supply the defect of the written instrument, as to the consideration, and res gestæ, between the parties? The case of Wain *v.* Warlters, 5 East, R. 10, was the first case which settled the point, that it was necessary, to escape from the statute of frauds, only may parol evidence be given to establish the consideration, when none is expressed; but, where the in-

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that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has, from its origin, encountered many difficulties, and been matter of serious observation, both at the bar and on the bench, in England and America. After many doubts, it seems, at last, in England, by the recent decisions of Saunders *v.* Wakefield, 4 Barn. & Ald. 395, and Jenkins *v.* Reynolds, 3 Brod. & Bing. 14, to have settled down into an approved authority. It has, however, not received a uniform recognition in America; although in several of the States, and particularly in New York, it has, to a limited extent, been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the Supreme Court of Massachusetts, in Packard *v.* Richardson, 17 Mass. R. 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this Court. In the case of Leonard *v.* Vredenburgh, 8 John. R. 29, Mr. Chief Justice Kent, in delivering the opinion of the Court, adverting to the fact, that that case was one of a guaranty, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor, added, 'and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in Wain *v.* Warlters did not stand in the way.' One of the points in that case was, whether the parol proof of the consideration was not improperly rejected at the trial; and the decision of the Court was, that it ought to have been admitted. It is not, therefore, as was suggested at the argument, a mere obiter dictum, uncalled for by the case. It was one, though not the only one, of the points in judgment before the Court. The same doctrine has been subsequently recognized by the same Court, in Bailey *v.* Freeman, 11 John. R. 221, and in Nelson *v.* Dubois, 13 John. R. 175." See also 3 Kent, Comm. Lect. 44, p. 122, 123, (5th edit.); Emmott *v.* Kearns, 5 Bing. New Cas. 559; Manrow *v.* Durham, 3 Hill, N. Y. R. 584; Hough *v.* Gray, 19 Wend. R. 202. But see Parker *v.* Willson, 15 Wend. R. 343; Hunt *v.* Brown, 5 Hill, N. Y. R. 145; Hall *v.* Farmer, 5 Denio, R. 484. [In the latter case, the New York authorities on this subject are reviewed, and the English doctrine recognized. See Post, § 472, note.] Post, § 467-469.

dorsement is in blank, on the back of a preëxisting Note, parol evidence may be admitted, to establish the terms of the guaranty, as well as the consideration, and the blank be filled up accordingly.[1] It is not, however, our intention, in this place, to examine the doctrines applicable to guaranty in general, and the subsequent remarks will be limited to cases of the guaranty of Promissory Notes, and the obligations created thereby.

§ 460. Supposing the existence and validity of the guaranty sufficiently established, it remains, under this head, to consider, what is the true nature and extent of the obligation created thereby. By the law of France, and, indeed, by that of the Continental nations of Europe in general, the guarantor of negotiable paper is responsible, in the same manner as the drawer and indorsers of a Bill of Exchange, for whom the guaranty is given, unless there be a stipulation to the contrary, whether the guaranty be on the same instrument, or on a separate instrument.[2] By our law the obligation of an indorser and that of a guarantor are ordinarily very different. Each, indeed, is a conditional obligation; but the condition is not, or, at least, may not be, the same. In the case of an indorsement, the indorser

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[1] Josselyn *v.* Ames, 3 Mass. R. 274; Ulen *v.* Kittredge, 7 Mass. R. 232; Oxford Bank *v.* Haynes, 8 Pick. R. 423; Tenney *v.* Prince, 4 Pick. R. 385; White *v.* Howland, 9 Mass. R. 314; Moies *v.* Bird, 11 Mass. R. 436; Beckwith *v.* Angell, 6 Connect. R. 315; Dean *v.* Hall, 17 Wend. R. 214; Oakley *v.* Boorman, 21 Wend. R. 588; Hough *v.* Gray, 19 Wend. R. 202; Miller *v.* Gaston, 2 Hill, N. Y. R. 188, 191. Johnson *v.* Wilmarth, 13 Metcalf, R. 416.

[2] Code de Comm. art. 142; Story on Bills, § 435; Pardessus, Droit Comm. Tom. 2, art. 394, 396, 397. See also Heinecc. De Camb. cap. 3, § 26–28; Pothier, De Change, n. 50; Savary, Le Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 8, p. 205; Id. Tom. 2, Pt. 14, p. 94; Post, § 464.

contracts to be liable to pay the Note, in case of its dishonor, if it is duly presented for payment to the maker at its maturity, and due notice is given to him of the dishonor, and not otherwise.[1] In the case of a guaranty, the rule is not equally strict; and the guarantor contracts, that, upon the dishonor of the Note, he will pay the amount, upon a presentment being made to the maker, and notice given him of the dishonor within a reasonable time; and this reasonable time is ordinarily measured by the fact, whether, by the omission to make due presentment at the maturity of the Note, and to give him due notice of the dishonor, he, the guarantor, has sustained any loss or injury. If he has, then he is exonerated, *pro tanto;* if he has not sustained any loss or injury, then he is liable for the whole Note.[2] So that punctual presentment for payment and punctual notice to the guarantor are not indispensable, to charge him; whereas both are ordinarily indispensable, to charge the indorser.

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1 Ante, § 135.

2 Ante, § 133, 134, 147, and note; Bayley on Bills, ch. 7, § 2, p. 286–290, (5th edit.); 1 Bell, Comm. B. 3, Pt. 1, ch. 2, § 4, p. 377, (5th edit.); Chitty on Bills, ch. 10, p. 474–476, 529, (8th edit.); Story on Bills, § 305, and note, § 372, 393; Warrington *v.* Furbor, 8 East, 242, 245; Phillips *v.* Astling, 2 Taunt. R. 206, 211, 212; Hitchcock *v.* Humphrey, 5 Mann. & Grang. 559, 568, 569; Oxford Bank *v.* Haynes, 8 Pick. R. 423, 428; Babcock *v.* Bryant, 12 Pick. R. 133; Salisbury *v.* Hale, 12 Pick. R. 416; Thomas *v.* Davis, 14 Pick. R. 353; Talbot *v.* Gay, 18 Pick. R. 534; Dole *v.* Young, 24 Pick. R. 250; Beckwith *v.* Angell, 6 Connect. R. 315; Cannon *v.* Gibbs, 9 Serg. & Rawle, 202; Douglass *v.* Reynolds, 7 Peters, R. 113; Loveland *v.* Shepard, 2 Hill, N. Y. R. 139; Douglas *v.* Howland, 24 Wend. R. 35; Lewis *v.* Brewster, 2 McLean, R. 21; Foote *v.* Brown, 2 McLean, R. 369; Hank *v.* Crittenden, 2 McLean, R. 557; Skofield *v.* Haley, 22 Maine R. 164, (9 Shepley, R. 164); Howe *v.* Nickels, 22 Maine R. 175, (9 Shepley, R. 174); Thrasher *v.* Ely, 2 Smedes and Marshall, R. 139; Hale *v.* Rogers, 7 Humphrey, R. 536. But see Walton *v.* Murcall, 13 Mees. & Wels. 72.

In this respect, our law applies to cases of guaranty the same rule, which the law of France applies to all cases of the drawing and indorsement of Bills of Exchange; that is, it exonerates the drawer, and indorsers, and guarantors, in all cases, so far, and so far only, as they have sustained loss or injury, from the want of due presentment, or due notice of the dishonor.[1]

§ 461. Such, then, is the general nature and effect of the obligation of the guaranty of a Promissory Note, created by mere intendment and operation of law, where no other stipulation exists between the parties. But it is competent for the parties to shape and modify the obligation and effect of a guaranty, as they may of an indorsement, in any manner, which their own convenience, or pleasure, or interests may dictate. Thus, an indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the Note, with or without due presentment or due notice.[2] In like manner, a guarantor may incur an absolute and positive liability to pay the Note, at all events. And indeed, (as we shall presently see,) he may, by the form, and time, and circumstances, under which the guaranty is given, make himself responsible, as a sole and separate, or as a joint, or a joint and several, maker upon the Note, and not merely as a guarantor, in the strict sense of the word.

§ 462. The like distinction between the obligation of a guarantor, so called, and a surety or co-promisor, is

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[1] Ante, 318, 370; Pothier, De Change, n. 156, 157; Story on Bills, § 393-395, 478, and note; Kemble *v.* Mills, 1 Mann. & Grang. R. 762, the Reporter's note 6; Casaregis, De Comm. Discur. 54; Baldasseroni, Leggi e Costumi del Camb. Pt. 2, art. 10, § 35.

[2] Ante, § 147, and note; Story on Bills, § 215, 371.

equally as well known, and acted upon, in the foreign law, as in ours. Thus, Heineccius says; "*Multum ergo interest inter avallum et obligationem correalem, quæ potissimum in cambiis propriis locum habet, quaque tenentur, qui se in solidum in cambio obligarunt: fidejussor enim, si debitor principalis solvendo est, tantum in subsidium; correus in solidum principaliter tenetur, sive alter correus solvendo sit, sive non sit, quamvis uno solvente alter liberetur.*"[1] The distinction is also preserved, in the foreign law, between the character of a guarantor, and that of an indorser, although, in most cases, the liabilities and rights of each are governed by the same rules. If the party writes his name at the bottom of a Bill of Exchange, or a Promissory Note, with the word "aval," or in blank, he is deemed a guarantor; if on the back, he is deemed an indorser, unless, perhaps, where the language used, or the circumstances, repel the presumption, or control the inference.[2]

§ 463. In the second place, then, as to the different forms or modes, in which the guaranty of a Promissory Note may arise. It may be (as in cases of Bills of Exchange), (1.) By an independent written instrument; or, (2.) By a writing on the Note itself.[3]

§ 464. In respect to the first class of cases, that where the guaranty is upon a separate instrument, we shall necessarily be brief, as, for the most part, by our law, the same principles will apply to that class, as apply to the class of cases, where the guaranty is on the

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[1] Heinecc. de Camb. cap. 3, § 27.

[2] Story on Bills, § 455; Savary, Le Parfait Négociant, Tom. 2, Pt. 14, p. 94.

[3] Pothier, De Change, n. 50; Story on Bills, § 454; Id. § 394, 395; Code de Comm. de France, art. 142; Codigo de Commercio (of Spain), art. 476.

same paper with the Note itself. The principal difference is, that where the guaranty is on a separate instrument, it must contain on its face a sufficient reference to the note intended to be guaranteed to identify it and give it certainty. Where it is on the Note itself, the identity and certainty are sufficiently apparent from the language of the paper itself. Perhaps another difference may exist, (although no question of this nature seems to have occurred directly in judgment,) and that is, that a guaranty on the back of the Note may be (as we shall presently see) by a blank indorsement of the guarantor, and may be filled up afterwards, at the pleasure of the holder, so only as it conforms to the actual intention of the parties. Whereas it admits of the greatest doubt, whether a blank signature upon a separate paper could be afterwards filled up, so as to import a guaranty, without breaking in upon all the purposes intended to be attained by the statute of frauds. In respect to the consideration, there does not, by the law as administered in America, seem to be any difference between the two classes of cases, or at least none, where the guaranty is contemporaneous with the making of the Note, and a part of the *res gestæ*; for, in each case, it is not necessary to be apparent on the instrument, but it may be established by parol proofs *aliunde.*[1] In other respects, and especially in the duty of the guarantee, as to diligence in presenting the Note for payment, and giving notice of the dishonor to the guarantor, the law is the same, whether the guaranty is on the Note itself, or on a separate instrument.[2]

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[1] Ante, § 459.

[2] Ante, § 460. Where the guaranty of a Bill of Exchange is written upon a separate instrument, it is, upon the continent of Europe, governed

§ 465. A few cases may serve to illustrate the doctrine applicable to guaranty by a separate instrument. Thus, where A. wrote the following memorandum: "I hereby guaranty the present account of Miss H. M., due to B. & Co., of £112.4.4, and what she may contract from this date to 30th of September next;" upon an objection taken, the Court held, that the consideration sufficiently appeared upon the face of the instrument.[1] The ground seems to have been, that the consideration was for a future credit, as well as the past credit, and the guaranty was founded upon their conjoint operation, and it was not necessary, that the consideration and the promise should be coextensive. So, where A. wrote to B.: "You will be so good as to withdraw the Promissory Note, and I will see you at Christmas, when you shall receive from me the amount, together with a memorandum of my son's making, in the whole £45;" it was held, that parol evidence was admissible to prove, that the Note referred to was for £35, and that the withdrawal of the Note was sufficient to satisfy the statute of frauds.[2] So, where A. wrote a letter to B., as follows: "W. being disappointed in receiving remittances, and

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by somewhat different remedies from what exists where it is written on the Bill itself. In the former case the holder is entitled only to the common action or remedy upon the contract against the guarantor; but in the latter case, the holder is entitled to the same summary remedy as he has on Bills, jura cambiali. Story on Bills, § 395. The obligations, also, of the holder in respect to protest for non-payment, and notice of the dishonor to the guarantor, are the same, where the guaranty is on the Bill, as it is to the regular parties on the Bill. Story on Bills, § 372, 393 – 395, 454, 455.

[1] Russell *v.* Moseley, 3 Brod. & Bing. R. 211. But see Wood *v.* Benson, 2 Cromp. & Jerv. 95; 2 Tyrw. R. 98; Raikes *v.* Todd, 8 Adolp. & Ellis, 846, which seem contra. See also Haigh *v.* Brooks, 10 Adolph. & Ellis, 309.

[2] Shortrede *v.* Cheek, 1 Adolp. & Ellis, 57.

you expressing yourself inconvenienced for money, I send you his acceptance at two months." B. refused to take the Bill, unless A. would put his name on it; and A. thereupon wrote on the back of the letter: "I will see the Bill paid for W.;" it was held to be a valid guaranty for a sufficient consideration apparent on the paper.[1] So, where A. wrote on a separate paper the following memorandum, on the same day the Note was made: "I hereby guaranty the payment of a Note at sixty days, drawn by B. & C., payable to the order of D., E., & F., for value received," it was held, that the words "value received" were a sufficient description of the consideration, and that a person, who first took the Note, and advanced money on the faith of the guaranty, although his name was not stated on the guaranty, was entitled to maintain an action thereon.[2]

§ 466. In the next place, as to a guaranty upon the Note itself. We have already seen,[3] that it is in some cases a matter of no inconsiderable nicety and difficulty to decide, whether, upon the matters apparent upon the Note itself, a particular party is to be deemed a promisor, or a co-promisor, or a surety, or a guarantor, or an indorser. Where a note is made in the names of two persons, and is signed by both, the one "as principal," and the other "as surety," there is no doubt, that, as to the payee and subsequent parties, it is to be deemed the joint Note of both; and if the language be, "We jointly and severally promise," it is the joint and several Note of both.[4] The same result will arise if two persons

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1 Emmott *v.* Kearns, 5 Bing. N. C. 559.

2 Watson's Ex'rs. *v.* McLaren, 19 Wend. R. 557; S. C. 26 Wend. R. 425, in Error; Ante, § 458.

3 Ante, § 13, 33.

4 Ante, § 57.

sign a Note drawn in these terms, "I promise to pay," and one sign as principal, and another as surety; for it will be the joint and several Note of both.[1]

§ 467. These are cases, comparatively speaking, simple in their structure and interpretation. But suppose the Note were drawn in the common form, "I promise," &c., and signed by one person as maker, and below his signature another person should, on the face of the Note, write the following words; "I acknowledge myself holden as surety for the payment of the demand of the above Note;" the question would then arise, whether he was to be held liable as a joint promisor, or as a surety upon an independent promise.[2] And very different consequences might follow from the one interpretation from those, which would belong to the other. If treated as an independent promise, it might, under certain circumstances, be within the statute of frauds, and a distinct consideration should either appear upon its face, or at least be proved, to make it an available contract.[3] But, if treated as a joint and concurrent contract, it would be obligatory both upon the principal and surety, as joint makers, and would require no proof of any distinct consideration to support it.[4] On the other hand, the interpreta-

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[1] Ante, § 57; Hunt *v.* Adams, 5 Mass. R. 358, 361.

[2] Hunt *v.* Adams, 5 Mass. R. 358; Hunt *v.* Adams, 6 Mass. R. 519.

[3] Ibid.; Tenney *v.* Prince, 4 Pick. R. 385; S. C. 7 Pick. R. 243. See Barrows *v.* Lane, 5 Verm. R. 161; Hodgkins *v.* Bond, 1 New Hamp. R. 284; Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426; Douglas *v.* Howland, 24 Wend. R. 35, 40; Bewley *v.* Whiteford, 1 Hayes, Irish Exch. R. 356.

[4] Ibid.; Ante, § 57, 133. The distinction is very clearly stated by Mr. Chancellor Kent in his Commentaries (3 Kent, Comm. Lect. 44, p. 121-123, 5th edit.) He there says; "The English statute of frauds, which has been adopted throughout this country, requires, that, 'upon any special

tion might be materially affected by the fact, whether the signatures and contracts were contemporaneous and a part of one and the same general transaction (a part of the *res gestæ*), or whether the Note was first made and signed by the principal, as a distinct transaction, and afterwards, at another time, the contract

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promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum or note thereof, must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' An agreement to become a guarantor, or surety, for another's engagement, is within the statute; and if it be a guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration for it, must appear in the writing. The word 'agreement,' in the statute, includes the consideration for the promise, as well as the promise itself, for without a consideration there is no valid agreement. This was the decision in the case of Wain *v.* Warlters; and though that decision has been frequently questioned, it has since received the decided approbation of the Courts of Law; and the Lord Chief Justice of the Common Pleas (Best), observed, that he should have so decided, if he had never heard of the case of Wain *v.* Warlters. The English construction of the statute of frauds has been adopted in New York and South Carolina, and rejected in several other States. The decisions have all turned upon the force of the word 'agreement'; and where, by statute, the word 'promise,' has been introduced, by requiring 'the promise or agreement' to be in writing, as in Virginia and Tennessee, the construction has not been so strict. Where the guaranty or promise, though collateral to the principal contract, is made at the same time with the principal contract, and becomes an essential ground of the credit given to the principal debtor, the whole is one original and entire transaction, and the consideration extends and sustains the promise of the principal debtor, and also of the guarantor. No other consideration need be shown than that for the original agreement, upon which the whole debt rested, and that may be shown by parol proof, as not being within the statute. If, however, the guaranty be of a previously existing debt of another, a consideration is necessary to be shown, and that must appear in writing, as part of the collateral undertaking; for the consideration for the original debt will not attach to this subsequent promise; and to such a case the doctrine in Wain *v.* Warlters applies. But if the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracted parties, it is then not a case within the statute."

of the surety was made, as a distinct and independent transaction.[1] And accordingly, in a case like that above supposed, where it appeared, that the whole contract took effect at one and the same time, as different parts of one entire transaction, it was held, that both the principal and the surety were to be deemed joint contractors and joint makers of the Note.[2] But if the contracts had been entered into at different times, the contract of the surety would have been deemed in the nature of a guaranty, collateral to the Note, and governed by the general principles applicable to guaranty.[3]

§ 468. Similar principles have been applied to the interpretation of a contract written on the back of the

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1 Ibid.; Baker *v.* Briggs, 8 Pick. R. 222. See Ulen *v.* Kittredge, 7 Mass. R. 233; Ante, § 133; 3 Kent, Comm. Lect. 44, p. 122, (5th edit.); Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426.

2 Hunt *v.* Adams, 5 Mass. R. 358. The case was as follows. Chaplin made a Note for $1,500, payable to Bennet. Before the Note was delivered to Bennet, Adams signed the following agreement written upon the Note: "I acknowledge myself holden as surety for the payment of the demand of the above Note." Bennet's administrator brought an action against Adams, declaring, 1. Upon a Note signed by the defendant solely; 2. On a Note made by him jointly and severally with Chaplin. Parsons, C. J., delivered the opinion of the Court. "The defendant is an original party to the contract. This mode of signing entitles the defendant, if he pays the Note, to an indemnity from Chaplin. But, as to the intestate, they must be considered as joint and several promisors. The legal effect of this note does not differ from one written, 'For value received, I promise to pay,' &c., and signed by one with 'principal' annexed to his name, and by another with 'surety' thus annexed." Hunt *v.* Adams, 5 Mass. R. 358. In another action between the same parties on another contract, not materially varying from the above, the Court continued of the same opinion. Hunt *v.* Adams, 6 Mass. R. 519.

3 Ibid. See also Carver *v.* Warren, 5 Mass. R. 545; Ante, § 133; 3 Kent, Comm. Lect. 44, p. 122, (5th edit.); Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426-428; Ansbough *v.* Gearhart, 1 Jones, Penn. R. 482.

Note. Thus, where A. made a Note, payable to B. or order, for a certain sum of money, and at the same time, under the same date, C. and D. indorsed on the back of the Note, " For value received, we jointly and severally undertake to pay the money within mentioned to the said B.," it was held, that each of the indorsers was to be treated as a joint and several promisor with A. on the Note, and as if he had, on the face of the Note, signed the same as surety.[1] So, where A. indorsed on a joint and several Note, payable to B. or bearer, at the time when it was made, "For value received, I guaranty the payment of the within Note, and waive notice of non-payment," it was held that A. was bound as a joint and several maker, and in the same manner, as if he had signed the Note as surety.[2] So, where, on a Note payable to B. or bearer, A., at the time of making it, indorsed on it, "This may certify, that I guaranty the payment of the within Note," it was held, that A. was bound as a joint and several maker.[3] So, where A., long after a Note, payable to B. or bearer, was made, but before it was due, indorsed on it, "For value received, I guaranty the payment and collection of the within Note to C. or bearer," it was held, that A. was liable thereon, as a several maker of the Note.[4] So, where the payee of

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1 White *v.* Howland, 9 Mass. R. 314 ; Carver *v.* Warren, 5 Mass. R. 545. See also Sumner *v.* Guy, 4 Pick. R. 311 ; Baker *v.* Briggs, 8 Pick. R. 122 ; Guidrey *v.* Vives, 15 Martin, R. 659 ; Nelson *v.* Dubois, 13 John. R. 175.

2 Luqueer *v.* Prosser, 1 Hill, N. Y. R. 256 ; S. C. 4 Hill, N. Y. R. 420 ; Manrow *v.* Durham, 3 Hill, N. Y. R. 584. See also Ketchell *v.* Burns, 24 Wend. R. 456.

3 Hough *v.* Gray, 19 Wend. R. 202 ; Miller *v.* Gaston, 2 Hill, N. Y. R. 188.

4 Miller *v.* Gaston, 2 Hill, N. Y. R. 188.

a negotiable Note indorsed on it, "For value received, I assign, sell, and guaranty the payment of the within Note to A. or bearer," it was held, that the payee was absolutely bound to pay the Note, and that A. might maintain an action thereon against the payee, without any proof of demand on the maker, or notice to the payee.[1] So, where a Note was written, "We, A., as principal, and B., as surety, promise," &c., and the Note was signed by A., and indorsed by B., the latter was held liable as joint maker.[2] [So, also, where a party indorsed, without date, upon a Note, "I will see the within paid," and signed it, the presumption was declared to be that it was done at the date of the Note, and as part of the transaction, and he was held as an original promisor.[3]]

§ 469. The principle upon which all these cases turn is the same; and that is to expound the particular transaction, without reference to the form, which it has assumed, in such a manner as will best carry into effect the substantial intention of the parties, *ut res magis valeat quam pereat*, rather than by a close or technical interpretation, adhering to the letter, to defeat the very objects and purposes, for which alone the transaction must have taken place, and thus to make it operate at once as a delusion and a fraud upon the ignorant or the unwary.[4] Nor is there any thing novel in this mode of interpretation, applied to this class of cases. It stands upon the principle, that two instruments of the same general nature, both executed at the same

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1 Allen *v.* Rightmere, 20 John. R. 365, 366.

2 Palmer *v.* Grant, 4 Connect. R. 389.

3 Ansbough *v.* Gearhart, 1 Jones, Penn. R. 482.

4 Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; Robinson *v.* Abell, 17 Ohio, R. 36.

time, and relating to the same subject-matter, are to be construed together, as forming but one agreement. As he, who signs on the face, and he, who indorses his name on the back, both promise to do the very same thing, to wit, to pay the money at the specified time, they may, without doing violence to the contract, be deemed as joint makers; and as, in point of form, each promises for himself, the undertaking may be treated as several, as well as joint.[1] In respect to the consideration, it has has been thought sufficient, that the indorsement purports to be "for value received," or that the consideration, if not expressed, is established in proof by the contemporaneous facts when the Note was made.[2]

§ 470. But suppose the Note and written indorsement not to be both executed at the same time, but at different times and upon different considerations, the question would then arise, whether the indorsement was to be treated as a guaranty, or not; and if as a guaranty, whether, to make it valid, it would be necessary, that a sufficient consideration therefor should appear on the face of the guaranty. Upon this question there would seem to be a conflict of doctrine in the authorities, and in the reasoning on which it is founded.[3] Thus, where, on a Note, payable to B. or bearer, long after its date, but before it was due, and for a new purpose, A. and C., at the request and as surety of B., indorsed on it the following words; "We guaranty the payment of the within Note," and upon

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1 Miller *v.* Gaston, 2 Hill, N. Y. R. 188, 190; Oxford Bank *v.* Haynes, 8 Pick. R. 423; Bailey *v.* Freeman, 11 John. R. 220.

2 Ante, § 458.

3 Ante, § 147, and note.

the faith of the guaranty, for a valuable consideration, on the day of its date, it was taken by D., it was held by the Supreme Court of New York, that the indorsement amounted, in substance and legal effect, to a Promissory Note by the indorser, and as such it imported a consideration, and was not, therefore, within the statute of frauds, and was not to be treated as a guaranty; and that D. might sue thereon accordingly.[1]

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[1] Manrow *v.* Durham, 3 Hill, N. Y. R. 584. Mr. Chief Justice Nelson, in delivering the opinion of the Court, on this occasion, said; "The contract sued upon is, in substance and legal effect, a Promissory Note. As such, it imports a consideration; and is not, therefore, within the statute of frauds. All the numerous cases in which it has been held that blank indorsements of Promissory Notes might be filled up, and the parties thus bound as makers or absolute guarantors, were taken out of the statute upon this principle. The objection is not new, as it will be found to have been taken in nearly all the cases of this class. Most of them are cited in the recent case of Oakley *v.* Boorman, 21 Wend. R. 588. And see Park *v.* Brinkerhoff and others, 2 Hill, N. Y. R. 663. The present case is not distinguishable in principle from Hough *v.* Gray, 19 Wend. R. 202; Ketchell *v.* Burns, 24 Wend. R. 456; or Luqueer *v.* Prosser, 1 Hill, N. Y. R. 256. The contract is the same in form and substance as in those cases, and in each of them we held it to be an original undertaking, upon which the defendant might be made liable as the maker of a Promissory Note. See also McLaren *v.* Watson's Ex'rs, 26 Wend. R. 430, per Walworth, Ch. It is true, in some of the cases cited, the question did not arise under the statute, as the consideration was expressed in the guaranty. But whether expressed or not is wholly immaterial; for, regarded in the light of a Promissory Note, the instrument imports a consideration as clearly as if expressed. In Hough *v.* Gray, however, no consideration was expressed, and the instrument was, in terms, like the one in question. I concede that the latter was a case in which the guaranty was indorsed at the time of the making of the Note. But that is an unimportant fact, as respects the form of the instrument; for if, in order to be binding within the statute, it must express a consideration upon its face, and it be not enough that the nature of the contract import one, the objection would be fatal without regard to the time of the execution of the instrument. The only difference between the two cases is this: Where the guaranty and Note are contemporaneous, you may resort to the Note to sustain the consideration of the guaranty, if sought to be impeached. The Note contains aliment to support the guaranty. But when the guaranty is made at a

§ 471. A doctrine somewhat differently modified seems to have prevailed in Massachusetts; and it has

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different time, it must be sustained, if attacked for want of consideration, by showing an independent one. In this case, for instance, if the defendants had sought to rebut the presumption of consideration arising from the nature of the instrument, the plaintiff could have sustained it by proof that it was made for property delivered; as may be done in all cases between payee and maker, where the consideration of a Note is attacked. In the case of Miller *v.* Gaston, 2 Hill, N. Y. R. 188, we entertained no doubt that Miller might have sustained an action upon the guaranty against Gaston alone, as upon a new Note, though the guaranty was made some months after the date of the Note; and so the case was understood by the reporter, according to his marginal note of it. In the case of Oakley *v.* Boorman, 21 Wend. R. 588, the indorsement was made some two months after the Note, and the defendant was held liable as having intended by such indorsement to guarantee the payment of the Note in that form. The indorsement was in blank, and if a contract of indorsement had been written over the name of the defendant, it would have been nothing more nor less than an agreement to pay the Note, if the makers did not, on demand and notice, — a conditional agreement to pay, importing a consideration. Here there is an original, absolute agreement to pay the Note, importing the same thing, and therefore equally out of the statute. I admit, the case of Packer *v.* Wilson, 15 Wend. R. 343, militates against the doctrine here contended for; but it may be said of that case, that, at the time it was decided, a very prevalent opinion obtained with the profession, that a consideration, could not since the revised statutes, be inferred or implied for the purpose of sustaining an undertaking to pay the debt of another. 2 Rev. Stat. 135, § 2, sub. 2. Indeed, it seems to have been even doubted by the learned Chancellor in Rogers *v.* Kneeland, 13 Wend. R. 121, whether a seal would import a consideration within the new provision. That severe strictness of construction, however, has been since repudiated in repeated cases; and if the case of Packer *v.* Wilson is to be regarded as in conflict with the several authorities upon which I have placed the decision in the present case, I think it is impossible any longer to uphold it. For should the judgment of the Court below be maintained, we must give up the whole series of cases in this Court, where plaintiffs have been allowed to recover upon blank indorsements of non-negotiable paper. I am not prepared for so sweeping an innovation. On the contrary, I think our course of decisions may be sustained upon sound and consistent principles without impugning or in any way innovating upon adjudged cases." Mr. Justice Bronson delivered a dissenting opinion, and also reviewed the cases See also Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Ketchell *v.* Burns, 24 Wend. R. 456. But see Hunt *v.* Brown, 5 Hill, N. Y. R. 145; Post § 478, and note.

been there held, that the party indorsing such a Note ought to be deemed, not an original and absolute promisor, but a guarantor, and liable accordingly, if a consideration can be established in proof, although it is not stated in the guaranty.[1] Therefore, where a Note was payable to A. or order, and after it became due and remained unpaid, A. indorsed on it, "I guaranty the payment of the within Note in eighteen months, provided it cannot be collected of the promisor before that time," it has been held, in Massachusetts, to be a special guaranty, and that no person, except the immediate holder from the payee, could maintain a suit on it.[2]

§ 472. It is observable, that, in some of the cases before cited, the import of the language used by the indorser was that of guaranty, "I guaranty the payment," &c.; and the argument deduced from this mode of expression has been, that it limits the liability of the indorser to a mere guaranty, and that the Court are not at liberty to put upon the words of the party, indorsing the Note, a different interpretation, and to hold him liable absolutely as a maker, when he means, on the face of the indorsement, to be held only as a guarantor. There is great force in this argument, and it is difficult to see, upon what ground it can be overcome. It has accordingly been held in Massachusetts, that where the party wrote on the back of the Note, (not being negotiable,) at the time when it was made,

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1 See Ulen *v.* Kittredge, 7 Mass. R. 233; Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426, 427; Tenny *v.* Prince, 4 Pick. R. 385.

2 Taylor *v.* Binney, 7 Mass. R. 479; Canfield *v.* Vaughan, 8 Martin, R. 682. But see Upham *v.* Prince, 12 Mass. R. 14; Allen *v.* Rightmere, 20 John. R. 365; Myrick *v.* Hasey, 14 Shepley, R. 9; Ante, § 147, and note.

"I guaranty the payment of the within Note," it is to be deemed strictly a contract of guaranty; and therefore the party so indorsing is not to be held liable for the payment of the Note, unless upon due demand and due notice of dishonor to him within the reasonable time required on other common cases of guaranty.[1] In New York an opposite doctrine has been asserted, (although it does not seem to be finally established by the judgment of the highest appellate Court,) upon a ground, which, perhaps, is peculiar to the jurisprudence of that State, and certainly is not sustained by the ordinary interpretation of the contract of guaranty in other cases, either in England or America.[2] If there

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[1] Oxford Bank *v.* Haynes, 8 Pick. R. 423. See also, Leonard *v.* Vredenburgh, 8 John. R. 29.

[2] Luqueer *v.* Prosser, 1 Hill, N. Y. R. 256; S. C. in Error, 4 Hill, N. Y. R. 420. In this last case, the Note was a joint Note, payable to the payee or bearer. The indorser wrote on the back of it, in fulfilment of the original agreement on which the Note was given, "For value received, I guaranty the payment of the within Note, and waive notice of non-payment." The suit was brought by the plaintiff jointly against the makers and the indorser, and a verdict given for the plaintiff on a motion for a new trial. Several points were made, and the case was ultimately decided upon the point, that, under a statute of New York, the defendants were jointly suable. In the Supreme Court, Mr. Justice Cowen, in delivering the opinion of the Court, said: "In Hough *v.* Gray, 19 Wend. R. 202, Moon made his Note payable to Cameron, or bearer, and Hough indorsed, 'This may certify that I guaranty the payment of the within Note.' We held, that he was liable as maker, severally, to Gray, who had purchased the paper of Cameron. I remarked, that the Court below were clearly right in holding, that Hough was liable as a joint and several maker with Moon, the admitted maker; referring to the cases collected in Dean *v.* Hall, 17 Wend. R. 214, among which are the two cases I now cite from the Mass. R. If the respective papers in those cases were, in effect, joint and several Promissory Notes, it followed, that those in Hough *v.* Gray were such; and that they were negotiable, like a Promissory Note. These cases decide the present. Mr. Prosser's guaranty was the same in legal effect, as if he had signed with Edson & Arnold, as surety. His promise was absolute; not a mere commercial indorsement. In Allen *v.*

be any thing clear, upon principle or authority, it would seem to be that the contract of guaranty is not an ab-

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Rightmere, 20 John. R. 365, the Court said of such an undertaking, 'It is absolute, that the maker shall pay the Note when due, or that the defendant (the indorser) will himself pay it.' How is this distinguishable from a direct signature as surety? In the latter case, both promise to see the money paid at the day. A man writes thus: 'I promise that $ 100 shall be paid to A. or bearer'; who would doubt that such a promise would be a good Note? The use of the word 'guaranty', or 'warrant,' or 'stipulate,' or 'covenant,' or other word importing an obligation, does not vary the effect. Read the obligation of a man who signs a Note with his principal, 'A. B., surety'; both and each virtually stipulate in the language of the Note I have supposed. Both promise that the payee 'shall receive.' In Morice *v.* Lee, 8 Mod. 362, 364, Fortescue, J. said, 'I promise that J. S. or order shall receive £100,' is a good Note. Suppose it to stand, 'shall receive £100 of James Jackson'; or, I will see that £100 is paid by James Jackson'; all this, and the like, is no more than saying, I will pay so much by the hand of another. If there be, in legal effect, an absolute promise that money shall be paid, all the rest is a dispute about words. A Note is payable to A. or order, and he indorses it to B. thus: 'Pay the contents to B. I waive presentment and notice as indorser'; this is a good Promissory Note. The law raises an absolute promise on such an indorsement. No doubt it inures as an indorsement for the purpose of transferring the principal Note; but it is, moreover, an absolute promise to pay. It is saying, 'so much is, without condition, due from the indorser to the indorsee.' And a common Due Bill is a Note. Kimball *v.* Huntington, 10 Wend. R. 675, 679, 680. The whole inquiry is, does the paper import an engagement that money shall be paid, absolutely? If it do, no matter by what words, it is a good Note. Then, on the question whether this Note be joint or several, or both: 'I promise to pay,' signed by two, is joint and several. Chitty on Bills, 561, (Am. ed. of 1839.) Each engages for himself and both. It is the same thing, where one promises as principal, and the other as surety, and whether they both sign on the same side of the paper, or on different sides. Each engages, and both engage, for the payment of the same sum, at the same time, and to the same person; their obligations are identical throughout; both papers make but one instrument. When the indorser says, 'I guaranty the payment of the within Note,' he promises the future holder, as well as the payee. The authorities say rightly, he has done the same as if he had signed as surety. By reference, the guarantee becomes a part of the principal Note. The guarantor becomes surety for the Note as it is, payable to bearer, without declaring that he will engage to any other than the payee. That the guaranty in question does not come up to the solute, but a conditional contract. It may be admitted, that if the other language, used in the particular in-

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definition of a Promissory Note, we are referred to Oxford Bank *v.* Haynes, 8 Pick. R. 423. In that case, it was certainly held, that the words, 'I guaranty the payment of the within Note,' signed by the guarantor, made him liable as such, but not as surety; in other words, the Court denied to such an indorsement the operation of a Promissory Note. But the decision was based on a rule as to the mode of fixing guarantors peculiar to that State. The Court admitted, that if the engagement were to be considered absolute, it was a Promissory Note; but they considered it conditional, and, under some circumstances, at least, as requiring presentment and notice, to fix the guarantor; and such is the doctrine of some other States. It is, however, unknown here. It was repudiated in Allen *v.* Rightmere, and often since; in one case, very lately, on a review of several decisions by the Courts of the United States and by the State Courts. This distinction prevailing in Massachusetts, of course makes all the difference. With our rules as to charging guarantors, the learned Court in Massachusetts virtually concede, that the defendant's guaranty would be considered a Note, even there. Another case cited for the defendant proceeded on the same ground as that of Oxford Bank *v.* Haynes. It is Green *v.* Dodge, 2 Hamm. Ohio R. 430, 439. Another, Cumpston *v.* McNair, 1 Wend. R. 457, went on the ground, that the guaranty was not, as in this case, absolute, but was made conditional by its own express provisions. All three of these cases will be found, when their principle is seen, to be in favor of the views I have expressed concerning the guaranty now in question. I am aware of no case the other way. Non constat, in Meech *v.* Churchill, what was the language of the guaranty? The case is very far from deciding the present." The Court of Errors affirmed the original judgment in favor of the plaintiff; but for different reasons from those assigned in the Court below, Mr. Chancellor Walworth, in delivering his opinion in the Court of Errors, (the only opinion delivered,) said: "If the undertaking of Prosser cannot be considered as a Promissory Note in itself, so as to render him liable as a maker; or as an indorsement of the Note with a waiver of notice, so as to entitle the bearers of the Note to recover against him as an indorser, this joint suit upon the money counts cannot be sustained. But if he is liable to the bearers of the Note, either as maker or indorser, and could have been declared against as such in a separate suit against him, I think the statute is broad enough to entitle them to recover in this form of action. For the legislature unquestionably intended to authorize a joint suit to be brought against all the parties who were liable as drawers, indorsers, makers, and acceptors of the same paper. It is not necessary, therefore, to inquire whether Arnold & Edson and Prosser could, at the common law, have been all sued, in one action, as strument in connection with the word "guaranty," is such as necessarily and positively to require a differ-

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joint makers of the Note in question. In this case, if the legal liability of Prosser did not appear upon the instrument served with the declaration, I think the parol evidence of the agreement of the drawers to get indorsed paper for the horse and wagon, for which the note was given, could not aid the plaintiffs in the Court below. For where the party to a Note or Bill fills up the instrument by which his liability is created, at the time he signs it, as in this case, it would be a violation of settled principles to allow parol evidence to be given for the purpose of showing, that he intended to contract for something different. And even in the case of a blank indorsement upon negotiable paper, if it can be filled up and made to operate as a general indorsement, I agree with Mr. Justice Bronson, in the case of Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80, that parol evidence ought not to be received to show, that a different liability was intended to be created; and thus deprive the indorser of his right to notice of non-payment. Where a Note is payable to bearer, so that no words of transfer are necessary to entitle a subsequent holder to recover thereon in his own name, a blank indorsement is, in fact and in law, neither more nor less than a conditional guaranty of payment by the drawer, provided due notice of demand and non-payment is given to the indorser. And parol evidence ought not to be received, in such a case, to show that the parties intended, that the indorser should be made liable absolutely, without the performance of this condition precedent. But in this case, the notice was expressly waived by the written guaranty indorsed on the Note; and, in addition to that, the plaintiffs proved a demand of the makers when the Note became due, and that notice of non-payment to the indorser or guarantor was actually given. No parol proof of the circumstances under which the Note was given, was therefore necessary to entitle the holders to recover against him as such indorser or guarantor. Had the indorsement guaranteed the payment of the Note to Parsons, by name, without any words of negotiability, it would probably have only operated as a special indorsement, so as to make it necessary for the holder of the Note to sue the same in the name of Parsons only; and that would have enabled the guarantor to set up any legal defence which he had to the Note in the hands of the person to whom such special guaranty was made. But a general guaranty, like this, upon a Note payable to bearer, is in law a general indorsement of the Note, with a waiver of the condition precedent of a notice of non-payment by the drawers. The plaintiff in error, therefore, was liable to the defendants in error as such indorser, and was properly sued as such in a joint suit with the makers, under the provisions of the statute on the subject of joint suits. I also think that Prosser, the guarantor, could have been sued upon this guaranty, by the bearer of the ent interpretation, the Court are at liberty to reject the interpretation of the word "guaranty" in its strict

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Note, as upon an absolute promise to pay the amount to the bearer when it became due ; constituting the guarantor, in effect, the maker of a Promissory Note, payable to bearer, for the sum and at the time specified in the Note upon which this guaranty was written. Allen *v.* Rightmere, 20 John. R. 366 ; Hough *v.* Gray, 19 Wend. R. 202 ; Ketchell *v.* Burns, 24 Wend. R. 450. Although this guaranty does not, in words, guarantee the payment to Parsons or bearer, as the indorsement did in the case of Ketchell *v.* Burns, it does so in effect. For, no person being named in the guaranty, it is an absolute promise that the amount of the Note upon which it is indorsed shall be paid to the payee therein named, or to the bearer, at the time in such Note specified. And the words 'for value received,' which are in this guaranty, remove all possible objection that it is a promise to pay the debt of Edson & Arnold, and that the consideration as well as the promise, must be in writing ; if such an objection could have been sustained where a guaranty indorsed upon a Note stated no consideration for the promise, and the form of the security was such, that the guarantor could not be made liable as a mere indorser. I think there was no error in the judgment of the Court below, and that it should, therefore, be affirmed." Some of the later cases seem to adopt the general doctrine stated in the text, as to the liability of the indorser as a guarantor being conditional only under the like indorsements. See Loveland *v.* Shepard, 2 Hill, N. Y. R. 139; Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80. The case of Allen *v.* Rightmere, 20 John. R. 365, is perhaps distinguishable. The Note was there payable to the guarantor himself, or order, and he indorsed on the Note, "For value received, I sell, assign, and guaranty the payment of the within Note to A. or bearer," might be deemed to import, as the Court held them to be, not a conditional undertaking, but an absolute agreement, that the maker would pay the Note when due, or that the defendant, being the payee and indorser, would himself pay it. See Douglass *v.* Reynolds, 7 Peters, Sup. Ct. R. 113, 127. Hough *v.* Gray, 19 Wend. R. 202, seems to have proceeded upon the same ground as Allen *v.* Rightmere, 20 John. R. 202. The words were, "I guaranty the payment of the within Note"; and they were construed to import an absolute guaranty, the Note being payable to A. or bearer. In Lamorieux *v.* Hewit, 5 Wend. R. 307, the Court held, that the words, "I warrant the collection of the within Note, for value received," imported a conditional guaranty or agreement only, that the defendant would pay the Note, if not collected of the maker. In Ketchell *v.* Burns, 24 Wend. R. 456, the Note was dated on the 12th of September, 1837, and payable to B. or bearer, by the first of July then next, and on the back, the indorser, under the date of 25th of September, 1837, wrote the following indorsement:

sense, and to expand it so as to meet and give consistency to the other language. But if the whole instrument can be so construed as to give full meaning to the word "guaranty," in its strict sense, consistently with the context, then it would seem difficult to assign any sufficient reason, why the ordinary meaning of the word "guaranty" should be deserted and another forced upon it. The doctrine asserted in New York does not attempt to deny the rules of law ordinarily applicable

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"For and in consideration of $31.50, received of C., I hereby guaranty the payment and collection of the within Note to him or bearer"; and the Court held, that these words imported a negotiable promise absolutely to pay the bearer. In Hunt *v.* Brown, 5 Hill, N. Y. R. 145, the Note was negotiable, and was indorsed by the payee; and the defendant wrote on the back, "I guaranty the collection of the within Note"; and the Court held it to be a guaranty, or collateral undertaking, and not an absolute promise to pay the amount of the Note, and therefore void for want of a consideration, expressed on the face of the Note. The Court said, that it would have been otherwise, and the agreement have been an absolute Promissory Note, if it had been, "I guaranty the *payment* of the Note," instead of the *collection* of the Note. We see, from these citations, that the interpretation of the particular language of the indorsements has often turned upon very nice distinctions; and it is not too much to say, that these distinctions are not always very satisfactory. [But in a later case, the Supreme Court of New York, held these words on the back of a Promissory Note, viz.: "We, the undersigned, guaranty the payment of the within," to be a guaranty, and invalid, because the consideration on which it was made did not appear. Whittlesey, J. in giving the opinion, remarked as follows: "I cannot satisfactorily acquit myself of the responsibility cast upon me to respect and obey the deliberate expression of the legislative will without declaring that in my judgment the present case is one covered precisely by the statute. I am constrained, therefore, to say, notwithstanding the decisions which have introduced a new doctrine in cases precisely like the present, and notwithstanding the conflicting decisions, in cases very nearly like this in their facts — wholly like it in principle — that the obligation upon which this action is brought is an undertaking to answer for the debt of another. In such cases, the statute requires the consideration to be expressed in writing, signed by the party. The consideration not being so expressed in the writing, in this case the obligation is void." Hall *v.* Farmer, 5 Denio, R. 484.]

to contracts of guaranty; but it does, in effect, deny to the word "guaranty" its true import in the cases alluded to, although such an interpretation is not indispensable to give the instrument a reasonable operation.

§ 473. In all the foregoing cases, there was a written memorandum indorsed by the party upon the back of the Note, either at the time when it was made, or afterwards; and, of course, the only question there was, what was the true construction of the written memorandum, as to the parties in interest. But cases have occurred of a very different nature, where the party sought to be charged has indorsed his name in blank thereon. These cases have been either, (1.) where the Note was not negotiable, or (2.) where it was negotiable. In the former class of cases, it has been held, that, if the blank indorsement was made at the same time as the Note itself, the indorser ought to be held liable, as an original promisor or maker of the Note, and that the payee is at liberty to write over the blank signature. "For value received, I undertake to pay the money within mentioned to B." (the payee.)[1]

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[1] Ante, § 58, 59; Josselyn *v.* Ames, 3 Mass. R. 274; Herrick *v.* Carman, 12 John. R. 159; Nelson *v.* Dubois, 13 John. R. 175; Moies *v.* Bird, 11 Mass. R. 436, 440; Campbell *v.* Butler, 14 John. R. 349; Dean *v.* Hall, 17 Wend. R. 214, 217-220; Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426, 427; Cooley *v.* Lawrence, 4 Miller, Louis. R. 639; Baker *v.* Briggs, 8 Pick. R. 122; Leonard *v.* Vredenburgh, 8 John. R. 29; Labron Woram, 1 Hill, N. Y. R. 91; Hough *v.* Gray, 19 Wend. R. 202; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; Sylvester *v.* Downer, 20 Vermont R. 355. In Moies *v.* Bird, 11 Mass. R. 436, 440, Mr. Justice Parker, in delivering the opinion of the Court, said; "It is manifest that the defendant intended to make himself liable, in some form; at least, such is the intent legally to be presumed, even against his declaration, at the time of signing. Had the Note been made payable to him, and negotiable in its form, the plaintiff would have been restricted to such an engagement, written over

§ 474. But if the blank indorsement has been at a subsequent period, and upon a transaction altogether

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the signature, as would conform to the nature of the instrument. In such case, the defendant would have been held as indorser, and in no other form; for such must be presumed to have been the intent of the parties to the instrument. But this Note was not made payable to the defendant, and therefore was not negotiable by his indorsement. What, then, was the effect of his signature? It was, to make him absolutely liable to pay the contents of the Note. If he had been asked, after the Note became due, to guarantee its payment, and such had been the understanding, when he gave his name, it might have been necessary to declare against him, as guarantor, instead of charging him, as original promisor; but no such agreement is proved. He puts his name upon a Note, payable to another, in consequence of a purchase, made by his brother, in a day or two after the bargain was made, knowing that he could not be considered in the light of a common indorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the Note, to write any thing over his name, which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as original promisor." In Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426, 427, the same learned Judge, in delivering the opinion of the Court, said; "It is somewhat extraordinary, that the nature of this contract, and the extent of the liability it creates, are not very clearly settled, in the books. It has been sometimes held to be an absolute, sometimes a conditional, obligation. Sometimes a guarantee has been deemed a surety, and, at others, not more than an indorsee. And this, perhaps, has arisen from the different forms in which the contract has been made. In several cases, where the party put his name on the back of the Note, without any words written over it, at the time, he not being the payee of the Note, he has been charged as an original promisor, being considered in the light of a surety, and he has been declared against, as such; but in these cases, his signature was given at the time of making the Note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally. The case of Josselyn *v.* Ames is of the first class, and that of Moies *v.* Bird, of the second. In other cases, the signature of a third party, not named in the Note, has been given, a long time after the making of the Note, and without any circumstances showing that this third party had any concern in the original contract. Such was the case of Ulen *v.* Kittredge, 7 Mass. R. 233. In the first class of cases, the holder of the Note has been allowed to treat the person, whose name is on distinct from the original formation of the Note, there, it should seem that the indorser is not to be treated as an original promisor, or maker, but, at most, as a guarantor. In this latter view, very different questions have arisen; first, whether it is not necessary, that a distinct and valid consideration should be shown, to support the supposed promise; and secondly, whether, if the consideration and promise are sufficiently established by parol proofs, the blank indorsement can be filled up in conformity with the proofs, and will not be in violation of the statute of frauds.[1] Both of

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the back, as a surety or original promisor, without any proof of consideration, other than as against the person, who signed his name under the Note, or of any actual promise, on his part, to pay, except what is derived from his signature to the Note. In the second class of cases, proof has been required of the promise or engagement to become liable, and he is to be charged in no other form, than is consistent with that engagement; and, it being a collateral engagement to pay the debt of another, there must be proof of a consideration for the promise. The distinction is clearly stated, in the case of Hunt *v.* Adams, 5 Mass. R. 361. But the cases above cited, where the party signing on the back of the Note has been held to be an original promisor, are where the signature is in blank, and not where a special undertaking is written over it. In such cases, the party chargeable, the Note not being negotiable, gives authority to the payee or holder to write over his signature such words as will bind him to the payment, not as indorser, for he cannot be such, technically, to a Note not negotiable, but as promisor, surety, or guarantee, at his election. No such authority exists, where the tenor and form of the undertaking are already drawn out, before the signature of the party."

[1] Ulen *v.* Kittredge, 7 Mass. R. 233; Oxford Bank *v.* Haynes, 8 Pick. R. 423, 427–430; Ante, § 472, and note; Dean *v.* Hall, 17 Wend. R. 214; Parks *v.* Brinkerhoff, 2 Hill, N. Y. R. 663; Tenney *v.* Prince, 4 Pick. R. 385. But see Ante, § 459, and note; Oakley *v.* Johnston, 21 Wend. R. 589; Beckwith *v.* Angell, 6 Connect. R. 315; Sandford *v.* Norton, 14 Verm. R. 228; Fear *v.* Dunlap, Green, Iowa, R. 331. In Tenney *v.* Prince, 4 Pick. R. 385, the subject was much discussed. Mr. Chief Justice Parker, on that occasion, in delivering the opinion of the Court, (the case being one of a negotiable Note, indorsed in blank,) said; "By the facts agreed, it appears, that the defendant put his name on the back of the Note, about nine months after its date, and three months

these questions have, in America, been resolved in the affirmative.[1]

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before it became due. There is no evidence of the intent and purpose of this act of the defendant, nor of any consideration which moved him to it. The writing made by the plaintiff, over the signature, would make it an original promise, of the same date with the Note, to pay the contents of the Note, according to its tenor. We do not think there was any authority in the plaintiff to make this use of the signature, because it is inconsistent with the circumstances under which the signature was given. It is impossible to infer an original promise to pay this Note, coeval with its date, from a signature put upon it nine months after. The case of Ulen *v.* Kittredge is no authority for it; for, in that case, Kittredge was charged as guarantor, and there was a consideration in forbearance towards the promisor, and the Court inferred from the act and declarations of Kittredge an authority to make him thus liable, the Note being due, when the indorsement was made. Nor does the case of Moies *v.* Bird support it; for, though the signing of Bird was two or three days after the Note was made, there were facts, from which an agreement to be responsible from the beginning was justly inferred. These two cases approached nearer to the one before us, than any which have been cited from our books, but they do not reach the present case, for this is a naked indorsement, without any accompanying facts or declarations tending to explain the act. The principle, by which all our decisions have been regulated, from the case of Josselyn *v.* Ames downwards, is, that where the indorsement is made at the time of making the Note, the person indorsing the Note is to be treated as an original promisor, and this because he is supposed to participate in the consideration; that is, the payee is supposed to have parted with something valuable, upon the strength of the liability of the party, who puts his name on the Note; and, as such party cannot be answerable as an indorser, he shall be answerable as an original promisor. This is well understood to be the law of this Commonwealth, and we do not feel disposed to change it. No authority has been produced from this or any other state or country, which would justify us in extending the liability of these anomalous indorsers. We cannot yield to the suggestion of counsel, that the blank signature gives authority, in this case, to refer the effect of the signature to the date of the Note, because it is proved, that that signature was given nine months afterwards, and we have no facts to justify such a reference. But this signature is not without effect; it was intended as security to the plaintiff, and it ought to avail as intended. The only form of engagement, which is consistent with the time and circumstances

[1] Ibid.

§ 475. There do not, indeed, seem to be any important diversities in the American authorities in the class of cases which we have just been considering, that is to say, of Notes not negotiable. But in the other class of cases, that of Notes negotiable and indorsed in blank, there have been some discrepancies of judicial opinion.

§ 476. In Massachusetts, it has been held, that if a person puts his name in blank upon the back of a Note, payable to a third person or order, at the time when it is made, for the purpose of giving it credit and currency, and he is to be bound to the absolute payment thereof, (which, in the absence of countervailing proof, will be presumed,) the person so indorsing may be treated as an original promisor or joint maker of the note.[1] In

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under which the signature was made, is a guaranty of the payment of the Note, when it should become due, and that is a contract, which may be enforced, if it was made on legal consideration, and not otherwise. If within the statute of frauds, it is sufficiently in writing, with the engagement to that effect which the plaintiff is authorized to place over the signature, to be sustained. But whether within the statute or not, it cannot avail the plaintiff, without proof of consideration, because it is a collateral not an original, undertaking. We think the signature conveys the authority to superscribe this engagement, as was decided in 1801, in a case reported in a note to Precedents of Declarations, (2d edit.) 150, afterwards in Josselyn *v.* Ames, Ulen *v.* Kittredge, and many other subsequent cases. The action, in its present form, therefore, cannot be maintained; but if it is supposed, that a consideration can be proved, the plaintiff has leave to amend his declaration and his indorsement over the signature, and a new trial is granted." In Beckwith *v.* Angell, 6 Connect. R. 315, the authorities were cited at large, and fully considered. See Ante, § 58, 59.

[1] Baker *v.* Briggs, 8 Pick. R. 122; Tenney *v.* Prince, 4 Pick. R. 385; Austin *v.* Boyd, 24 Pick. R. 64. In Baker *v.* Briggs, 8 Pick. R. 122, 130, Mr. Chief Justice Parker, in delivering the opinion of the Court, said: "The Note was made by Ryan to the plaintiff, and the name of the defendant written on the back. Supposing this was done, when the Note was made, (and there was no evidence to the contrary,) according to several decisions, it was right to declare against him, as promisor; but still he

New Hampshire and Vermont, the same doctrine has prevailed.[1] In New York, the earlier cases inclined to the same opinion.[2] But in the later cases a different doctrine has been maintained, and a distinction has been taken between cases, where the Note is negotiable, and cases, where it is not negotiable; and it has been broadly laid down, that, in the former cases, the party, so indorsing the Note in blank, when it is made, if it is originally made payable to a third person or order, or to a third person or bearer, it is not ordinarily to be treated as an original promisor or maker, nor as a guarantor, but simply in the character of an indorser upon the Note.[3] If the Note is payable to A. or order, the party so indorsing can ordinarily be treated only as a second indorser;[4] if the Note is payable to order or to bearer, he may, under certain circumstances, be treated as the first indorser, and liable, as such, to the holder.[5]

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stood in relation to Ryan as a surety, and was entitled to any advantages belonging to that character, as he would if his name had been put on the face of the Note, when he might prove that he was only surety; and if the creditor had done any act, which could in law discharge a surety, he might prove that in his defence." In Oxford Bank *v.* Haynes, 8 Pick. R. 423, 426, 427, the same learned Judge, in commenting upon the cases, seems to have limited the doctrine to Notes not negotiable. Ante, § 473, note.

[1] Flint *v.* Day, 9 Verm. R. 345; Nash *v.* Skinner, 12 Verm. R. 219; Sylvester *v.* Downer, 20 Vermont, R. 355; Martin *v.* Boyd, 11 New Hamp. R. 385. See also Thomas *v.* Jennings, 5 Smedes & Marshall, Mississippi, R. 627; Jennings *v.* Thomas, 13 Ibid. 617.

[2] Herrick *v.* Carman, 12 John. R. 159; Nelson *v.* Dubois, 13 John. R. 175; Campbell *v.* Butler, 14 John. R. 349.

[3] Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80; Hough *v.* Gray, 19 Wend. R. 202; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; S. C. 7 Ib. 416–426, note; Spies *v.* Gilmore, 1 Comstock, R. 321.

[4] Ellis *v.* Brown, 6 Barbour, Sup. Ct. R. 282. See also Crozer *v.* Chambers, Spencer, N. Jersey R. 256; Fear *v.* Dunlap, 1 Greene, Iowa R. 331; Jennings *v.* Thomas, 13 Smedes & Marshall, R. 617.

[5] Dean *v.* Hall, 17 Wend. R. 214; Seabury *v.* Hungerford, 2 Hill,

§ 477. The doctrine, in Massachusetts, Connecticut, and Vermont, has gone one step further; and it has

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N. Y. R. 80; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; Oakley *v.* Johnston, 21 Wend. R. 588; Labron *v.* Woram, 1 Hill, N. Y. R. 91; Tillman *v.* Wheeler, 17 John. R. 326. The subject was much discussed in Dean *v.* Hall, 17 Wend. R. 214, where the Court do not seem to have been prepared finally to abandon the doctrine of the former cases. There, the Note was payable to A. or bearer, and indorsed in blank by the defendant. Mr. Justice Cowen, on that occasion, elaborately discussed all the cases; and after citing them, said: "Such are the cases relied upon to sustain this declaration. I think the utmost they establish is, that where the defendant is privy to the consideration, and indorses a Note not negotiable, or at most one payable to order, or to the plaintiff or bearer, and not negotiated, the declaration may then charge the defendant directly as the maker. This is the extent of Herrick *v.* Carman, and Nelson *v.* Dubois, which go the farthest. None of the cases can mean, that, whatever may be the consideration, if the defendant stand in the ordinary relation of a commercial indorser, he is not to be treated as such. The distinction is further illustrated by Ulen *v.* Kittredge, 7 Mass. R. 233, Moies *v.* Bird, 11 Mass. R. 436, and Campbell *v.* Butler, 14 Johns. R. 349. These cases were all identically the same in their circumstances. The indorsers were charged on blank indorsements upon Notes payable to the plaintiff or order, but expressly to raise a credit at the time in favor of the maker. The only peculiarity lies in the strong intendment from very weak evidence, which the Court made in Moies *v.* Bird, to connect the defendant with the original consideration. In all, the plaintiff was allowed with his own hand to write a full length Note over the name. The principle of all these cases is fully explained by the late one of Beckwith *v.* Angell, 6 Conn. R. 315, which pushed the former authorities to a greater length than they would appear originally to warrant. On a Note similar to those in the last cited cases, 7 and 11 Mass. R. and 14 Johns. R., the defendant indorsed his name in blank, long after the Note had been executed, as a mere surety, without the least privity with the original consideration. The plaintiff was allowed to write over it thus: 'In consideration of further forbearance, I guaranty the payment of the within Note.' This was in itself a Promissory Note, and so agreed to be within Allen *v.* Rightmere, 20 Johns. R. 365; and that therefore no demand or notice was necessary. Peters, J. who delivered the opinion of the Court, said: 'The undertaking of an indorser is always collateral, unless made otherwise by special agreement. But the defendant was not an indorser, because he was neither promisee nor indorsee. His contract was therefore necessarily special, and whatever the parties chose to make it. Had it remained blank, it must have been considered primâ facie a guaranty, or nothing. This de-been held, that, where a blank indorsement is made upon a Promissory negotiable Note by a third person,

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pended on the inducement and intention with which the defendant wrote his name.' Bristol, J., said: 'By the common law, the holder of a Note has authority to write over the indorsement the real contract between the parties.' Hosmer, C. J., dissented; but he did not deny the right to fill up the blank according to the intent. He only insisted, that, conformably to a series of adjudications in Connecticut, the intent to be inferred from such a position of the indorser's name was merely to make himself liable on the failure of the principal, after the holder had exercised due diligence in attempting the collection. The difference lay only in the mode of filling up. Peters, J., had abundantly proved by authority the doctrine, so familiar to the mercantile community, that Notes, Bills, or indorsements may thus be written, where the intent is apparent; indeed, that the holder may put the blank paper in any form, which shall accord with the intent of the names, either as makers, drawers, payees, or indorsers. We arrive, through the last case, to the plain and simple foundation into which the power of the bonâ fide holder is resolvable: it is the intent of the parties, not written out in full, but evinced, by the character of the slip on which the name appears, connected with the course of local adjudication, but subject to be modified by oral evidence. The main difficulty in maintaining such contracts arises out of the statute of frauds. In England, an indorsement, such as we have been considering, would probably be viewed as primâ facie evidence of an intent to be made chargeable as second indorser, although it stands the first in chronological order; Bishop *v.* Hayward, 4 T. R. 470; and see Herrick *v.* Carman, 12 John. R. 161, before cited; and, although entirely without words of negotiability, it seems to be well settled, that if the payee indorse and deliver over a Note or Bill, he is entitled to all the privileges of a first indorser, as between himself and the indorsee; for the act of indorsing is equivalent to a Bill of Exchange on the maker. Chitty on Bills, 218, 219, (8th Am. (Springfield, 1836) from 8th London edit.); Hill *v.* Lewis, 1 Salk. 132. On the whole, there is no case requiring, that, upon the face of this declaration we should infer any other than an intent in the defendant, to stand as an ordinary indorser. Why do the cases stop short of that? We have seen, that it is because the law either cannot charge the defendant as indorser, or it is because he has entered into some special engagement, incompatible with that character. No case goes farther." In Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80, which was a Note payable to A. or bearer, and indorsed by J. B., (the defendant) thus, "J. B., backer," Mr. Justice Bronson, in delivering the opinion of the Court, said; "If we assume, that the Note was originally passed to the plaintiff, who is named in it as payee, that will not alter the case. The defendant might still have been charged as indorser; and where long after the date of the Note, the payee may write over the signature a guaranty thereof for any consider-

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he may be so charged, he cannot, I think, be made liable in any other form. The Note is payable to the plaintiff or bearer, and, in its legal effect, was payable to the bearer. The plaintiff might have declared, that Pickering made his Promissory Note payable to bearer, and delivered it to the defendant, who thereupon indorsed and delivered it to the plaintiff, with an averment, that payment was demanded of the maker at maturity, and due notice of non-payment given to the defendant. The plaintiff might also have transferred the Note by delivery to some third person, and then the holder might have declared in the same way; or he could have alleged, that Pickering made his Note payable to Daniel Seabury or bearer, that Seabury delivered it to the defendant, who indorsed and delivered it to the holder. But, without transferring the Note, if the plaintiff had taken the proper steps for that purpose, there could be no difficulty in his declaring and recovering against the defendant, as indorser. We had occasion to consider this question, in Dean *v.* Hall, 17 Wend. R. 214, and that case will be found to be entirely decisive of the one at bar. Coleman made his Promissory Note payable to Howard or bearer, upon the back of which Hall indorsed his name, and the Note was then delivered to Howard, the payee, named in it. We held, that there was no legal difference between a Note payable to bearer, and one payable to a particular person or bearer; that Howard, the payee, or Dean, to whom he had transferred the Note, might either of them have declared and recovered against Hall, as indorser; and that they could not charge him in any other character. If the note had not been negotiable, or if, for any other reason, the case had been such, that the defendant could not, by the exercise of proper diligence, have been charged as indorser, and there had been an agreement, that he would answer in some other form, then the plaintiff might have written over the name such a contract as would carry into effect the intention of the parties. When a contract cannot be enforced in the particular mode contemplated by the parties, the Courts, rather than suffer the agreement to fail altogether, will, if possible, give effect to it in some other way. But they never make contracts for parties, nor substitute one contract for another. This was, in legal effect, regular mercantile paper, upon which the defendant contracted the obligation of an indorser within the law merchant; and by that obligation, and no other, he is bound. It is said, that the defendant was privy to the consideration for which the Note was given, and therefore liable as maker or guarantor. But it is not enough, that the indorser knows what use is to be made of the Note, or that he indorses for the purpose of giving the maker credit, either generally, or with a particular individual. If the Note is negotiable, the only inference to be drawn from the fact of his putting his name on the back of it is, that he ation, which the parol proofs shall establish to exist, and the payee may maintain a suit upon the same, as

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intended to give the maker credit, by becoming answerable as indorser; and this inference is so strong, that it will prevail even where his obligation as indorser cannot be made operative, without first obtaining the name of another person to the paper. Herrick *v.* Carman, 12 John. R. 159; Tillman *v.* Wheeler, 17 John. R. 326. Before he can be made liable as maker or guarantor, there must at the least be an agreement, that he will answer as such. Nelson *v.* Dubois, 13 John. R. 175. And where a parol agreement to that effect is shown, I do not see how it can be made to take the place of the written contract of indorsement. In other cases, the rule is, that when parties have come to a written contract, that is taken as the evidence of their final agreement, and all prior negotiations are merged in it. In Nelson *v.* Dubois, the defendant agreed to become security for Brundige, and to guarantee the payment of a Note, which B. was about to make to the plaintiff; but when the contract came to be reduced to writing, it took the form of a negotiable Promissory Note, upon which the defendant might have been charged as indorser. That was the final agreement between the parties, and I see no principle, upon which the plaintiff could be allowed to abandon the written contract, and go back to the prior negotiations, for the purpose of charging the defendant as guarantor. And although the defendant was charged in that form, the case is not, I think, an authority for the position, which it is usually cited to support. The point, that the defendant might have been made answerable as indorser, was neither taken at the trial nor on the argument, nor was it mentioned by the Court; but the contrary was assumed, in every stage of the cause." In Hall *v.* Newcomb, 3 Hill, N. Y. R. 233, the Note was payable to A. or order, and indorsed in blank by the defendant, and sued by A. Mr. Justice Cowen, on that occasion, in delivering the opinion of the Court, distinctly overruled the early cases, and said: "The Note in question was payable to the plaintiff or order: and there was nothing in the indorsement by the defendant below to indicate, that he meant to be considered liable in any other character, than that of a strictly commercial indorser. True, he knew the use which was to be made of the Note: he was privy to the consideration. But so is every accommodation indorser, who becomes a party, with intent to raise money at a particular bank. This takes nothing from his right to require presentment and notice, provided the Note be negotiable. The question depends entirely on the fact of negotiability. The true rule is laid down by Mr. Justice Bronson, in Seabury *v.* Hungerford, 2 Hill, N. Y. R. 84. I know Mr. Justice Spencer conceded enough in Herrick *v.* Carman, 12 John. R. 161, to maintain this action. But the concession was made on the authority of Josselyn *v.* Ames, 3 Mass. R. 274, which was the case of a Note not negotiable. The case of Campbell a valid guaranty; thus supplying at once, by parol proofs, the consideration, and also the written agreement.[1] [But in Louisiana it has been declared to be, according to the uniform jurisprudence of the state, that, when a person, not a party to a Note, puts his name on the back of it, he is presumed to bind himself as surety.[2]]

§ 478. A distinction has also been taken in New York between a written guaranty on the back of a negotiable Note, made after the Note was given, which imports to guarantee the *payment* of the Note,

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v. Butler, 14 John. R. 349, went on Herrick *v.* Carman, and another case, Nelson *v.* Dubois, 13 John. R. 175. The latter case was reconsidered in Seabury *v.* Hungerford, where it was denied, that the mere indorsement of negotiable paper can be turned into an absolute guaranty, from the circumstance of its being intended to give the maker credit with the holder. The intent to give credit must be taken with the usual qualification, which attaches to other accommodation indorsements. These are also made with the intent to give credit. See Hough *v.* Gray, 19 Wend. R. 202, 203. That the plaintiff below might have put the Note in such a form, by indorsing it himself, as to charge the defendant below in the character of second indorser, there is not the least doubt. This was conceded in Herrick *v.* Carman. And see Dean *v.* Hall, 17 Wend. R. 221. The Note being entirely available to the holder in that form, the giving it effect in any other would therefore be going beyond the principle, which makes a contract inure, as having a different effect from what its direct words import. Such a forced construction should never be made, except to prevent a failure of the contract altogether; ut res magis valeat quam pereat. This maxim was agreed upon in Seabury *v.* Hungerford, as furnishing the only ground for changing a simple indorsement into a guaranty or an absolute promise. Being on a Note payable to the holder, not negotiable, and so no possibility of raising the ordinary obligation of indorser, there is then room to infer, that a different obligation was intended, whether the indorsement be for the purpose of giving the maker credit on a future advance, or not."

[1] Ulen *v.* Kittredge, 7 Mass. R. 233; Moies *v.* Bird, 11 Mass. R. 436; Tenney *v.* Prince, 4 Pick. R. 385; Beckwith *v.* Angell, 6 Connect. R. 315; Sandford *v.* Norton, 14 Verm. R. 228; Sylvester *v.* Downer, 20 Verm. R. 355.

[2] McGuire *v.* Bosworth, 1 Robinson, Louisiana R. 248.

and a guaranty, made at the same date as the Note, which imports only to guarantee the *collection* of the Note: and it has been held, (as we have seen,) that, in the former case, the party indorsing the Note is liable as an absolute promisor or maker of the Note, and therefore no consideration need appear on the face of the indorsement;[1] but, in the latter case, it is a mere guaranty, and if the consideration does not appear on the face of the indorsement, it is void within the statute of frauds.[2] The distinction between the cases is certainly very nice, if, indeed, in any view, it can be deemed satisfactory; and, in the former case, it is placing an interpretation upon the word "guaranty," which seems scarcely justified by any of the ordinary rules applied to similar language. There is also this further difficulty in that case, that the indorsement was not contemporaneous with the Note; and no consideration was expressed in the guaranty.[3]

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[1] Manrow *v.* Durham, 3 Hill, N. Y. R. 584. See Ante, § 470, and note.

[2] Hunt *v.* Brown, 5 Hill, N. Y. R. 145. In this last case, Mr. Justice Bronson, in delivering the opinion of the Court, said: "This is a collateral undertaking by the defendant, as a surety to pay the debt of Lewis, and no consideration is expressed in, or can be inferred from, the written agreement. The promise is clearly void within the statute of frauds. If it had been a guaranty of payment, the case would have fallen within the decision in Manrow *v.* Durham, 3 Hill, N. Y. R. 584, and the contract would have been upheld, on the ground, that it was a Promissory Note, which imports a consideration. But this is a guaranty of collection, and I am not aware, that such an undertaking has ever been deemed a Promissory Note. The Judge has reviewed his decision at the circuit, and ordered a new trial, in which we think he was quite right."

[3] Mr. Justice Bronson, in his dissenting opinion, in Manrow *v.* Durham, 3 Hill, N. Y. R. 584, has shown the difficulties attendant upon that case, in a very striking manner; and it calls, therefore, for a careful examination. To some extent, it is certainly broken in upon by the case of Hunt *v.* Brown, 5 Hill, N. Y. R. 145.

§ 479. But whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third person on the back of a Note made payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or a guarantor, or an indorser, there is one principle admitted by all of them; and that is, that the interpretation ought to be just such as carries into effect the true intention of parties, which may be made out by parol proof of the facts and circumstances, which took place at the time of the transaction. If the party indorsing the Note intended at the time to be bound only as a guarantor of the maker, he shall not be deemed to be a joint promisor, or an absolute promisor, to the payee. If he intended only to be a second indorser on the Note, he shall never be held as liable to the payee, as a first indorser. It is only in cases where the evidence on these points is doubtful, or obscure, or totally wanting, that the Courts of Law adopt rules of interpretation, as furnishing presumptions of the actual intentions of the parties.

§ 480. If we keep in view this principle of interpretation of the contracts of the parties in cases of this peculiar sort, it will be found, that some of the apparent diversities in the authorities immediately vanish, and others become of slight importance, and are, for the most part, easily reconcilable. Where the Note is negotiable, and is indorsed in blank by a third person, not being the payee, or a prior indorsee thereof, there, in the absence of any controlling proof, it is presumed, that such person means to bind himself in the character of an indorser, and not otherwise, and precisely in the order and manner, in which he stands on the Note.[1] If the Note is not negotiable, and the indorsement in blank is not a part of the original

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[1] Herrick *v.* Carman, 12 John. R. 159. In this case the Note was originally made by Ryan, payable to L. Carman & Co., and was indorsed by Herrick; and a suit was afterwards brought thereon by the plaintiff against Herrick. Mr. Chief Justice Spencer, in delivering the opinion of the Court, said; "The defendant in error (the original plaintiff) purchased the Note at a discount, and with full knowledge of all the facts in the case; his right, therefore, to recover, cannot be superior or better than that of L. Carman & Co., from whom he derived whatever title he had. It does not appear, that the plaintiff in error indorsed the Note for the purpose of giving Ryan credit with L. Carman & Co., or that he was in any wise informed of the use to which Ryan meant to apply the Note. In the absence of any proof to the contrary, we must intend that Herrick meant only to become the second indorser, with all the rights incident to that situation. The fact of his indorsing first, in point of time, can have no influence, for he must have known, and we are to presume he acted on that knowledge, that, though the first to indorse, his indorsement would be nugatory, unless preceded by that of the payees of the Note. Since the case of Russell *v.* Langstaffe, Doug. 514, it is not to be doubted, that the indorsement of a blank Note is a letter of credit for an indefinite sum; but the present is not that case. There can be no doubt, here, but that the Note was filled up when it was indorsed by the plaintiff in error. Had it appeared, that the plaintiff indorsed the Note for the purpose of giving Ryan credit with Lawrence Carman & Co., then I should have considered him liable to them, or any subsequent indorser, and the plaintiff's indorsement might have been converted into a guaranty to pay the Note, if Ryan did not, according to the decision of the Supreme Judicial Court in Massachusetts, 3 Mass. R. 274. Under such a state of facts, there would be no objection to the right of the defendant in error to recover as the indorser of Herrick. In Bishop *v.* Hayward, 4 Term R. 470, Lord Kenyon impliedly admits, that there may be circumstances under which a prior indorser may recover against a subsequent one. We have already decided that the payees of this Note could not, directly or indirectly, recover on it, (10 John. R. 224,) and that decision is supported by the case of Bishop *v.* Hayward. The defendant in error, having purchased this Note at a discount, and with full knowledge of the facts, has virtually agreed not to resort to Lawrence Carman & Co. in any event; and yet, if he can sustain this suit, he will, in effect violate the agreement under which he became the purchaser of the Note; because, upon this evidence, Herrick, if obliged to pay, would have his remedy over against Lawrence Carman & Co. The defendant does not stand before the Court with the title or character of a

transaction, but subsequently made, there, in the absence of the like controlling proofs, it is deemed a

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fair, bonâ fide indorsee of a Note, in the usual course of trade; but rather in the light of a speculator, attempting, under the specious character of an indorsee, to recover a sum of money, to which those from whom he derives his title had, with his full knowledge, no right. It may be regarded as a general rule, that when an indorser cannot recover against a subsequent indorser, no person acquiring a title under such prior indorser, and acquainted with all the facts, shall be allowed to recover." The same learned Judge, in delivering the opinion of the Court in Nelson *v.* Dubois, 13 John. R. 175–177, said; "If what was said by me, in delivering the opinion of the Court in the case of Herrick *v.* Carman, 12 John. R. 160, be law, then the decision of the Court below was erroneous. Although what was then said was deemed pertinent to that case, it may not have been necessary to the decision of the cause, and this Court, therefore, are not to be considered as compromitted by it. The facts, in that case, are the same as in this, with the difference only, that it did not appear that Herrick indorsed the Note for the purpose of giving Ryan, the maker of the Note, credit with Lawrence Carman & Co. It was then, and still is, my opinion, that, had he done so, he would have been liable to them, or any subsequent indorsee, and that Herrick's indorsement might have been converted into a guaranty to pay the Note, if Ryan did not. In the present case, it does appear, clear and affirmatively, that the plaintiff refused to sell the horse, for which the Note was given on Brundige's responsibility, and that the defendant put his name on the Note as guarantee for Brundige's payment of it, when it fell due; and that, but for the defendant's undertaking, as guarantee, the plaintiff would not have parted with his property." In Oakley *v.* Johnston, 21 Wend. R. 588, where the Note was negotiable, and payable to a third person who had indorsed it, and afterward was indorsed in blank by the indorser, before it became due, and he received a money consideration to guarantee it; it was held, notwithstanding the special circumstances, that he was not liable as guarantor; but solely as indorser. Mr. Justice Cowen, in delivering the opinion of the Court, said; "Had this been an ordinary contract of guaranty or insurance, there is no doubt, that it must have contained all the requisites claimed for it by the defendant in the Court below. A consideration must have been expressed, and been followed by an agreement to guarantee or insure the payment, and the whole been subscribed by the defendant below. But the defendant below did not put himself in the position of a man expressly contracting to pay the debt of another by an ordinary simple contract, calling, in order to give it effect, for all the express requisites demanded by the statute of frauds. He chose to satisfy the statute in another way, which he had mere guaranty, and the indorser liable only as a guarantor.[1] If the indorsement, instead of being in blank,

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a perfect right to do. He indorsed those negotiable Notes, in the hands of the plaintiffs, saying, 'I choose to guaranty the debt in that form.' This gave the plaintiffs below the authority to write over his name an order or Bill of Exchange upon Ordronaux to pay the money, and subjected him as indorser. Smallwood *v.* Vernon, 1 Strange, 478; Lord Ellenborough, in Ballingalls *v.* Gloster, 3 East, 482. Suppose, that for the same consideration, he had signed his name as maker to a Note in blank, authorizing the plaintiffs to fill it up with the seven or eight thousand dollars; is there a doubt, that he would have been liable as maker, and might have been so treated throughout? This doctrine is settled in respect to an indorser. Russel *v.* Langstaffe, Doug. 514. There a man indorsed blank Notes, with intent they should be filled up, and money raised on them. The plaintiff took them, knowing how and why they were indorsed, and sued the indorser, — the declaration stating, that he indorsed the Notes after they were made. The defence was, that they were indorsed prematurely. It was, however, given up by the attorney-general. After Lee had argued it, Lord Mansfield said it did not lie in the defendant's mouth to say the indorsements were irregular. The defendant below here attempted the same thing in another form. He indorsed the Notes for a valuable consideration, while they were in the hands of the plaintiffs below, making out a complete case in point of form. He shall not after that be allowed to gainsay his own act. He is estopped; the act inures as an indorsement before the plaintiffs below obtained the Notes. To all this the defendant below agreed, and he shall not be received to violate his agreement. It has been held by several Courts, that, where a man puts his name on a Note not negotiable, with intent to guarantee its payment, you may write a guaranty, indeed a Promissory Note, over the name, and expressing a valuable consideration. Josselyn *v.* Ames, 3 Mass. R. 274; White *v.* Howland, 9 Mass. R. 315; Hunt *v.* Adams, 5 Mass. R. 358; Palmer *v.* Grant, 4 Conn. R. 389; Beckwith *v.* Angell, 6 Conn. R. 315. And see other cases cited in Dean *v.* Hall, 17 Wend. R. 219, 220; Seymour *v.* Van Slyck, 8 Wend. R. 421, 422, and the cases there cited by Sutherland, J. At least you may write the ordinary indorsement, which amounts to a Bill of Exchange. Chitty on Bills, 218, 219, (Amer. edit. 1836); Hill *v.* Lewis, 1 Salk. 132; and charge the defendant by notice. This would be making the contract most favorable to him. It is of the nature of a Note or Bill, and equally so of an indorsement, even in blank, that it imports a consideration, the same as a specialty." But see Hall *v.* Newcomb, 3 Hill, N. Y. R. 233; Ante, § 476, and note; Labron *v.* Woram, 1 Hill, N. Y. R. 91; Tillman *v.* Wheeler, 17 John. R. 325.

[1] Ante, § 474; Dean *v.* Hall, 17 Wend. R. 214. But see Oakley *v.*

is filled up, and the party says, "I guaranty the within Note," or uses other equivalent language, the word "guaranty" will have its ordinary strict meaning applied to it, unless the context, or the attendant circumstances, repel that interpretation.[1] If the indorsement is on a negotiable Note, payable to a third person, and the party indorsing writes on it, "A. B., backer," the latter word will be interpreted to mean indorser, and consequently, the party will be deemed liable to the payee only, as indorser, and not as maker or guarantor.[2] On the other hand, if the Note is negotiable

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Boorman, 21 Wend. R. 588; Manrow *v.* Durham, 3 Hill, N. Y. R. 584; Foster *v.* Barney, 3 Verm. R. 60. See Leggett *v.* Raymond, 6 Hill, N. Y. R. 639.

1 Ante, § 472; Loveland *v.* Shepard, 2 Hill, N. Y. R. 139; Lamourieux *v.* Hewit, 5 Wend. R. 307. See Leggett *v.* Raymond, 6 Hill, N. Y. R. 639; Myrick *v.* Hasey, 14 Shepley, R. 9.

2 Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80-82. In this case, the Note was as follows: "March 30, 1837. Six months from date, for value received, *we jointly and severally* promise to pay Daniel Seabury or bearer, the sum of one hundred and twenty-five dollars, with interest from date." Signed Justice Pickering. On the back of the Note was written, "John I. Hungerford, backer, Schoharie." The Court, notwithstanding the word "backer," construed the party indorsing liable only as an indorser. On that occasion, Mr. Justice Bronson, in delivering the opinion of the Court, said: "Although the nature of the obligation which the defendant intended to contract was sufficiently manifested, by putting his name on the back of the Note, he seems to have added the word 'backer,' for the purpose of declaring still more explicitly, that he was to be regarded as an indorser; and his residence was given for the purpose of indicating the place to which notice might be sent, in case the Note should not be paid at maturity by the maker. I infer, also, from the conversation between the parties about the time the Note fell due, that they both regarded the defendant as standing in the character of an indorser, and entitled to notice as such. I do not see, therefore, upon what principle he can be charged as maker or guarantor. It would be substituting a new contract for the one which the parties have made. If the special circumstances, which have been mentioned, are laid out of view, the result will still be the same. When a man writes his name, without any thing more, on the back of a

and payable to the order of A., and indorsed by A. in blank, and then B. should write on the back, "For a valuable consideration, I guaranty the collection of the within Note," he would be held liable as guarantor only, and not as indorser, upon the true import of the instrument.[1] But if B. had written on the Note, long after it was made, "For value received, I guaranty the payment and collection of the within Note to C. (an indorsee) *or bearer*, when due," there the indorsement would be held to be a new negotiable Note, in which B. would be bound as maker to the indorsee, although, as to the original Note, the contract would be a mere guaranty.[2] So, if the original payee of a

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negotiable Promissory Note, he agrees that he will pay the Note to the holder on receiving due notice that the maker, on demand made at the proper time, has neglected to pay it. This is the legal effect of the indorsement, and the case is not open to any intendment, — certainly not to the presumption, that the party meant to contract a different obligation. Proof that he put his name on the Note, for the purpose of giving credit to the maker, or enabling him to raise money upon the paper, only shows that there is a special relation between him and the maker; not between him and the holder. It does not change the nature of the contract of indorsement from what it would be, had the Note actually passed through his hands in the usual course of business, and been indorsed for value. If this be not so, then every accommodation indorser may be treated as a maker or guarantor of the paper." See also another citation from the same opinion, Ante, § 476, note, and Leggett *v.* Raymond, 6 Hill, N. Y. R. 639.

[1] Loveland *v.* Shepard, 2 Hill, N. Y. R. 139; Hunt *v.* Brown, 5 Hill, N. Y. R. 145. See Leggett *v.* Raymond, 6 Hill, N. Y. R. 639.

[2] Miller v. Gaston, 2 Hill, N. Y. R. 188; Ketchell *v.* Burns, 24 Wend. R. 456; Allen *v.* Rightmere, 20 John. R. 365; Ante, § 472, note. In the case of Miller *v.* Gaston, 2 Hill, N. Y. R. 188, the Note was originally made payable to L. P. Hovey or order, and signed by Aaron Hovey, and indorsed first by Lindley P. Hovey, as follows: "I guaranty the payment of the Note within." Long afterwards, N. B. Gaston indorsed on the same Note, "For value received I guaranty the payment and collection of the within Note to Adam Miller or bearer, when due." On a suit by Miller against Gaston, the Court held Gaston bound as the maker of a new

negotiable Note should indorse a guaranty upon the back thereof, agreeing to be bound to the payment of

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Note. Mr. Justice Bronson, in delivering the opinion of the Court, said: "Neither Lindley P. Hovey nor Gaston was either maker or indorser of the Note within the law merchant; and the suit was not well brought against them, or either of them, in conjunction with Aaron Hovey the maker. They were guarantors, and were only answerable in that character. In this state, we have not lost sight of the distinction between commercial paper and other written promises to pay money; and a man may guarantee the collection or payment of a Promissory Note, or make any other special undertaking in relation to it, without being regarded either as maker or indorser of the original instrument. The obligation of a guarantor is usually more onerous than that of an indorser; but that consideration does not give the creditor a right to disregard the contract actually made, and substitute another, though less burdensome one, in its place. Where a third person is privy to the original consideration, and, at the time the Note is given, indorses an absolute undertaking on the back to pay it at maturity, he may be treated as a joint and several promisor with the party who signs on the face of the Note. Hough *v.* Gray, 19 Wend. 202. This stands upon the principle, that two instruments of the same general nature, both executed at the same time, and relating to the same subject-matter, are to be construed together as forming but one agreement. As he who signs on the face, and he who indorses his name upon the back both promise to do the very same thing, to wit, to pay the money at the specified time, they may, without doing any violence to the contract, be regarded as joint makers. And as, in point of form, each promises for himself, the undertaking may be treated as several as well as joint. See Bank of Oxford *v.* Haynes, 8 Pick. R. 423. In the case at bar, there is no evidence going to show when Lindley P. Hovey put his name on the Note; and besides, he is the payee of the Note, and could not have been a joint or several maker with Aaron Hovey. As to Gaston, it is quite evident, that he had nothing to do with the original concoction of the Note, for his name does not appear upon it, until nearly three months after the Note was given, and after it had passed through the hands of the payee. Gaston cannot, therefore, be charged as maker. The case of Ketchell *v.* Burns, 24 Wend. 456, goes upon the ground, that Burns made a new negotiable Promissory Note on the back of the original Note made by Parsons. It lacked nothing of being a complete instrument in itself, except a specification of the amount to be paid, and the time of payment; and in both of those particulars, it was rendered certain, by a reference to another writing on the other side of the same piece of paper. Burns was not charged as a joint maker with Parsons, nor as a party in any form to the original Note; but he was held answerable as upon a new and independent the Note, he would be held to be an absolute promisor, and unconditionally bound to pay the Note, as the true interpretation of his contract.[1] Whatever difficulties

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contract. He could not have been sued with Parsons under our statute, for they were not different parties to the same Note. If that case was rightly decided, Gaston may be sued as the maker of a new Note; but he cannot be sued with Aaron Hovey, either as a joint or several maker of the original Note. Neither L. P. Hovey nor Gaston can be charged as indorser, for the plain reason, that they have severally made an express contract of a different nature, and have not agreed to answer as indorsers. This is not only quite clear upon principle, but it is also settled upon authority. Meach *v.* Churchill, 2 Wend. R. 630; Lamourieux *v.* Hewit, 5 Wend. R. 307. And see Allen *v.* Rightmere, 20 John. R. 365. The contract of guaranty upon this Note differs not only in terms, but in its own nature, from the contract of indorsement upon mercantile paper; and the two things cannot be confounded without losing sight of the agreement made by the parties, and setting up another in the place of it. The case of Watson's Ex'ors *v.* McLaren, 19 Wend. 557, 566, does not decide, as the reporter seems to suppose, that a guaranty can under any circumstances be treated as the indorsement of a Note. The Judge was speaking of what was said by counsel on the authority of Upham *v.* Prince, 12 Mass. R. 14. True, he afterwards goes on to speak of what 'that case shows,' without expressing, in terms, any dissent from the doctrine; but neither dissent nor approbation was called for on that occasion."

[1] Allen *v.* Rightmere, 20 John. R. 365. See Williams *v.* Granger, 4 Day, R. 444; Breed *v.* Hillhouse, 7 Connect. R. 523; Sage *v.* Wilcox, 6 Connect. R. 81; Bayley *v.* Hazard, 3 Yerg. R. 487. But see Ante, § 147, and note. The note in Allen *v.* Rightmere, 20 John. R. 365, was signed by Toan, payable to Rightmere or order, and the guaranty by the payee to Rightmere was, "For value received, I sell, assign, and guaranty the payment of the within Note to John Allen or bearer." The declaration contained counts against him as indorser, and also on the special guaranty; and the money counts. Mr. Chief Justice Spencer, in delivering the opinion of the Court, said: "Proof of demand, and notice of nonpayment were not necessary. The defendant's engagement is, in effect, that Toan should pay the Note, or that he would pay it. It is the duty of the debtor to seek the creditor, and pay his debt on the very day it becomes due. As regards the maker of the Note, and to render him liable, no demand is necessary. A demand of payment is necessary only to fix an indorser, or a surety, whose undertaking is conditional. An indorser does not absolutely engage to pay. It is a conditional undertaking to pay, if the maker of the Note does not, upon being required to do so, when the

may be thought to exist in some of these cases, as to interpretations put upon the contract of the party sought to be charged, the Courts will be found uniformly to have adopted that, which in their judgment expounded truly the intention of all the parties thereto.

§ 481. Passing from these in some respects perplexing considerations, applicable to the forms or modes, in which a guaranty may arise, let us, in the next and third place, examine when, and under what circumstances, a guaranty is negotiable or not. And here it may be laid down as a general rule, that a guaranty will not be construed to be negotiable, unless, from the language and attendant circumstances, it is manifest, that such is the intention of the guarantor, and, by the principles of commercial law, that intention is capable of being carried fully into effect.

§ 482. Letters of credit, which are familiarly in use in the commercial world, may be properly deemed a species of guaranty; and when they are addressed generally to all, and any persons, who will make the advances in favor of a particular party, or to his order, they amount to a direct agreement to repay the advances so made, or to accept a Bill drawn for the same by the creditor. In this respect, such a letter may be deemed, for many purposes, a circulating or negotiable credit.[1]

Note falls due, and upon the further condition, that the indorser shall be notified of such default. The defendant insists, that he stands in the situation of an indorser merely; but such is not the fact. The undertaking here is not conditional; it is absolute, that the maker shall pay the Note when due, or that the defendant will himself pay it. In Tillman *v.* Wheeler, 17 John. R. 326, and the cases there referred to, it was taken for granted, that upon a guaranty such as this, no demand or notice would have been necessary." See also, Heaton *v.* Hulbert, 3 Scamm. Illinois R. 489.

[1] Marius on Bills, p. 35, 36; Molloy, De Jure Marit. ch. 10, § 36;

§ 483. But it is not our present purpose to examine the nature, operation, or negotiability of guaranties in general, but of those only which are either the accompaniments of, or indorsed upon, Promissory Notes. It seems clear, by the foreign law, that where the guaranty is on the face, or at the bottom of the Promissory Note, (*pour aval,*) that unless some other restrictive language accompanies it, it is generally negotiable, and passes to every subsequent indorsee or holder, and gives him precisely the same rights, as if it were made personally to himself, and subjects him to the same obligations.[1] And this quality, without question, has a great tendency to promote the free circulation and general credit of the Note.[2] The doctrine seems equally applicable, by the foreign law, to cases where the guaranty is on a separate paper, and is transferred at the same time with the Note to the holder. Indeed, according to Pothier, this latter, in his time, was the most ordinary form of a guaranty, or *aval*.[3] This also is the law of Scotland.[4]

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1 Bell, Comm. B. 3 ch. 2, § 4, p. 371, (5th edit.) ; Com. Dig. *Merchant*, F. 3, F. 6 ; Story on Bills, § 459 - 463 ; Lawrason *v.* Mason, 3 Cranch, 492 ; Boyce *v.* Edwards, 4 Peters, Sup. Ct. R. 121 ; Adams *v.* Jones, 12 Peters, Sup. Ct. R. 207, 213 ; Carnegie *v.* Morrison, 2 Metc. R. 381, 395, 396 ; Russell *v.* Wiggin, 2 Story, R. 213 ; S. C. cited in Story on Bills, § 462, note.

1 Story on Bills, § 456 ; Pardessus, Droit Comm. Tom. 2, art. 397 ; Savary, Le Parfait Négociant, Pt. 1, Liv. 3, ch. 8, p. 205 ; Heince. de Camb cap. 3, § 26 - 29 ; Id. cap. 6, § 10 ; Mr. Senator Verplanck's opinion in McLaren *v.* Watson's Ex'ors, 26 Wend R. 441 - 444 ; Codigo de Commercio (of Spain), Lib. 1, tit. 9, § 6, art. 478.

2 Ibid.

3 Pothier, De Change, n. 50 ; Savary, Le Parfait Négociant, Pt. 1, Liv. 3, ch. 8, p. 205 ; Id. Tom. 2, Pt. 14, p. 94 ; Heince. de Camb. cap. 3, § 26 - 29 ; Story on Bills, § 395, 454.

4 1 Bell, Comm. B. 3, ch. 2, § 4, p. 376. Mr. Bell expresses himself

§ 484. In our law a different rule seems to prevail. In case of a separate instrument of guaranty, at least, where it is not expressly stated, that the guaranty shall be negotiable, as, for example, where the Note is payable to A. or order, or A. or bearer, unless the separate guaranty of the Note is also made as such to A. or order, or A. or bearer, it seems clear, that the guaranty is to be limited to the very person, to whom it is given, or

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with some hesitation on the subject, although it is not easy to see the ground of his doubts, and the Court of Session in Scotland have fully recognized the doctrine. He says; "It has been questioned, whether the indorsation of a Bill, which has been guaranteed by a separate letter accompanied by delivery of the letter of guaranty, will give to the indorsee the same right, as if the letter itself were a negotiable instrument, passing without any latent qualification. It is generally held by bankers, that, when they thus acquire right to the guaranty, they are entitled to demand payment from the surety, as if the letter had originally been addressed to themselves; and this has been adjudged by the Court of Session in reliance on such understanding. Before the point can be held established, a much more deliberate inquiry must be made into the usage: if indeed, any usage can establish a point against the principles of law, which this seems to be. It may be, that the very design of expressing the guaranty by letter, instead of indorsing the Bill, is to preserve to the writer the full benefit of his remedy against the person, to whom the letter is addressed; and it is anomalous at once to confer on such an engagement the privileges of an indorsable and negotiable instrument, and yet not to give to the grantor of it the benefit of that strict negotiation, which is the counterpart of the privileges of Bills." Mr. Thompson (on Bills, ch. 3, § 3, p. 278, 2d edit.) says; "In one case, the Court of Session decided, in conformity with a report from bankers, that a letter of guaranty for a Bill to the original payee, given with the Bill to a bank who discounted it, was effectual to them against the grantor, notwithstanding a discharge by the party to whom it had been granted. But great doubts have been expressed of the soundness of this decision. The report on which it proceeded did not state the practice, but merely expressed an opinion; and it seems scarcely consistent with principle, that the indorsement of a Bill should transfer, with all its privileges, a guaranty, which was merely delivered with it, without indorsement. Such an instrument does not appear to be transferable even by indorsement. The holder of a Bill or Note will not be liable for it, if he delivers it without indorsement, nor for any debt, but by way of sale, or in exchange for another Bill.

with whom it is just contracted.[1] The same doctrine has been applied, where the guaranty contains the name of no person on it, to or with whom it is made; for then it will be construed to be limited to the first person, who takes the Note, and advances money on the faith of the guaranty, and it will not be deemed to be negotiable.[2] But, if the guaranty be in its very terms negotiable, and is passed with the Note, as if it be, like the Note, payable to A. or order, or to A. or bearer, and is thus designed to circulate, as a negotiable instrument, a very different question may arise, upon which, at present, our law does not furnish any direct conclusive authority.[3] But where the guaranty is indorsed on the back of the Note, and is in its terms made negotiable to A. or order, or to A. or bearer, there does not seem any reason to doubt, that it acquires a general negotiable character, and that any subsequent holder is entitled to maintain a suit thereon, who has received it in the ordinary mode of transfer.[4] Indeed, it seems, that such a guaranty amounts, in point of law, to the making of a new negotiable Note, and

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[1] Watson's Ex'ors *v.* McLaren, 19 Wend. R. 557; S. C. 26 Wend. R. 425; True *v.* Fuller, 21 Pick. R. 140; Lamourieux *v.* Hewitt, 5 Wend. R. 307; Tyler *v.* Binney, 7 Mass. R. 479; Leggett *v.* Raymond, 6 Hill, N. Y. R. 639; Myrick *v.* Hasey, 14 Shepley, R. 9.

[2] Watson's Ex'ors *v.* McLaren, 19 Wend. R. 557; S. S. 26 Wend. R. 425; Dean *v.* Hall, 17 Wend. R. 214; True *v.* Fuller, 21 Pick. R. 140; Miller *v.* Gaston, 2 Hill, N. Y. R. 188. See Walton *v.* Dodson, 3 Carr. & Payne, 162; Story on Bills, § 457–459.

[3] See Story on Bills, § 456–458; Chitty on Bills, ch. 6, p. 272, 273, (8th edit.); Upham *v.* Prince, 12 Mass. R. 14. This subject was much discussed in the elaborate opinion of Mr. Senator Verplanck, in the case of McLaren *v.* Watson's Ex'ors, 26 Wend. R. 425, 431, 436, 441, 442.

[4] Watson's Ex'ors *v.* McLaren, 19 Wend. R. 557; S. C. 26 Wend. R. 425; Ketchell *v.* Burns, 24 Wend. R. 456; Leggett *v.* Raymond, 6 Hill, N. Y. R. 639–641; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Manrow *v.* Durham, 3 Hill, N. Y. R. 584; Story on Bills, § 457, 458.

may be declared on as such; and the guarantor may be held liable as maker.[1]

§ 485. In the fourth place, let us consider, in what manner a guaranty is, or may be, extinguished or discharged. Many of the acts or omissions which will discharge an indorser from his responsibility, apply with equal force to the case of a guaranty.[2] Without pretending to enumerate all of them, in detail, we may advert to a few, which are of the most common occurrence, or the most fixed and certain in their character. Among these we may enumerate: — (1) The omission to make due presentment of the Note at its maturity, or to give due notice of the dishonor thereof to the guarantor, whereby he has suffered any loss or injury; for then he will be discharged to the extent of the loss or injury, which may be a total loss, or a partial loss.[3]

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[1] Ibid.; Ante, § 468.

[2] See Ante, § 357; 1 Bell, Comm. B. 3, Pt. 1, ch. 2, § 4, p. 359, 377, (5th edit.)

[3] Ante, § 460; Bayley on Bills, ch. 7, § 2, p. 286–289, (5th edit.); Warrington *v.* Furbor, 8 East, R. 242; Phillips *v.* Astling, 2 Taunt. R. 206; Swinyard *v.* Bowes, 5 Maule & Selw. 62; Holbrow *v.* Wilkins, 1 Barn. & Cressw. 10; Van Warts *v.* Wooley, 3 Barn. & Cressw. 439; Pitman on Prin. and Surety, ch. 5, p. 187. Mr. Thomson (on Bills, ch. 6, § 4, p. 506 - 509) says; "Persons, who have given a Bill or Note, without their names being on it, or who are bound for payment of it by a separate letter of guaranty, do not seem entitled to the same strictness of negotiation as if they had been direct parties, though it is not easy to fix a certain rule as to the negotiation they may require. It may perhaps be held, that they are entitled to fair, though not rigid negotiation; for example, to get notice of dishonor, not so soon as is required in Bills, but within such time as may enable them to protect themselves from loss, and that, if the holder fails in these requisites, he must show that the guarantee has not thereby suffered damage. But it does not seem to have been quite settled, where the onus probandi on this point lies; for, in the cases referred to, there has been either direct proof of injury, or proof that there could be no injury. Thus, the holder of a Bill, which was said to be included

Thus, if the maker were in good credit at the time of the maturity of the Note, and has since failed in busi-

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under a guaranty by the defendants, was cut off from recourse against them, as he had neither presented the Bill, nor notified its nonpayment, either to the drawers or the guarantees, though the acceptors did not become bankrupt for a year, or the drawers for eight months, afterwards, so that, but for his neglect, he might have secured payment, or the guarantees might have made good their relief. On the other hand, it was held to be no defence to a guarantee, against payment of a Bill drawn for a debt, for which he had become bound on the acceptor's account, that it had not been presented at the term of payment, when such presentment would have done no good, as the acceptor had previously become bankrupt. Again, where the plaintiff had got from the defendant, but without his indorsation, a Bill drawn by him upon, and accepted by, a debtor of his, and the Bill was dishonored on the 4th February, but no notice given to the defendant, it being proved, however, that, between 4th and 11th February, at which last date the acceptor became bankrupt, he could not have paid the Bill, the defendant was held not to be discharged for want of notice, as he had not suffered loss. In another case, where the holder of a Bill notified the acceptor's insolvency to a guarantee, before the Bill became due, the latter was found not entitled to object, that there had been no regular presentment, or notice of non-payment, as he could not have suffered any injury through the want of them. Although none of these cases decides the question of onus probandi, yet, as it was undertaken by the holder, in the third and fourth cases now cited, it seems rather to be implied, that it remains with him. Such is the law, so far as it can be deduced from the English authorities, regarding guaranty as applicable to Bills. What is the law of Scotland on the subject, it is difficult to say. In two early cases, one mentioned by Forbes, and the other shortly noticed by Lord Elchies, it is said to have been held, that a person granting a letter of credit guaranteeing a Bill was entitled to the same notice of its dishonor as an obligant on the Bill. On the other hand, it has been repeatedly held, that, when a person guaranteed a certain advance to be made to another party, the creditor might make good the guaranty against him on instructing the advance, without notifying it to him at the time of making it, or giving notice of the debtor's failure to pay, as of the dishonor of a Bill. This was held, as to a letter of credit foradvances made by Bills, though, the letter did not specially refer to the mode of advance, where no notice was given except by raising the action, after the principal debtor had become bankrupt and had absconded. In another case, where a letter of credit had been given, for the purchases to be made by a certain individual, within a limited time, the grantor of the letter was made liable, without ness, or has become a bankrupt, or an insolvent, that will discharge the guarantor, *pro tanto*, to the extent of

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notification, although the principal debtor had in the mean time become bankrupt ; the majority of the Court holding, without laying down a general rule, that, in this case, where the amount of furnishings was not great, and the period of the letter limited, no notice was necessary. In a case where a person had granted a letter, agreeing to guarantee such sums as another party might draw for, thus directly referring to Bills, the Court sustained recourse against him on the letter, after the principal debtor's failure, though no notice had been given him, either of the advances on the Bills, or the balance unpaid, which had been due for some time before. In a later case, where the defender had granted a letter of guaranty for a Promissory Notè, bearing, that the Note was to be renewed for four months longer, and had afterwards, in another letter, agreed to the renewal, and, at the same time, expressed his understanding, that the money was to lie for a considerable time, he was held not to be released by the circumstance of no renewal having been taken, or notice given of the non-payment of the first Note, and no diligence having been done on it for several months after it became due. But, in a case, where the defender had granted a letter of guaranty, which was held to apply to certain Bills, the Court decided, though ultimately with hesitation, that the circumstance of the holder having failed to protest certain of these Bills, when they became due, against the different parties to them, though all these parties had previously become bankrupt, and the holder had ultimately drawn dividends from their different estates, cut off his claim of recourse against the guarantees. Whether there is any difference, in such a case, as to the guarantee's liability, between want of protest and want of notice, when all the parties to the Bills have previously become bankrupt, or whether the guarantees are entitled, in either case, to require strict negotiation, is a question, which probably requires to be reconsidered. In a case, where the drawer of a Bill had, on the acceptor's failure to retire it, promised by letter, notwithstanding an alteration on the Bill, to retire it in fourteen days, and, within that time, sent a new draft on the same acceptor at ten days, which he desired the creditor to get accepted, and advise speedily, it was decided, that the creditor, by neglecting to notify the non-acceptance and non-payment of this draft for two years, during which time the drawee had become insolvent, had forfeited all claim, even on the first Bill. In another case, a party guaranteeing the regular acceptance of Bills, by a separate letter, was found not released by their not being presented till the term of payment, when, in consequence of the drawer's intervening failure, acceptance was refused. It was held, that he could not insist on earlier presentment, unless it had been stipulated in his letter of guaranty.

the loss or injury, sustained by him, from the omission to make due presentment to the maker, or to give due notice to him, the guarantor.[1] (2.) The guarantor will be discharged by any act of the holder, which will discharge the maker; such as an acquittance or a release of the maker. (3.) Or, by the holder's giving time to the maker, and thereby impairing the rights, or increasing the risk, of the guarantor.[3] (4.) Similar principles will apply to the case of the holder's surrendering any collateral security, given by the maker to the prejudice and without the consent of the guarantor.[4] (5.) Taking collateral security from the maker, without any agreement to give time to him, will not discharge the guarantor.[5]

§ 486. On the other hand, a guarantor, like an indorser, may waive his right to a defence, resting on the gross laches of the holder of the Note, in not seasonably enforcing his demand against the maker, or in giving notice to him, the guarantor. His contract is a conditional one, it is true; and, if the condition is not complied with, he is discharged. But still, he may, by his subsequent promise, revive or continue the

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[1] Ibid.

[2] Ante, § 423, 424; 1 Bell, Comm. B. 3, Pt. 1, ch. 2, § 4, p. 359, 377, (5th edit.); Pitman on Princ. and Surety, ch. 5, p. 157; Cowper *v.* Smith, 4 Mees. & Wels. 519.

[3] Ibid.; 1 Story on Eq. Jurisp. § 424 – 426; Pitman on Prin. & Surety, ch. 5, p. 166; Id. p. 174 – 182; Combe *v.* Woolf, 8 Bing. R. 156; Samuell *v.* Howarth, 3 Meriv. R. 272; Holl *v.* Hadley, 5 Bing. R. 54; Howell *v.* Jones, 1 Cromp. Mees. & Rosc. 97; Sigourney *v.* Wetherell, 6 Metc. R. 553.

[4] Ibid.; 1 Story on Eq. Jurisp. § 324 – 326; Mayhew *v.* Crickett, 2 Swanst. R. 185, 191; Pitman on Prin. and Surety, ch. 5, p. 178, 179.

[5] Sigourney *v.* Wetherell, 6 Metc. R. 553, 564; Norton *v.* Eastman, 4 Greenl. R. 521.

guaranty, and if he has, at the time, full knowledge of all the facts, there seems the same reason for holding him bound by such new promise, as there is in the like case of an indorser.[1]

[1] Sigourney *v.* Wetherell, 6 Metc. R. 553, 563.

CHAPTER XI.

CHECKS ON BANKS AND BANKERS.

§ 487. It remains to say a few words upon Checks, a species of instruments, which has grown into daily and general use in our day, but whose origin is much later than that of Bills of Exchange and Promissory Notes. A Check is a written order, or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument.[1] In England, where the business of banking is extensively carried on by private persons, Checks are usually drawn on them. In America, the business of banking is almost universally carried on by incorporated banks, and rarely by private bankers. Checks in England,[2]

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1 Chitty on Bills, ch. 11, p. 545, (8th edit.); Roscoe on Bills, ch. 1, p. 9, (edit. 1829.)

2 The common form of an English Check, (Chitty on Bills, ch. 5, p. 167, 8th edit.) is as follows:

Messrs. A. B. & Co. London, 1 January, 1845.
Pay to C. D. or Bearer Twenty Pounds.
£20 —— (Signed) E. F.

The common form of an American Check is:

Suffolk Bank.

$ 1000 — 50 cents. Boston, 1 January, 1845.
Pay to A. B. or Bearer, value received, one thousand dollars and $\frac{50}{100}$.
(Signed) C. D.
To the Cashier.

therefore, are drawn upon the bankers by name, as, for example, Messrs. Baring, Brothers; in America, they are always drawn upon the bank by its corporate name, and addressed to the cashier thereof.

§ 488. Checks are usually drawn payable to a party named, or bearer; but there is nothing in our law to prevent them from being made payable to a particular person, by name, or to him or bearer, or to him or his order.[1] The only difference is, that where they are made payable to a particular person only, they are not negotiable; where they are payable to order, they are negotiable by indorsement; and where they are payable to bearer, they are negotiable by mere delivery.[2] In these respects, they have the precise qualities and effects of Bills of Exchange.[3] Theoretically, indeed, it may be said, that Checks are not usually intended for circulation, but to enable the holder immediately to demand and receive the money stated therein, and therefore negotiability is not of their essence, but, at most, merely an optional quality.

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[1] Thomson on Bills, ch. 1, § 5, p. 191, 192, (2d edit.); Id. ch. 3, p. 257. See Mr. Justice Cowen's opinion in Harker *v.* Anderson, 21 Wend. R. 372, 374; Etting *v.* Brinkerhoff, 2 Hall, R. 459, 463. See Boehm *v.* Sterling, 7 Term R. 423, 430; 3 Kent, Comm. Lect. 44, p. 75, (5th edit); Id. p. 78; Cruger *v.* Armstrong, 3 John. Cas. 5, 7, 9; Ex parte Brown, 2 Story, R. 502, 612.

[2] Ibid.

[3] From the language used by Mr. Chitty, it might seem, that Checks were by our law always required to be payable to bearer; for he says a Check "is uniformly made payable to bearer." Chitty on Bills, ch. 11, p. 545, (8th edit.) The same suggestion is incautiously adopted in Woodruff *v.* Merchants' Bank of City of New York, 25 Wend. R. 672, 673. Such is certainly the ordinary form; but it is not indispensable. Mr. Thomson has more correctly stated the fact, when he says that a Check is to pay a sum of money "to a party therein named, or more generally to the bearer." Thomson on Bills, ch. 1, § 5, p. 191, 192, (2d edit.)

§ 489. Indeed, Checks have many resemblances to Bills of Exchange, and are, in many respects, governed by the same rules and principles, as the latter.[1] But, *Nullum simile est idem;* and their nature, obligation, and character are in some respects different from those of common Bills of Exchange.[2] The circumstances in which they principally differ from Bills of Exchange, or at least from Bills of Exchange in ordinary use and circulation, are — (1.) They are always drawn on a bank, or on bankers, and are payable immediately on presentment, without any days of grace.[3] (2.) They require no acceptance as distinct from prompt payment.[4] (3.) They are always supposed to be drawn upon a previous deposit of funds, and are an absolute appropriation of so much money in the hands of the bank or bankers to the holder of the Check, to remain there until called for, and cannot, therefore, be afterwards withdrawn by the drawer.[5] We shall presently

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[1] 3 Kent, Comm. Lect. 44, p. 75, (5th edit.)

[2] Mr. Chitty (on Bills, ch. 11, p. 547, 8th edit.) says; "Most of the rules respecting Bills of Exchange and Promissory Notes, especially payable on demand, affect Checks on bankers."

[3] Thomson on Bills, ch. 1, § 5, p. 191, (2d edit.); 3 Kent, Comm. Lect. 44, p. 104, note; Chitty on Bills, ch. 9, p. 410, 419, 420, (8th edit.); Id. ch. 9, p. 377, (9th edit.); Ex parte Brown, 2 Story, R. 503, 504; Chitty on Bills, ch. 9, p. 410, (8th edit.); Id. ch. 11, p. 545; Down *v.* Halling, 4 Barn. & Cress. 330, 333; Woodruff *v.* Merchants' Bank of City of New York, 25 Wend. R. 673; Salter *v.* Burt, 20 Wend. R. 205.

[4] Ibid.

[5] Ibid.; Conroy *v.* Warren, 3 John. Cas. 259, 262, 264; Cruger *v.* Armstrong, 3 John. Cas. 5, 9; Brown *v.* Davies, 3 Term R. 80; Boehm *v.* Sterling, 7 Term R. 423, 429, 430. See Kemble *v.* Mills, 1 Mann. & Grang. 757. Mr. Justice Cowen, in Harker *v.* Anderson, 21 Wend. R. 372, held Checks to be, to all intents and purposes, Bills of Exchange payable on demand. But the other Judges did not assent to his opinion. Indeed, certain principles apply to Checks, which scarcely find a suitable analogy in Bills of Exchange; and the case of Little *v.* The Phenix Bank,

see, that these circumstances have an important bearing and influence upon the rights and responsibilities of the parties to Checks.

§ 490. It has already been stated, that Checks are payable immediately on presentment, without any days of grace.[1] They are sometimes made in terms payable on demand, which language of course imports, that they are payable immediately. But they are usually in England, and almost invariably in America, made payable without the addition of the words on demand; and then they are in contemplation of law, equally

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2 Hill, N. Y. R. 424, shows very clearly the danger of confounding them. Bills of Exchange may, without doubt, be drawn payable on demand; but, ordinarily, they are not so drawn; and, therefore, are entitled to grace. Bills of Exchange may be presented for payment, without a prior presentment for acceptance; but then this is so only when they are payable at so many days after date. Bills of Exchange are not always, and, indeed, not in our times ordinarily, drawn upon actual funds in the hands of the drawee; but frequently are drawn upon a previous arranged credit. Checks are often designated as Bills of Exchange, and in a general sense may be justly called so. But in a juridical view, it often becomes necessary to discriminate between them, because the analogies do not hold throughout. It is often said, that the indorser of a negotiable Note may be treated as the drawer of a Bill of Exchange on the maker. But we should deceive ourselves, if we were to suppose, that for all purposes, and under all circumstances, the indorser of a Note was to be deemed liable in the same manner, and to the same extent, as the drawer of a Bill; or, that the maker was in all cases affected by the same responsibility, as an acceptor. Thus, for example, the maker never admits the genuineness of the signature of an indorser, as an acceptor does of the drawer. Story on Bills, § 113, 262-264; Ante, § 135, 379. Mr. Chanceller Kent, in his Commentaries, (Vol. 3, Lect. 44, p. 104, note, 5th edit.), has well said, that there is so much analogy between Checks and Bills of Exchange and Promissory Notes, that they are frequently spoken of without discrimination; and this sufficiently accounts for the general language in the authorities cited by Mr. Justice Cowen, in 21 Wend. R. 372-374. In Woodruff *v.* Merchants' Bank of City of New York, 2 Hill, N. Y. R. 673, the Court took a clear distinction between Checks and Bills of Exchange, as governed in some respects by different principles.

[1] Ante, § 489.

payable on demand.[1] It makes no difference in point of law, as between the parties, (independent of the Stamp Acts,) whether a Check be ante-dated, or post-dated; it is still payable on its presentment, at any time after the date.[2] But a case may be supposed of a Check drawn on a bank, payable on a specified day, as, for example, it may be dated on the first day of January, 1845, and be made payable in terms on the tenth day of the same January; and the question might then arise, whether it was payable on that very day, without any allowance of the days of grace.[3] The

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[1] Chitty on Bills, ch. 5, p. 167, (8th edit.); Ante, § 224, 487, note.

[2] Bayley on Bills, ch. 3, § 6, p. 85, (5th edit.); Harker *v.* Anderson, 21 Wend. R. 372, 374, per Cowen, J.; Mohawk Bank *v.* Broderick, 10 Wend. R. 304; S. C. 13 Wend. R. 133; Allen *v.* Keeves, 1 East, R. 435; Ex parte Brown, 2 Story, R. 502, 512; Salter *v.* Burt, 20 Wend. R. 205; Ante, 220, note.

[3] See Mohawk Bank *v.* Broderick, 10 Wend. R. 304; S. C. 13 Wend. R. 133. In this case, Mr. Chancellor Walworth said; "The Check in this case was post-dated, as of the 14th of January, although actually drawn and negotiated before that time. Hence, it is insisted, in behalf of the defendants, that it must be considered, as if it was dated at the time it was actually drawn, and was made payable on a day certain. The Court below was right, however, in treating it as a Bill or Check, payable at sight, or upon the presentment thereof at the bank at any time on or after the day of its date, but not before; or, in other words, so far as concerns the question of presentment and notice of non-payment, it is to be considered as if drawn, as well as dated, on the 14th of January. The drawing of post-dated Checks is an every day's occurrence in our commercial cities; and I believe the uniform understanding of the parties in such cases is in accordance with the construction which the Supreme Court has given to the transaction in the present case. It is not necessary, for the decision of this case, to inquire whether any greater degree of diligence is to be used by the holder of a negotiable Check upon a bank, in presenting it for payment, than is required from the holder of a similar draft, at sight, upon an individual. Both are at times made and negotiated for the avowed purpose of a temporary circulation; and when made for such a purpose, I can see no good reason for requiring of the holder any greater degree of diligence in the one case than in the other. The true rule as to both

general understanding among banks is believed to be, that in such a case the Check is payable on the tenth day of January, without grace, and it is treated as a Check, payable on demand, on that very day. In any other view the Check might be presented for, and require, acceptance; and yet it is understood, that such acceptance is never called for, or given.[1]

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undoubtedly is, that the holder must use reasonable diligence, according to the ordinary course of business in other cases of a like nature; and what is such reasonable diligence must, in some measure, depend upon the particular circumstances of each case. For instance, a person residing in Schenectady gives me his Check upon a bank in Albany in payment of an antecedent debt, or gives me his draft upon an individual residing in the same place, under similar circumstances; I should not, in either case, be authorized to send the Check or Bill to my correspondent at New Orleans, to be laid out in the purchase of sugar or cotton, and hold the drawer liable for the solvency of the bank or the drawee of the Bill, in the mean time, because, that is not the ordinary course of business, and he could not, therefore, have contemplated such a risk; but, if I had purchased the Check or Bill of the drawer, for the purpose of being sent to New Orleans, and to be negotiated there, and with his knowledge, he would then have assumed the risk of the solvency of the drawee until the Check or Bill was returned and presented for payment, according to the usual course of trade in such cases."

[1] See Chitty on Bills, ch. 11, p. 546, (8th edit.); Ex parte Brown, 2 Story, R. 502, 512, 514, 515. But see Harker *v.* Anderson, 21 Wend. R. 372, 375, Mr. J. Cowen's opinion. This whole subject was much discussed In the Matter of Brown, 2 Story, R. 502, where the Checks were drawn on the Granite Bank, dated on a particular day, and were payable on another specified day. One of the checks was in the following form: — "Granite Bank, $703.50. Boston, April 18, 1841. Pay to W. Courtis & Co., 18th May, or bearer, seven hundred three dollars, fifty cents. Ephraim Brown, by J. W. Green. To Cashier." The Court held them to be Checks payable on the very day specified, without grace; and that the omission of the holder to make presentment for payment on the day specified did not excuse the drawer from payment, as he had no funds in the Bank when the Check was presented for payment. On that occasion the Court said; "In respect to the first point, the argument pressed is, that Checks are always, and properly, payable on demand, and that, when payable at a future time, they become, to all intents and purposes,

§ 491. The differences in point of law between Checks and Bills of Exchange, or at least those of

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inland Bills of Exchange. But I am not, by any means, prepared to admit the validity or force of this distinction; and no case has been cited, which, in my judgment, satisfactorily establishes it. A Check is not less a Check, because it is post-dated, and thereby becomes, in effect, payable at a future and different time from that on which it is drawn, or issued. This is sufficiently apparent from the case of Allen *v.* Keeves, 1 East, R. 435. That it may be declared upon as a Bill of Exchange, is no proof that it may not also be declared upon as a Check. In many cases, they are identical in their legal results; but by no means in all. Mr. Chitty very properly says, that a Check nearly resembles a Bill of Exchange; but (he adds) it is uniformly made payable to bearer, and should be drawn upon a banker, or a person acting as such. I agree, that it nearly resembles a Bill of Exchange; but nullum simile est idem. It is commonly, although not always, made payable to the bearer; but I conceive it to be still a Check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually also, made payable on demand; although I am not aware, that this is an essential requisite. The distinguishing characteristics of Checks, as contradistinguished from Bills of Exchange, are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for mere acceptance; but only for payment. Mr. Chancellor Kent, in his learned Commentaries, (3 Kent, Comm. p. 75, 4th edit.) says; 'A Check upon a bank partakes more of the character of a Bill of Exchange than of a Promissory Note. It is transferable, like a Bill of Exchange. It is not a direct promise by the drawer to pay; but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay.' But he has more fully explained his real meaning in a note to the index to the fourth edition of his Commentaries, (4 Kent. Comm. p. 549, note *, 4th edit.) which I adopt, with entire confidence, as expressive of my own opinion: 'A Check' (says he) 'differs from a Bill of Exchange in this, that it has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a Check is not a surety, but the principal debtor, as much as the maker of a Promissory Note. The Check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the Check, and there it ought to remain until called for, and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, the ordinary form and in common use, will be fully seen and illustrated by a few considerations. In the

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and he may, under circumstances, be deemed to have made the Check his own, to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser who has a right to require diligence on the part of the holder, to relieve him from responsibility. It is true, however, that there is so much analogy between Checks and Bills of Exchange, and negotiable Notes, that they are frequently spoken of without discrimination.' The case of Gruger *v.* Armstrong, 3 John. Cas. 5, does not inculcate any different doctrine, when correctly considered. And the case of Conroy *v.* Warren, 3 John. Cas. 259, expressly distinguishes between Checks and Bills of Exchange; and puts the doctrine of the necessity of presentment for payment upon its true and reasonable ground; whether any damages have been sustained by the drawer by the delay or not; and I conceive that the point, as to notice of the dishonor of a Check, would mainly turn upon similar considerations. We all know, from the history of inland Bills of Exchange, that, originally, they were not entitled to days of grace; and that days of grace were first established, as applicable to them, by the statutes 9th and 10th Will. 3, ch. 17, and 3d and 4th of Anne, stat. 2, ch. 9. In Massachusetts, days of grace were not formerly allowed upon Promissory Notes, payable at a future time; and the like rule was supposed to apply to inland Bills of Exchange, or, at least, the contrary was not established. This rule in Massachusetts was altered by the statute of 1824, ch. 130, and by the Revised Laws of 1835, stat. 12, ch. 33, § 5, 6, which allow days of grace upon all Bills of Exchange, payable at sight, or at a future day certain, and on all Promissory negotiable Notes, orders, or drafts, payable at a future day certain. But no mention whatsoever is made in either statute of Checks; but they are silently left to the known rules, practice, and usages of banks, which I believe to be invariable, never to accept them prior to payment, and always to pay them on presentment on or after the day stated for payment by the date, or upon the face of the Check. Thus, if a Check be dated on the 1st of December, and be payable on the 10th of December, it is presentable on the latter day, and on presentment on that day, it will be paid by the bank. It is never presented for acceptance, and no days of grace are ever allowed upon it. In short, it is always treated as payable on the very day designated as the day of payment. If it be asked, What is the reason of all this? The true answer is, that it is the usage of banks, and the understanding of the parties to the Check, and being the constant habit of business, it becomes, like all the other usages of merchants, the lex et norma, by which to expound the contract. The parties have, in the present case, used the common form of a first place, it is a well known rule of law, that a Bill of Exchange, or a Promissory Note, taken after the

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Bank Check, and by so using it, they impliedly authorize the bank to treat it as a Check, and pay it as a Check, payable on the very day, on which it is dated, or on which it purports to be payable, without any grace. The words of both these instruments are precisely alike, except as to sums and times of payment. The first one is; 'Granite Bank, Boston, April 18, 1851. Pay to W. Courtis & Co., 18 May, or bearer, seven hundred and three dollars 50-100. Ephraim Brown, by J. W. Green. To the Cashier.' The second is dated on the 18th of April, and is to 'Pay to W. Courtis & Co., 10th June, or bearer, seven hundred and seventy-six dollars 52-100.' Signed in the same manner, and addressed in the same way, 'To the Cashier' of the Granite Bank. No one can doubt, that it is entirely competent for the parties to agree, that an instrument shall be treated, to all intents and purposes, as a Check, and to have all the attributes and incidents thereof, and to declare, that it shall not be deemed a Bill of Exchange. In fact, by the forms here adopted, the parties do so declare; and, as I understand it, the banks uniformly act upon this understanding, and always pay such Checks upon the day fixed for payment, without any allowance of grace, if they have funds; and this is done without any suspicion, that it is a misuser or misapplication of the funds of the drawer. I am aware of the case of Brown *v.* Lusk, 4 Yerger, R. 210, in which it was held, that a Check, drawn in Nashville, on the Branch Bank of the United States at Nashville, on the 13th of December, 1827, payable to A. B., or bearer, on the 14th of January following, was held to be an inland Bill of Exchange, and entitled to the days of grace. This case was decided in the absence of Mr. Chief Justice Catron; and not only was no authority cited for the position, but the very citation from Chitty on Bills, which was relied on to support it, distinctly shows, that there is a marked distinction between Checks and Bills of Exchange. Mr. Chitty there says; 'They' (Checks) 'are not due before payment is demanded, in which they differ from Bills of Exchange and Promissory Notes, payable on a particular day.' Now, the most that this position proves is, that Checks are not governed in all cases by the same rules as Bills of Exchange and Promissory Notes. They are not payable until presentment. But how does this show when they are presentable; or that they may not be made payable on any other day certain than the day of the date? Or that days of grace are to be allowed upon them, if payable on a day certain? The learned Judge, who delivered the opinion of the Court in Brown *v.* Lusk, added; 'They' (Checks) 'are appropriations of money in the hands of a banker, and are payable on presentment.' In this remark, he but followed out what was intimated by Lord Kenyon, in Boehm *v.* Sterling, 7 Term R.

day of payment, or, as the common phrase is, when it is overdue, subjects the holder to all the equities attaching to it in the hands of the party, from whom he receives it.[1] But this rule does not apply to a Check; for it is not treated as overdue, although it is taken by the holder some days after its date, and it is payable on demand. On the contrary, the holder, in such a case, takes it, subject to no equities, of which he has not, at the time, notice; for a Check is not treated as overdue, merely because it has not been presented, as early as it might be, or as a Bill of Exchange is required to be, to charge the drawer, or indorser, or transferrer.[2] One reason for this seems to be, that, strictly speaking, a Check is not due, until it is demanded.[3] And, therefore, it is not overdue, until it has been presented for payment and payment refused.[4] Hence, a *bonâ fide* holder, pur-

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423, 429, and has been since often recognized as sound law. But we all know, that, at law, neither a Bill of Exchange, until acceptance, nor a Promissory Note, is any appropriation of the money of the drawer or maker in the hands of any one. In truth, a Check is an instrument sui generis, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the bank or banker, and it appropriates the amount to the holder of the Check. And I agree with Lord Kenyon, in holding, that the drawer cannot honestly alter the state of his accounts with the bank or banker, so as not to leave in his hands sufficient to pay the Check on the very day on which it is presentable and payable; for that would be a fraudulent misapplication of the appropriated funds."

1 Ante, § 178 – 180.

2 Rothschilds *v.* Corney, 9 Barn. & Cressw. 388. See Down *v.* Halling, 4 Barn. & Cressw. 330, 333; Brooks *v.* Mitchell, 9 Mees. & Wels. 15; Bayley on Bills, ch. 5, § 3, p. 164, (5th edit.); Boehm *v.* Sterling, 7 Term R. 423, 429, 430.

3 Cruger *v.* Armstrong, 3 John. Cas. 5, 9; Chitty on Bills, ch. 11, p. 546, (8th edit.)

4 See Rothschilds *v.* Corney, 391, per Littledale, J.; Barough *v.* White, 4 Barn. & Cressw. 325, 328, 329; Roscoe on Bills, p. 134, (edit. 1829.)

chasing a check six days after its date, for a valuable consideration, is entitled to hold it against the drawer, and to claim payment from the banker, notwithstand-

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In respect to Bills and Notes payable on demand, the time when they should be presented for payment, and the time when they are, as to subsequent holders, to be treated as overdue, does not seem very accurately defined; and in relation to them, as in relation to Checks, much may depend upon the nature of the particular Bills or Notes, and the course of business respecting them. In Barough *v.* White, 4 Barn. & Cressw. 325, it seems to have been thought that a Note, payable on demand, was not to be deemed overdue, if it was apparently intended for circulation. Mr. Chitty (on Bills, ch. 9, p. 416,) says; "If a Bill or Note, payable on demand, be payable elsewhere than in the place where it was received, it was formerly supposed that the party receiving it must forward it for payment by the next post after he received it, although that post went out on the same day. But it is now established, that it would suffice if such Bill or Note were forwarded for payment by the regular post on the day after it is received, and that the person receiving it by the post in London is not bound to present it for payment till the next day. It is certain, however, that the holder's not forwarding such Bill or Note, for payment, by the post, or some conveyance of the day after it was received, and keeping it in his possession till on or after the third day for sending it, would be deemed laches; a Bill or Note must not be locked up or kept till a third day, and if it be, the party from whom the holder received it will be discharged from liability, in case it be dishonored. In a recent case, where the defendant, being indebted to the plaintiff, paid to him the debt in country Bank-notes (payable in the country, and also in London) on a Friday, several hours before the post went out, and the plaintiff transmitted halves of the Notes by a coach on Saturday, and the other halves by Sunday night's post, and all the halves arrived in London on Monday, but those by the coach two hours later than those by the post, and were presented for payment and dishonored on the Tuesday, it was held that the plaintiff had not been guilty of laches, and that he might recover from the defendant his original debt. And where a servant, on behalf of his master, at one o'clock on a Friday afternoon, received of the defendant, at Davenport, country Bank-notes, payable there, in payment for cattle sold there, and in consequence of his master being absent from home all Saturday morning, did not deliver them to him until after banking hours on Saturday evening, and they were not presented for payment until Monday morning, and between three and four, in the afternoon of Saturday, the bank stopped payment: it was held, that the master was not guilty of laches, in not presenting the Notes before the bank stopped on Saturday."

ing it has been obtained by fraud from the drawer.[1] And if the drawer, or indorser, or transferrer of a Check, has issued or passed it long after its date, he will be held liable to a subsequent *bonâ fide* holder thereof for a valuable consideration, without notice, notwithstanding the consideration, upon which he has so issued or passed it, has, as between himself and the person, to whom he originally delivered it, entirely failed.[2]

§ 492. In the next place, the drawer of a Bill of Exchange is liable to payment thereof, only upon the condition, that it has been duly presented for payment at its maturity and dishonored, and he has received due notice of the dishonor.[3] And in either case, it makes no difference, whether he has suffered any loss or injury thereby, or not.[4] In case of a Check, the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder, in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only *pro tanto*.[5]

§ 493. And this leads us to the consideration of the true nature and extent of the rights and duties of the holder of a Check, and of the liabilities of the

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1 Ibid.

2 Boehm *v.* Sterling, 7 Term R. 423; Chitty on Bills, ch. 11, p. 546, 547, (8th edit.); Bayley on Bills, ch. 5, § 3, p. 164, (5th edit.)

3 Ante, § 198, 201.

4 Ante, § 299.

5 3 Kent, Comm. Lect. 44, p. 104, note, (5th edit.); Gruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259; Murray *v.* Judah, 6 Cowen, R. 490; Mohawk Bank *v.* Broderick, 10 Wend. R. 306; Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425, 428, 429; Pack *v.* Thomas, 13 Smedes & Marshall, R. 11; Post, § 497, 498.

drawer and of the indorser or transferrer of the same. And first, the rights and duties of the holder in respect to the drawer. And here the general rule is, that the holder, in order to charge the drawer in case of a dishonor, is bound to present the same for payment within a reasonable time, and to give notice thereof to the drawer within a like reasonable time; otherwise, the delay is at his own peril.[1] What is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place of receiving the Check, and upon the relations of the parties between whom the question arises.[2] If the payee, or other holder of the Check, receives it immediately from the drawer, in the same town or city where it is payable, he is bound to present it for payment to the bank or bankers, at farthest, on the next succeeding secular day after it is received, before the close of the usual banking hours.[3] He may, how-

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[1] 3 Kent, Comm. Lect. 44, p. 88, 91, (5th edit.); Chitty on Bills, ch. 8, p. 246–248; Id. ch. 9, p. 412, 416, 418, 420; Id. ch. 11, p. 546, 547, (8th edit.); Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Taylor *v.* Young, 3 Watts, R. 343; Conroy *v.* Warren, 3 John. Cas. 259; Boehm *v.* Sterling, 7 Term R. 430; Thomson on Bills, ch. 6, § 1, p. 436, (2d edit.); Ante, § 207.

[2] Bond *v.* Warden, The (English) Jurist, 1845, vol. 9, p. 198.

[3] Chitty on Bills, ch. 6, p. 247, (8th edit.); Id. ch. 9, p. 413, 416, 419, 420; Id. p. 410; Id. p. 377, 379, (9th edit.); Id. p. 385, 386, (9th edit.); Robson *v.* Bennett, 2 Taunt. R. 410; Rickford *v.* Ridge, 2 Camp. R. 537; Boddington *v.* Schlencker, 4 Barn. & Adolp. 752; Bayley on Bills, ch. 7, § 1, p. 240–242, (5th edit.); Story on Bills, § 470, 471. Mr. Chitty, on this subject (p. 419, 420) says; "With respect to a Check on a banker, it is now settled, that it suffices to present it for payment to the banker at any time during banking hours (in London, five o'clock) on the day after it is received, and that no laches can be imputed to the holder in not presenting it for payment early in the morning of the second day, although the bankers paid drafts on them until four o'clock in the afternoon, and then stopped payment. And where a person in London received a Check upon

ever, although he is not bound so to do, present it for payment on the same day, on which it is drawn or delivered to him; but he is at liberty to wait until the next succeeding day.[1] Where he receives the Check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and the person, to whom it is thus forwarded, will not be bound to present it for payment until the day after it has reached him by the course of the post.[2] If payment is not thus regularly demanded, and the bank or bankers should fail, before the Check is presented, the loss will be the loss of the holder, who will have made the Check his own, and at his sole risk, by his laches.[3]

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a London banker, between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good Check, and the next day, at noon, presented it for payment at the clearing-house, the Court held, that there had been no unreasonable delay, either by the holder, in not presenting it for payment on the first day, which he might have done, or by his banker in presenting it at the clearing-house only on the following day at noon; it being proved to be the usage among such bankers, not to pay Checks presented by one banker to another after four o'clock, but only to mark them, if good, and to pay them the next day at the clearing-house. If a Check on a banker be delivered to a person at a place distant from the place where it is payable, it will suffice to forward it by post or otherwise to some person residing at the latter [place], on the day after it is received, and it will suffice for him to present it on the third day. And it has been holden, that a London banker, who receives a Check by the general post, is not bound to present it for payment until the following day." See also Chitty on Bills, ch. 6, p. 247, (8th edit.); Id. ch. 11, p. 546, 547; Alexander *v.* Burchfield, 7 Mann. & Gr. 1061.

1 Ibid.

2 Ibid.; Moule *v.* Brown, 4 Bing. New Cas. 266; Chitty on Bills, ch. 9, p. 416, 417, (8th edit.)

3 Alexander *v.* Burchfield, 1 Carr. & Marsh. 75; 3 Scott, N. R. 555; 7 Mann. & Gr. 1061; Down *v.* Halling, 4 Barn. & Cressw. 330, 333; Chitty on Bills, ch. 9, p. 419, 420, (8th edit.); Id. ch. 4, p. 546, 547.

The reason of this strictness is said to be, that a Check, unlike a Bill of Exchange, is generally designed for immediate payment, and not for circulation; and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may; and if he does not, he keeps it at his own peril.[1]

§ 494. Where the holder does not receive the Check immediately from the drawer, but through a succession of subsequent holders after the first, then, in case of a dishonor thereof, the drawer will not be bound beyond the period of time, for which he would be bound to the first holder.[2] The reason is that, which has just been assigned, that the drawer does not issue the Check for general circulation, and therefore he is not, by implication, bound to allow a prolonged circulation thereof at his own risk, for the sole benefit of the original holder, who chooses to put it into general circulation. If, therefore, in the intermediate time, the bank or bankers should fail in business, and would have paid the Check, if it had been presented in due season, the loss must be borne by the holder, and not by the drawer.[3]

§ 595. In the next place, in respect to the rights and duties of the holder against the indorser or transferrer of the Check. Where a Check is negotiable, and passes by indorsement, or by mere delivery, the same rule applies between the immediate parties to the transfer, as applies between the drawer and the original payee of the Check.[4] It must, if payable in the same town or

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[1] Per Bayley, J., in Down *v.* Halling, 4 Barn. & Cressw. 333.

[2] Chitty on Bills, ch. 9, p. 421, (8th edit.); Id. ch. 9, p. 387; Boehm *v.* Sterling, 7 Term R. 423.

[3] Chitty on Bills, ch. 9, p. 421, (8th edit.)

[4] Chitty on Bills, ch. 9, p. 719–421, (8th edit.) Mohawk Bank *v.* Broderick, 10 Wend. R. 304; S. C. 13 Wend. R. 133.

city, where the transfer is made, be presented for payment before the close of the bank hours of the next succeeding secular day; and if he receives it at a distance from the place of payment, he must forward it for payment by the post of the next succeeding secular day, to some person at that place, for payment.[1]

§ 496. The same rule equally applies as between the indorser or transferrer of the Check, and any subsequent remote holder; for, although each party may be allowed a day, as between himself and the party, from whom he has received the Check, to make a presentment for payment, and give notice of the dishonor; yet this does not authorize a succession of subsequent holders to keep the instrument day after day in circulation, so as to retain the liability of all the prior parties thereto upon any ultimate failure of the drawee to pay the Check. The drawer and every holder is liable to every subsequent holder only upon due presentment and dishonor of the Check, within the time for which he would be liable, if the Check had been presented by the party immediately claiming from or under him.[2]

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[1] Ante, § 493; Chitty on Bills, ch. 6, p. 247, (8th edit.); Id. ch. 9, p. 414, 416-421; Id. ch. 11, p. 547; Story on Bills, § 472-475.

[2] Chitty on Bills, ch. 9, p. 387, (8th edit.); Id. p. 421. See Mohawk Bank *v.* Broderick, 19 Wend. R. 306; Etting *v.* Brinkerhoff, 2 Hall, R. 463; Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425, 429; Murray *v.* Judah, 6 Cowen, R. 490; Thomson on Bills, ch. 6, § 1, p. 436, (2d edit.) Story on Bills, § 472, 473. Mr. Chitty (p. 421) says: "It will be observed, that this rule, allowing the party receiving a Bill, Note, or Check payable on demand until the next day to present it for payment, will not enable a succession of persons to keep such instrument long in circulation, so as to retain the liability of all the parties, in case the same should ultimately be dishonored by the maker of the Note or drawee of the Check. And though each party may be allowed a day, as between him and the party from whom he received a Check, it would be otherwise as to the drawer, if the banker should, during a succession of several days, fail, and would

§ 497. But although the drawer of a Check (and the indorser or transferrer of a Check is ordinarily in the same predicament) is not fixed with an absolute responsibility to pay the Check upon its dishonor, unless it has been presented for payment on the next day after it is received, or unless sent by the post of the next day, according to and under the circumstances already mentioned;[1] yet this doctrine is to be received with its proper qualifications. Strictly speaking, it only applies, where, in the intermediate time between the drawing of the Check and the presentment thereof for payment, there has been a change of circumstances, materially affecting the rights and interests of the drawer, in respect to the bank or banker, on whom the Check is drawn. In such a case, the rule, that the Check must be presented within a reasonable time, is applied *ex rigore legis*, and is interpreted to mean, the shortest period within which, consistently with the ordinary employments and duties of commercial business, it is practicable to perform the duty; and the analogy of the time allowed in cases of the presentment of Bills of Exchange, and notice of the dishonor thereof, is adopted as reasonable and appropriate.[2] But the drawer is in no case discharged from his responsibility to pay the same, unless he has suffered some loss or injury, by the omission or neglect to make such presentment, and then

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have paid, if the Check had been presented on the day after it was drawn; a Check being an instrument, not in general intended by the drawer to be long in circulation, and in that respect differing from a country banker's Note, which is known to all parties to have been intended to be in circulation, and not so promptly presented for payment as a Check."

[1] Ante, § 493.

[2] Ante, § 200, 201, 207, 208, 319–328; Story on Bills, § 324, 382; Chitty on Bills, ch. 6, p. 246, 247, (8th edit.); Id. ch. 9, p. 414; Id. ch. 11, p. 547.

only *pro tanto*.[1] Thus, for example, if the bank or banker has failed, or become bankrupt, he will be discharged to the extent of the loss or injury he has sustained thereby.

§ 498. But where no change of circumstances has occurred in the intermediate time between the drawing and presentment of the Check, materially affecting the rights or interests of the drawer in respect to the bank or bankers, there that analogy is abandoned; and the same rule is adopted, as to the admeasurement of the reasonable time, as is adopted in cases of guaranty.[2] Hence it is (as we have already seen[3]) that the drawer will at all times be liable to pay the same, if the holder can show (for the *onus probandi* is thrown on him[4]) that the drawer has sustained, and can sustain, no loss or damage from the omission to demand payment at an earlier date of the bank or banker, on whom the Check is drawn.[5] Thus, if the bank or banker still remains in good credit, and is able to pay the Check, the drawer will still remain liable to pay the same, notwithstanding many months have elapsed since the date of the Check, and before the presentment for payment, and notice of the dishonor. So, if the drawer, at the date of the Check, or at the time of the presentment of it for pay-

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1 3 Kent, Comm. Lect. 44, p. 104, note, (5th edit.); Cruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259; Murray *v.* Judah, 6 Cowen, R. 490; Mohawk Bank *v.* Broderick, 10 Wend. R. 306; Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425, 428, 429; Serle *v.* Norton, 2 Mood. & Rob. 401; Ante, § 492.

2 Ante, § 284, 285, 460; Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425; 3 Kent, Comm. Lect. 44, p. 88, (5th edit.)

3 Ante, § 492.

4 Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425.

5 3 Kent, Comm. Lect. 44, p. 88, (5th edit.); Little *v.* Phenix Bank, 2 Hill, N. Y. R. 425; Cruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259.

ment, had no funds in the bank or banker's hands, or if, after drawing the Check, and before its presentment for payment and dishonor, he had withdrawn his funds, the drawer would remain liable to pay the Check, notwithstanding the lapse of time. The reason is, that, if he drew the Check without having any funds, he had no right to expect payment of the Check, and his conduct amounted to a fraud and imposition upon the payee; and he could suffer no loss or damage on account of the dishonor, or, at least, none, which might not be properly attributed to his own fault.[1] And if he originally had funds, and had since withdrawn them from the bank or banker's, he was himself guilty of a manifest wrong, in thus subtracting the very funds already appropriated to the payment of the Check.[2] The like doctrine will (as

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[1] Conroy *v.* Warren, 3 John. Cas. 259; Murray *v.* Judah, 6 Cowen, R. 484; Eichelberger *v.* Finley, 7 Harr. & John. R. 381.

[2] Conroy *v.* Warren, 3 John. Cas. 259; Murray *v.* Judah, 6 Cowen, R. 484; Eichelberger *v.* Finley, 7 Harr. & John. R. 381; Franklin *v.* Vanderpoel, 1 Hall, R. 78. In the Matter of Brown, 2 Story, R. 516, the Court said; "The like distinction between Checks and Bills of Exchange was stated by Mr. Justice Sutherland, in Murray *v.* Judah, 6 Cowen, R. 490. He there said: 'As a general rule, therefore, a Check is not due from the drawer, until payment has been demanded of the drawee, and refused by him. As between the holder of a Check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker, or drawer, a demand at any time before suit brought is sufficient, unless it appear, that the drawee has failed, or the drawer has in some manner sustained injury by the delay.' The same doctrine has been fully recognized in other cases. It is a natural, even if it be not a necessary, consequence of the fact, that a Check is an appropriation of the funds of the drawer in the hands of the bank or banker, to the amount of the Check; and consequently, the drawer has no right to withdraw the same. And, if the drawee, upon the presentment refuses to pay the Check; because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained, and can sustain, no loss, there is every reason to hold him liable therefor. Every Check is primâ facie presumed

has been already suggested) ordinarily apply to the case of an indorser or transferrer of a Check, in respect to subsequent holders.[1]

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to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the holder of the Check? Or, that he shall not be deemed to hold the money, as money had and received for the use of the holder, either because he had no funds in the bank, or because he still retains those funds, appropriated to the use of another, for his own use? I am aware that Mr. Justice Cowen, in his elaborate opinion in Harker *v.* Anderson, 21 Wend. R. 372, has endeavored to support the opinion, that a Check is to be deemed, to all essential purposes, to be a Bill of Exchange, and, therefore, that all the rules applicable to the latter are of equal force in relation to the former. Notwithstanding the array of authorities, so fully and learnedly brought forth by him in support of that opinion, my own judgment is, that they wholly fail of the purpose. It appears to me to be a struggle, on the part of the learned Judge, to subject all the doctrines applicable to all negotiable instruments to some common and uniform standard. I hope and trust, that such an effort will never prevail. In my judgment, it is far better, that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience, and to mould themselves into the common habits of social life, rather than to assume any artificial forms, or to regulate, by an inflexible standard, the whole operations of trade and commerce. As new instruments arise in the course of business, they should be constructed so as to meet and accomplish the very purposes for which they were designed by the parties, and not to defeat them. Checks are as well known now as Bills of Exchange, as a class of distinct instruments in commercial negotiations; and he, who seeks to make them identical in all respects with Bills of Exchange, may unintentionally be introducing an anomaly, instead of suppressing one. Upon the whole, my judgment is precisely in coincidence with that of Mr. Chancellor Kent, already cited on this subject. I hold, that the instruments in the present case are strictly Checks, and subject to all the incidents thereof; that they were payable on the very day on which payment was upon their face demandable, without any days of grace; and that both parties intended throughout, that they should be treated as Checks, and that they should be paid by the bank on the very day designated, or at any reasonable time thereafter.

[1] Ante, § 497.

§ 499. There is a class of Checks, which has recently sprung up in our commercial communities, of a peculiar

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But, assuming, for the purposes of the argument, that this is not entirely correct, (which I maintain, however, to be entirely correct,) still, in this case, in my judgment, the Checks are a good debt against the bankrupt. And this for two reasons, either of which would be conclusive. In the first place, it is manifest, that these Checks were drawn without the drawer having any right to draw. He had no funds in the bank at the time, when the Checks were due and payable, or, indeed, for aught that appears, at any time since, to discharge them or either of them. Now, in the case of a Check, I take it to be clear, that the drawer impliedly engages, that at the time when the Check is due and payable he has, and will have then and at all times thereafter, sufficient funds in the bank to pay the same, upon presentment; and by the draft, he appropriates those funds absolutely for the use of the holder. Now, the bank is not bound to pay, unless it is in full funds; and it is not obliged to pay, or to accept to pay, if it has partial funds only; for it is entitled to the possession of the Check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the Check, which the holder cannot safely part with, unless he receives full payment, nor the bank exact, unless under the like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part; for he has a claim to the entirety. Now, the circumstance, that the drawer had no right to draw these Checks, and had no funds there at any time to pay the same, seems to me decisive, that he has no right to complain of the want of due presentment, or of the want of due notice. Not of the want of due presentment; for the Checks were demandable, not merely on the days on which they were respectively due, but, as against him, at any reasonable time afterwards; and he ought to have had funds at all times in the bank, to pay the Checks after they were due. Not of the want of notice; for as he never had any funds in the bank to pay the Checks, he had no right to believe they would be paid, and, strictly speaking, his conduct was an actual or constructive fraud upon the holders. In both views, the case of Conroy *v.* Warren, 3 John. R. 259, is a direct authority to the purpose. And it may be further added, that it was held in that case, in which I entirely concur, that, if the drawer sustains no damage, by want of due presentment or due notice, and the non-payment of Checks arise from his own default, or from his want of funds, he is liable to the holder to the full amount of the Checks. If the bank had funds, and had failed in the intermediate time, that might have furnished a different ground for defence. It would then be like the case of a Note, or acceptance, payable at a bank, where the bank had, at the time, funds to pay, and had failed, after it became due, and there had not character, and known as Memorandum Checks. In their form they do not in general differ from ordinary Checks;

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been a due presentment for payment. It appears to me equally clear, upon principle and authority, that the drawer is liable in all cases for the dishonor of Checks, whether they have been duly presented or not, or whether he has had due notice of the dishonor or not, in all cases where he has sustained no damage on account of the omission. But it is said, that in cases of Bills, due presentment and due notice are necessary, whenever the drawer has any funds in the hands of the drawee; and the same reasoning applies to cases of Checks. Now, I deny both the premises and the conclusion. In the first place, as I understand it, the true doctrine is this; that, if the drawer has a right to draw, in the belief that he has funds, or in the expectation that he shall have funds, at the time of the presentment for acceptance, by reason of arrangements with the drawee, or putting his funds in transitu; then, and in such cases, he is entitled to due notice. But according to the doctrine now contended for, if the drawer knows, that he has but one dollar in the hands of the drawee, and he has no expectation of any more being added, and has no right to believe, that a Bill for more will be honored, he may nevertheless draw a Bill on the drawee for ten thousand dollars: and if it is dishonored (as he knows it will be) he is still entitled to strict notice; whereas, if he had not the one dollar in the drawee's hands, he would not be entitled to any notice at all. Now, I do not understand the law to involve any such strange anomaly, not to call it an absurdity. In each case, the same reason applies; the draft is a fraud upon the holder; and in each case a meditated fraud shall not be sheltered behind a rule, intended to protect the innocent and trustworthy. The two cases relied on at the bar, to establish the opposite doctrine, turn upon the very considerations, which I have already suggested. In Hammond *v.* Dufresne, 3 Camp. R. 145, the Bill was drawn by the party, having no funds at the time; but the drawees accepted the Bill, and afterwards, and before the Bill became due, the drawer paid a larger sum on account of the acceptance; and Lord Ellenborough held, that the drawer was entitled to strict notice of the dishonor, when the Bill became due. Why? Because the drawer had a reasonable expectation, that the Bill would be accepted, (and it was accepted) and that it would be paid at maturity by the acceptors, as he was then in advance for them to a larger amount. In Thackeray *v.* Blackett, 3 Camp. R. 163, the two Bills drawn were accepted, and were dishonored at their maturity by the acceptors; but due notice thereof was not given to the drawer. The Bills were, in fact, drawn for the accommodation of the drawer; but before they became due, he had contracted engagements on account of the acceptors, to the amount of about £1,000, the Bills amounting to upwards of £3,600. Lord Ellenborough held the drawer entitled to strict notice; but it was upon the ground, that and, as to third persons, who are holders *bonâ fide* for a valuable consideration, without notice, they are affected with all the legal rights and consequences of ordinary Checks. But between the parties thereto they seemed designed as a mere memorandum of an indebtment, generally for money borrowed, and are in the nature of the common Due Bill, I. O. U. These Memorandum Checks have not, as yet, within our knowledge, given rise to any important judicial decisions. But two questions may naturally arise thereon. (1.) Whether, as between the immediate parties, the Checks are to be deemed presentable at all to the bank, on which they are drawn, before the holder has a right to demand payment of the amount of the drawer. (2.) If so presentable, then, within what time the holder is bound to present them for payment; whether within a reasonable time, according to the general rule, or at any time, depending upon his own sole option. Neither of these points seems, at present, to have undergone any positive adjudication.

§ 500. Before closing this work, it may be proper to say a very few words in respect to bankers' Notes, and

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there was an open account between the parties, and, therefore, the drawer could not necessarily have been aware beforehand, that either of the Bills would be dishonored; so that the case was put upon the clear ground, that the drawer had a right to draw, and had a right to believe, that his drafts would be honored. Indeed, in cases of a fluctuating balance between the parties, this may well constitute a ground, upon which, without knowing the exact state of the balance, the drawer may reasonably draw. And this is the very ground, upon which the doctrine was put, in the case of Orr *v.* Maginnis, 7 East, R. 358, where the Court thought, that in cases of a shifting balance, notice was necessary, because the drawer could not, or might not, know, that he was drawing without any right to draw. The same doctrine was upheld in Legge *v.* Thorpe, 12 East, R. 171, and was there expounded upon the principles, which I have stated."

Bank-notes, or, as they are sometimes called, Bank-bills. We have already had occasion to consider the time, within which Promissory Notes, payable on demand, should be presented for payment, in order to charge the indorser or transferrer of the same, that is, that the presentment should be within a reasonable time.[1] But a most material distinction, applicable to this subject, exists, or may exist, between the Notes of private individuals, and of persons, professing to carry on the business of bankers, and issuing their Notes, payable on demand, for the purposes of general currency and circulation.[2] In the latter class of cases, it is obvious, that the same strict rules ought not to be applied, as in the former, as to presentment for payment, either in respect to the makers, or in respect to the subsequent holders, by whom they are, or may be, passed and circulated. They are, indeed, in the ordinary course of business and trade, treated (like our Bank-notes) as ready cash, and accordingly so circulate, whether they are made payable to order, or to bearer.[3] Nevertheless, they are not deemed to be taken as an absolute payment in cash, unless so agreed by the parties; but, if presented in due time and dishonored, the party receiving them may, upon due notice, recover the amount or consideration, for which they were taken, from the payer.[4] Even if the bankers have failed and

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1 Ante, § 207.

2 Chitty on Bills, ch. 12, p. 554, (8th edit.)

3 Tassell *v.* Lewis, 1 Ld. Raym. R. 743, 744; Chitty on Bills, ch. 12, p. 554, (8th edit.); Pickard *v.* Bankes, 13 East, R. 20; Lowndes *v.* Anderson, 13 East, R. 130.

4 Ibid.; Owenson *v.* Morse, 7 Term R. 64; Chitty on Bills, ch. 9, p. 414–416, (8th edit.); Id. ch. 12, p. 554, 555.

shut up their banking-house, it seems to have been thought necessary, that a presentment of the Bank-notes should be made there for payment; or at all events, that notice should be given in due time, and an offer to return the Notes made to the person, from whom they were received; otherwise, the holder will have no remedy against him.[1] It has been justly said, that it is

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[1] Howe *v.* Bowes, 16 East, R. 112; S. C. 1 Maule & Selw. 555; S. C. in Error, 5 Taunt. R. 30; Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Henderson *v.* Appleton, cited in Chitty on Bills, ch. 9, p. 387, note, (8th edit.); Id. ch. 9, p. 356, note, (9th edit.); Rogers *v.* Langford, 1 Cromp. & Mees. 637; Chitty on Bills, ch. 9, p. 386, (8th edit.); Id. p. 417, 418; Id. ch. 9, p. 354 – 356, (9th edit.); Id. p. 384. Mr. Chitty, in his notes to the last edition, (the 9th), has given a full view of the cases above cited; and they are so instructive, that they deserve to be stated at large. Camidge *v.* Allenby, 6 Barn. & Cressw. 373; 9 Dowl. & Ryl. 391, (Chit. J. 1319.) In an action for the price of goods, it appeared, that the same were sold at York, on Saturday, the 10th of December, 1825, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as and for the payment of the price, certain Promissory Notes of the bank of D. & Co., at Huddersfield, payable on demand to bearer. D. & Co. stopped payment on the same day, at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the Notes, or presented them to the bankers for payment; but on Saturday, the 17th December, he required the vendee to take back the Notes, and to pay him the amount, which the latter refused. Held, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the Notes his own; and, consequently, that they operated as a satisfaction of the debt. Per Bayley, J.: "I think that the defendant, in this case, is entitled to the judgment of the Court. One short observation disposes of Warrington *v.* Furbor, 8 East, R. 242, and Swinyard *v.* Bowes, 5 Maule & Selw. 62, the authorities cited to show, that it was not necessary, in this case, to prove presentment for payment. In those cases, the person insisting on the want of presentment was not a party to the Bill; but here, the defendant was a party to the Notes; for they were payable to the bearer on demand, and he was the holder of them; and when such Notes are passed from hand to hand, the person taking them must trace his right through the former holder. If the Notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them, against the defendant.

difficult to say, what length of time is to be deemed unreasonable for presentment thereof for payment, as

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The plaintiff might have insisted upon payment in money. But if he consented to receive the Notes as money, they would have been taken by him at his peril. If, indeed, he could show fraud, or knowledge of the maker's insolvency, in the payer, then it would be wholly immaterial, whether they were taken at the time of sale or afterwards. Here, the Notes were given to him in payment subsequently, and the question is, whether they operate as a discharge of the debt due to the plaintiff, in respect of the corn. The rule as to all negotiable instruments is, that if they are taken in payment of a preëxisting debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do, in order to obtain payment of these Notes? They were intended for circulation. But I think that he was not bound immediately to circulate them, or to send them into the bank for payment, but he was bound, within a reasonable time after he had received them, either to circulate them, or to present them for payment. Now here it is conceded, that if there had not been any insolvency of the bankers, the Notes should have been circulated, or presented for payment, on the Monday. It is clear, that the plaintiff, on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instruments, it became his duty to give notice to the party, who paid him the Notes, that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the Notes; and it would then have been for the defendant to consider, whether he could transfer the loss to any other person; for, unless he had been guilty of negligence, he might perhaps have resorted to the person, who paid him the Notes. That party would, however, be discharged, if he received no notice of non-payment, or of the insolvency of the bankers, till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff, to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires that the party, on whom the loss is to be thrown, should have notice of non-payment, in order to enable him to exercise his judgment, whether he will take legal measures against other parties to the Bill or Note. Now here, if the Notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers; and he had a right to exercise his judgment, whether he would do so or not, although they had stopped, or he might have had a remedy against the person, who had paid him the Notes.

between the person, who passes away, and the person, who receives the same.[1] The only approximation to a

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It may be hard, in some cases, that the entire loss should fall upon any one individual, but it is a general rule, applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a Bill, or the maker of a Note; for a party is not only entitled to knowledge of insolvency, but to notice, that in consequence of such insolvency, he will be called upon to pay the amount of the Bill or Note. The case of Beeching *v.* Gower, Holt, C. N. P. 315, is an answer to the whole of the argument for the plaintiff, founded upon the fact, that the Notes were paid away after the bank had stopped. For these reasons, I am of opinion, that the plaintiff is not entitled to recover, and that a judgment of nonsuit ought to be entered." Henderson *v.* Appleton, tried in the Court of Pleas, at Durham. Upon a motion for a new trial, argued before Bayley, J., and Hullock, J., at Chambers, Serjeants' Inn, 23 July, 1827. Assumpsit for goods sold. Plaintiff sold goods to defendant, at Denlington market, on Monday, 12th December, and on account of the alarm respecting bankers, it was agreed, that the payment should not be made till the Monday following, the 19th December, when the parties again met at Denlington market, and defendant offered several country Notes, and offered plaintiff the choice, and he selected and took two five-pound Notes of Hutchinson's Stockton Bank, and in the evening went home to Husworth. By the course of the post, theNo tes could not have been presented at the bank at Stockton till Wednesday, the 21st December. It was proved, that the bank paid all day on Saturday, the 17th of December, but did not pay on Monday or afterwards, and refused to pay any Notes after Saturday. On Wednesday, the 21st, the plaintiff met the defendant at Stockton, and offered to return or exchange the same with the defendant, but he refused, saying, that the bank was going (meaning paying) on Tuesday. Verdict for plaintiff. Cresswell, for the defendant, on motion for a new trial, contended, that Bowes *v.* Howe, 5 Taunt. R. 30, establishes the obligation in all cases, to present for payment, and referred to Camidge *v.* Allenby, 6 Barn. & Cressw. 382, in which it was held, that, though the defendant delivered the Notes to the plaintiff after the bank stopped payment, yet, inasmuch as the plaintiff kept the Notes a week, after knowledge of the failure of the bank, without offering them to the defendant, or giving him notice, he had made the Notes his own; and Cresswell relied also on the words of the statute of Anne, and on the general rule, requiring the due

[1] Ibid.; Mohawk Bank *v.* Broderick, 10 Wend. R. 304; S. C. 13 Wend. R. 133; Ante, § 119, 389.

rule, which can be stated, is, that the delay should not be beyond what the common course of business warrants in such cases.[1]

§ 501. In America, the business of banking is generally carried on by incorporated banks, which issue their Notes with the intent, that they shall circulate as currency. And accordingly, they usually pass, and

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presentment of a Bill, although the acceptor has notoriously become bankrupt. Chitty, contra, relied on Howe *v.* Bowes, 16 East, R. 112, Owenson *v.* Morse, 7 Term R. 64, and Ex parte Blackburne, 10 Ves. 206 ; and insisted, that, as the defendant had himself delivered the Notes to the plaintiff, at a time when the bank had already stopped payment, he had broken the implied warranty, that the Notes, at the time of delivery to the plaintiff, were capable of producing the money, and that at least the defendant's subsequent conversation dispensed with the necessity for a formal presentment. Bayley, J., said, he believed the ground of the decision in Camidge *v.* Allenby was, that the Notes should be deemed a payment, unless returned in a reasonable time ; and that the plaintiff, by keeping the Notes a week after he had heard of the stoppage, without notice to the defendant, had precluded himself from recovery ; but that here the plaintiff had offered to return, and the defendant had refused to take back, the Notes, and therefore plaintiff was entitled to recover ; and Hullock, C., concurring, the rule for a new trial was discharged. Confirmed in Rogers *v.* Langford, 1 Cromp. & Mees. 637. In that case it appeared, that on Wednesday, the 23d November, A. bought goods from B., which he paid for in country Bank-notes. On Monday, the 28th, B. requested A.'s servant, as a favor, to exchange the Notes for money, which he accordingly did. On the same day, the bank stopped payment. A. heard of it on Tuesday, and on Wednesday wrote to B., informing him of the failure of the bank, and desiring him to exchange the Notes ; but the Notes were not produced or tendered to B. until long afterwards, nor were they ever presented at the bank. In an action brought by A. against B., to recover the value of the Notes, it was held, that A. was not entitled to recover. Per Bayley, B. : "I think the Notes ought to have been either presented by the holder to the Bank for payment, or else to have been returned without delay to the defendant, so as to give him an opportunity of getting payment for them, or of making the best of them." See also Chitty on Bills, ch. 9, p. 387, 388, (8th edit.) ; Id. p. 414 ; Id. ch. 12, p. 554, 555 ; Id. ch. 9, p. 356, (9th edit.) ; Id. p. 384 ; Ante, § 207, and note ; Post, § 502.

[1] Ibid.

are received, as cash or ready money.[1] It matters not how long Bank-notes have been issued, or how long they remain in circulation, or whether they have been received back into the bank, and reissued, or not; for they are still always treated as negotiable paper, not overdue, or liable to any equities between the bank, and any parties, who have subsequently received them, or between any intermediate parties.[2] The bank, therefore, always remains (as bankers do upon their Notes) liable to pay the same to any person, who becomes the holder or bearer thereof, at any distance of time from the original issue thereof. In respect to persons, who receive the same in the course of circulation, either in payment of prior debts, or of debts then contracted, the general rule is, that the creditor takes them at his own risk, if the bank is then in good credit, and he does not present the same for payment within a reasonable time, that is to say, as early as he may after the day, on which he received the same.[3]

§ 502. If the bank has actually failed, or should fail, before the Notes can, within such reasonable time, be presented for payment, then the holder, upon giving due notice of the dishonor, may recover the amount or consideration from the person, from whom he received the same. But it has been thought, that even the failure of the bank will not dispense with a due presentment for payment at the banking-house; and, at all events, it will be necessary to give due

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[1] Chitty on Bills, ch. 12, p. 555, (8th edit.); Id. ch. 12, p. 523, 524, (9th edit.); Mellen *v.* Race, 1 Burr. 457; Bullard *v.* Bell, 1 Mason, R. 243, 252.

[2] Solomons *v.* Bank of England, 13 East, R. 135, note; Bullard *v.* Bell, 1 Mason, R. 243, 251, 252.

[3] Ante, § 117–119, 389.

notice to the person, from whom the Notes were received, of the failure of the bank, accompanied with an offer to return the Notes, in order to bind him.[1] We have already had occasion to state, that there is some conflict in the American authorities upon the point, whether Bank-notes are to be deemed an absolute payment, and taken at the risk of the creditor, who receives the same, or not.[2] What has been stated in the preceding part of this section is the doctrine asserted in the English authorities; and it seems supported by what may well be deemed the preponderance of authority, as well as of reasoning, in America.[3]

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[1] Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Chitty on Bills, ch. 9, p. 387, and note, (8th edit.); Id. ch. 9, p. 356, (9th edit.); Rogers *v.* Langford, 1 Cromp. & Mees. 637; Ante, § 119, and note, § 389, 500.

[2] nte, § 119, and note, § 389.

[3] Ante, § 119, and note, § 389. The question was much discussed in The Ontario Bank *v.* Lightbody, in Error, 13 Wend. R. 101, (S. C. 11 Wend. R. 9,) in which the Court of Errors held the doctrine affirmed in the text. On that occasion, Mr. Chancellor Walworth said: "The question to be decided is, which of the parties shall sustain the loss in reference to the Bill of the Franklin Bank, received by Lightbody, paid upon the presentment of his Check. The law is well settled, that where the Note of a third person is received in payment of an antecedent debt, the risk of his insolvency is upon the party, from whom the Note is received, unless there is an agreement or understanding between the parties, either expres or implied, that the party who receives the Note is to take it at his own risk. The same principle is applicable to the Notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties, that if the Bill, at the time it is received, is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the bank. This implied agreement between the parties arises from the fact, that Bills of this description, so long as the bank which issued them continues to redeem them in specie, at its counter, are by common consent treated as money, and are constantly passed from hand to hand as such. The receiving them as money, however, is not a legal, but only a conventional regulation, adopted by the common consent of the community; as no State is authorized to coin money, or to pass any law by which any thing but gold or silver coin shall be made a legal tender

§ 503. We have thus gone over the most material doctrines applicable to Promissory Notes, to Guaranties

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in the payment of debts. This principle of considering Bank-bills as money, which the receiver is to take at his own risk, cannot, therefore, be carried any further than the conventional regulation extends, — that is, to consider and treat them as money, so long as the bank by which they are issued continues to redeem them in specie, and no longer. When, therefore, a bank stops payment, its Bills cease to be a conventional representative of the legal currency of the country, whether the holder is aware of that fact or not; from that moment the Bills of such bank resume their natural and legal character of Promissory Notes, or mere securities for the payment of money; and if they are afterwards passed off to an individual who is equally ignorant of the failure of the bank, there is no agreement on his part, either express or implied, that he shall sustain the loss which has already occurred to the original holder of the Bills. Upon the principles applicable to cases of mutual mistake, as those principles are administered in Courts of Equity, it is now settled that, if an individual passes to another a counterfeit Bill, or an adulterated coin, both parties supposing it genuine at the time it was received, the one who passes it is bound to take it back, and give him to whom it was passed a genuine Bill or an unadulterated coin in lieu thereof, or, in other words, to make good the loss. Markle *v.* Hatfield, 2 John. R. 455. That principle of natural justice is equally applicable to the case under consideration. The actual loss had been sustained by the failure of the bank while the plaintiffs in error were the holders and owners of the Bill; and it is a maxim of the law, that the loss is to him who was the owner at the time such loss happened, if both parties were ignorant of the loss at the time of making their contract. Here, the one party intended to pay, and the other supposed he was receiving the Bill of a bank, which was redeeming its Bills at its counter. Suppose the inquiry had been made of the defendant, 'Do you expect to sustain the loss, if the bank should fail before you shall have parted with this Bill?' The answer, according to the implied understanding of the parties, arising from the nature of the transaction, and considering the Bills of specie-paying banks as money, would certainly have been in the affirmative. But, if he had been asked, 'Do you understand that you are to bear the loss, if it should hereafter be ascertained, that the Franklin Bank has now actually failed and stopped payment?' he would unquestionably have answered, 'No; in that event, as the loss will have happened while you was the owner of the Bill, natural equity requires that you should bear it; and I shall expect you to take back the Bill, and give me one which is good.'" Mr. Senator Van Schaick also delivered a very able opinion on the same side. In Harley *v.* Thornton, 2 Hill, S. C. R. 509, note, the case was "a summary process to recover twenty dollars thereof, to Checks on Banks and Bankers, and to Bank-notes. In concluding these Commentaries, the reflec-

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from the defendant, under the following circumstances. In the course of a regular business transaction, the defendant passed to the plaintiff a twenty-dollar Bill on the Macon Bank of Georgia. The bank had failed and stopped payment before this, but this fact was not then known in the community where this transaction occurred, or to the parties themselves, at the time the Bill was passed. On these facts, the presiding Judge decreed for the plaintiff, and the defendant appealed and moves to reverse the decree." Mr. Justice Harper, in delivering his opinion in this case, (in which the other Judges concurred,) said ; "I do not know what other rule can govern this case, than that which is applied by the English authorities to negotiable Notes and Bills, and to bankers' Notes and Checks, which are commonly circulated, and answer the purposes of cash, This rule, though there has been a diversity in the cases on the subject, I take to be settled thus : that, if such Note or Bill be paid in satisfaction of a previous debt, or if it be paid in the ordinary course of business for a debt contracted at the time, as for goods sold, and it turns out to be bad, the person receiving it may resort to, and recover on, the original cause of action. If the Note, however, be sold or discontinued, or if there be an understanding or agreement, that the party receiving shall take it as payment, and abide the risk, there can be no recourse if it prove bad. The older cases, which are referred to in Owenson *v.* Morse, 7 Term R. 65, seem to make this distinction, that, if the Note be paid in satisfaction of a previous debt, and turns out to be bad, the party may resort to the original cause of action ; otherwise, if on account of a debt contracted at the time. That distinction, for which there seems little reason, was overruled in the case referred to. In that case the party agreed to purchase some plate and paid for it at the time in bankers' Notes. At the time of the payment, the banker's house was shut, and never opened again, he turning out insolvent; this was held to be no payment. To the same effect I understand the remarks of Lord Eldon, in Ex parte Blackburn, 10 Ves. 506 : 'I take it now to be clearly settled, that, if there is an antecedent debt, and a Bill is taken without taking an indorsement, which Bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that, if there is no antecedent debt, and A. carries a Bill to B. to be discounted, and B. does not take A.'s name upon the Bill, if it is dishonored there is no demand ; for there was no relation between the parties, except that transaction ; and the circumstance of not taking the name upon the Bill is evidence of the purchase of the Bill. In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent for the party to agree, that the payment shall be by a particular Bill. In this tion naturally suggests itself, how various, and intricate, and difficult are the practical details of the subject, entering so largely into the daily business of human life. The general principles, belonging to it, are, comparatively speaking, of great simplicity, and mainly dependent upon natural justice and equity; and they have accordingly been collected and arranged, with no common diligence and skill, by the learned jurists of Continental Europe, in successive treatises upon Bills of Exchange, from a very early period of commercial law down to our times. Jousse, and Scaccia, and Savary, and Pothier, and Heineccius, among the elder jurists and Pardessus, Boulay Paty, Baldasseroni, and Nouguier, among those of the present age, have, perhaps, expounded them with the most fulness and accuracy. And yet, if we stopped here, how little could be gleaned from their works to instruct and guide us in the many

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instance, it would be extremely difficult to persuade a jury, under the direction of a Judge, to say an agreement to pay by Bills was satisfied by giving Bills, whether good or bad.' See also Puckford *v.* Maxwell, 6 Term R. 52. Chitty, in his treatise on Bills, p. 339, speaking of bankers' Notes or Checks, says; 'On account of their being payable on demand, they are considered as cash, whether payable to order or bearer, but if presented in due time, and dishonored, they will not amount to payment.' See also the American authorities on the same subject, referred to in a note to the American edition of Chitty, p. 118, note (k). Thus, it will generally happen, that the holder of a Bank-note, who is in possession of it at the time the bank stops payment, must bear the loss, provided, that he has been in possession so long, that a reasonable time for presenting the Note and demanding payment has elapsed. It is always necessary, that the Note should be presented within a reasonable time, when the party intends to charge the person from whom he received it. In the present case, however, there is no question on this subject, for the bank had stopped payment before the Note was paid to plaintiff. In answer to a remark of counsel, it may be observed, that the insolvency of a bank is referred to the time of its stopping payment. It is supposed, that any particular Note would have been paid, if it had been presented before that time."

curious questions and important inquiries, which now meet us at every step in the crowded business of commerce, on the Exchange, and in the circulation and discount of negotiable credits. It is not, perhaps, too much to say, that the daily business of the city of London alone furnishes hundreds of cases, where the Continental jurists could afford no information to clear away any practical doubts, or to assist in forming any safe and satisfactory judgments. Yet how few are the doubts and details, which the commercial jurisprudence of England has not already reduced within very narrow limits of authority and precept. It is here, indeed, that the Common Law has achieved a silent, but a glorious and uncontested triumph. It has followed out its general principles into the most minute and varied results, and demonstrated, in a marvellous manner, its ready flexibility and power of adaptation to all the wants and exigencies of a busy, opulent, and refined society.

INDEX.

The References are to the Sections.

A.

SECTION

ABSCONDING OF PARTY,
When it will excuse the want of due presentment of Note for payment 205, 237
ACCIDENT, When it will excuse the want of due presentment of Note 205, 257-259
ACCOMMODATION NOTES 190
When a defence to a Note 190
When not a defence 194
When it excuses non-presentment of a Note at its maturity 268-270
When not 268, 269, 292
Effect of release as to other parties . . . 423
ACCORD AND SATISFACTION . . . 402, 403, 408
(*See* SATISFACTION.)
ACCOUNT, Notes payable for the use or account of a party 26, 143, 144
ADDRESS OF NOTICE OF DISHONOR,
How it should be 346, 347
Effect of mistake in 346, 347
ADMINISTRATORS AND EXECUTORS, Parties to Notes 63, 64
As makers 63, 64
As indorsers 120, 123
Transfers by 123
When payment demandable of . . . 253
When payment demandable by . . . 253
At what place demandable by or of . . . 253
ADMISSION OF SIGNATURE OF PARTIES, . . 135
When admitted or not . . 135, 379, 380
By indorser or not . . 135, 379, 380
Not by maker 135, 379
AGENTS, Parties to Notes 65-70
When bound by 65-70
Presentment of Notes for payment by . 246, 249
Notice by, of dishonor 301
Notice to, of dishonor . . . 307, 309

SECTION

AGENTS, *Continued.*
Within what time agent should give notice of dishonor 326
To whom he should give notice . . . 326

AGREEMENTS OF PARTIES TO NOTES,
When they will excuse non-presentment of Notes for payment 271-273
When a waiver of due presentment of Notes . 271-273, 295
Effect of ambiguous language in . . . 287
Parol agreement, varying terms on time of payment of Note, effect of 291
No excuse for non-presentment at maturity of Note . 291
Agreement as to time and place of notice, effect of . 314
Agreement to take a third person as substitute for the debt 425

ALIENS, Parties to Notes,
Alien enemies, when bound by or not . . 94-98, 100
Indorsement by or to, effect of 99

ALLONGE, What it is 151

AMOUNT OF MONEY IN NOTE, Must be fixed and certain 20, 21
Good if in ciphers, or figures, or words . . . 21

ANTE-DATING NOTE, effect of 48

ASSIGNEES OF BANKRUPT, Transfers by . . 123
When bound to make indorsement . . . 120
When entitled to sue 102
When presentment of Note for payment by . . 249
When to 252
Notice by or to, of dishonor . . . 305, 307

ASSIGNMENTS OF NOTES 41
Of negotiable Notes 41
Of non-negotiable Notes 42, 128
Payable to A. or assigns 49
To Government 41, 130
Effect of, without indorsement 117
Effect of, by the foreign law 131

ATTESTATION OF NOTES,
When necessary or not 54, 56

ATTORNEY, No power to indorse a Note committed to him for collection 121

AVAL, What it is, (*See* GUARANTY) . . . 455, 456
Effect of, by foreign law . . . 455, 456

B.

BANK-NOTES PAYABLE AT A BANK, When and how demandable . . . 227-230, 243, 251
Never deemed overdue 500, 501

SECTION

BANK-NOTES AND BANKERS' NOTES,
When payment in Bank-notes good or not . . . 119, 389, 500 - 502
Effect of failure of bank after Notes received in payment . . . 502
BANKERS, when treated as holders as to their customers . . 326
BANKRUPTCY, Effect on title to Note . . . 102
No excuse for want of due presentment of Note for payment . . . 203, 241
Presentment for payment in case of . . . 249, 252
In case of, by whom notice of dishonor is to be given . 305
In case of, to whom notice of dishonor is to be given . 307
Discharge of bankrupt, effect as to other parties on the Note . . . 428
BEARER, NOTES PAYABLE TO 116
How negotiable 116
By delivery 116
May be indorsed 132
Effect of indorsement of 132
Liability of transferrer of . . . 116 - 118
BILLS OF EXCHANGE, How they differ from Notes . 4, 453
Acceptance to pay at a bank, effect of . . . 227
BLANK NOTES, Effect of 10
Indorsements, effect of 138
BONA FIDE HOLDER, Who is deemed . . . 195

C.

CAPACITY AND COMPETENCY OF PERSONS,
Who are capable to make Notes . . . 60 - 62
Alien friends 94, 99
Trustees 63, 64
Guardians 63, 64
Executors and administrators . . . 63, 64
Agents . . . . . . 65 - 71
Partners 72, 73
Corporations 74
Who are incapable . . . . 75 - 102
Infants . . . . . 75, 77 - 82
Married women . . . . 75, 85 - 93
Alien enemies . . . . 75, 94 - 100
Persons non compotes 75, 101
Special prohibitions . . . 76, 77, 83, 84
Spendthrifts and prodigals 83, 84
Bankrupts 102
To make indorsements . . . . 80, 87 - 92

SECTION
CAPACITY AND COMPETENCY OF PERSONS, *Continued.*
Indorsements by infants 80
Indorsements by married women . . . 87-92
CASHIERS OF BANKS,
Indorsements to 127
Indorsements by 127
CHECK, When receiving a Check is payment of Note . . 389
CHECKS ON BANKS AND BANKERS,
Definition of Check 487
Form of . . . . 487, note
Payable to a particular party . . . 488
Payable to bearer 488
Payable to order 488
Resemblances and differences between Bills of Exchange and Checks . . . 489, 491, 492
In what they differ 489
Are always drawn on a bank or on bankers . . 489
No grace allowed on 489, 490
Always presumed to be drawn on funds deposited 489
When and how made payable . . . 490
On demand 490
On a fixed and certain day . . . 490
Effect of ante-dating or post-dating . . 490
When check demandable . . . 491, 492
When deemed overdue or not . . . 491
Drawer, when discharged by want of due presentment or not 492
Drawer, when discharged by want of due notice of dishonor 492
Want of due presentment or notice a discharge only to the amount of damage occasioned thereby 492
Rights and duties of holders of Checks . 493, 494
When to be presented for payment . . 493
In case of successive transfers . . 493, 494
Liabilities of drawer of Check . . 493, 497, 498
Liabilities of subsequent transferrers or indorsers 493-496
Memorandum Checks, what they are . . 499
Effect of 499
CHRISTMAS DAY, Deemed a holyday . . . 222
COIN OR CURRENCY, ... 389, 400
In what coin or currency Notes are payable . . 389
Effect of debasement of 390-400
Payment, in what coin or currency demandable 390-400

Section

COLLATERAL SECURITY,
Taking collateral security, when a waiver of due presentment of Note or not . . . 278, 284
Effect of holder's receiving the Note as collateral security only 284
When taking collateral security by holder does not discharge the other parties on the Note . . 416
COMPENSATION OR SET OFF, When a discharge,
In Roman and foreign law . . . 407, 437
Effect of, in foreign law 437
COMPOSITION OF DEBT 426, 427
Effect of composition with maker . . . 426
Effect of composition with indorser . . 426, 427
Effect as to prior and subsequent parties on the Note 426, 427
When it operates as a release . . . 426, 427
CONDITION IN NOTES, Effect of . . . 22–24
CONDITIONAL PAYMENT,
When a Note is or not . . 104, 105, 117, 404, 438
CONFUSION, Effect of, by the foreign law . . 439–444
CONSIDERATION,
Notes import primâ facie a consideration . . 7, 181
When consideration inquirable into or not . 181, 190, 191
Between what parties inquirable into . . . 181
Inquirable into, when Note overdue . . . 190
When not inquirable into . . . 190, 191
Not, in case of bonâ fide purchaser . 191, 192, 195
What consideration necessary to support Notes . 183
What is a valuable consideration . 183, 184, 186, 195
What is not sufficient 184
Moral consideration not sufficient . . 184, 185
Total want of consideration, effect of . . 187, 190
Partial want of consideration, effect of . . 187, 190
What is illegal 189, 193
What is void 188
When illegality avoids Notes . . . 190, 193
When illegality avoids indorsements . . . 193
CONTINGENCY, NOTES, PAYABLE ON, Effect of . 22–24
As to payment itself 22–24
As to person by whom payable 33, 34
As to person to whom payable 33, 35
CONTRACTS, By what law governed . . 154–177
(*See* Lex Loci.)
CORPORATIONS, When bound by Notes . . . 74
When they may make contract by Notes . . 74
COVENANT NOT TO SUE MAKER . . . 408

SECTION

COVENANT NOT TO SUE MAKER, *Continued.*
When it operates as a release . . . 408, 409
As to what parties it is or not . . . 409
Not to joint maker or joint indorser . . 409
CURRENCY AND COIN, In what currency Notes are payable . . . . . 389 – 400
Effect of debasement of . . . 390 – 400

D.

DAYS OF GRACE (*See* GRACE, DAYS OF) . . 215 – 225
Meaning of 215
What allowable 216
Operation of lex loci on 216
How calculated 217, 218
How affected by holydays . . . 219 – 223
DATE OF NOTES 45, 46, 47
When date required on 45, 46
Ante-dating, effect of 48
Post-dating, effect of 48
Time calculated exclusive of 211
DEATH OF PARTIES,
Of maker of Note, on whom demand of payment is to be made 253, 254
Of holder, by whom demand of payment is to be made 250
No excuse for non-presentment of Note for payment . 254
Of partner, or joint promisor, effect of . . 254, 256
DEFENCES AND DISCHARGES OF NOTES
(*See* CONSIDERATION) . . . 370 – 453
Want of consideration 181 – 187, 203, 204, 241, 286 – 296
Payment by maker . . . . 272 – 389
When good or not . . . 372 – 384, 386 – 388
By whom 374
To whom . . . . 375 – 378, 381
In cases of forgery of signatures . . 379 – 381
In cases of lost or stolen Notes . . . 382
At what time to be made 384
Partial payments, effect of 386
Mode of payment 389
In what coin or currency . . . 389
In cases of debasement of coin or currency 390 – 400
Payment by indorser . . . . 400 – 402
Satisfaction of Notes, otherwise than by payment 402, 403, 408
Distinction between satisfaction and extinguishment 403
What is a satisfaction or not . 402, 425, 426

SECTION
DEFENCES AND DISCHARGES OF NOTES, *Continued.*
Satisfaction by one joint maker or indorser discharges the other joint parties . . 425
When the Note of the party, or of a third person, a satisfaction or not 104, 404, 408, 425, 426
Discharge by operation of law . . 405, 407, 438
Discharge of party by bankruptcy . . 407, 428
Merger of Note by judgment . . . 407
Appointment of maker to be the executor of holder 407, 439-444
Bequest of Note by holder to maker . .. 407
Infancy of maker, when a discharge or not . 407
Marriage of holder, effect of . . . 407
Compensation or set-off . . . 407, 437
Discharge by act of party . . . 408-427
Accord and satisfaction 408
Release 408, 423-426
What parties discharged by a release 408, 423-426
Agreement to substitute new security . 408, 411
Covenant never to sue maker is a discharge of him 408
But not of other parties . . . 409, 425
What is not a discharge 410
Parol release is not 410
Taking collateral security is not . . . 411
What will discharge indorsers 412
When agreement between holder and maker for delay, a good discharge . . 413-419
Between what parties such agreement is a discharge or not . . . 413, 414, 417, 418
When agreement to give time not a discharge 417-421
Giving time to one joint maker or joint indorser is not 421
Where indorser consents to agreement is not . 419
Receiving part payment is not a discharge of other parties 422
Between whom a release is a discharge of other parties 423, 424
Between whom not of other parties . 423, 424
Release of one joint maker or indorser will discharge all the other joint parties . . 425
Satisfaction by one joint maker or indorser discharges the other joint parties . . 425
Covenant not to sue one joint maker or indorser, not a discharge of the others. . . 409
Composition of debt, what parties discharged thereby 426, 427
Discharges under foreign law . . . 429-444
By release 429-435

SECTION

DEFENCES AND DISCHARGES OF NOTES, *Continued.*
By compensation or set-off . . . 436, 437
By novation 438
By confusion 439-444
DELIVERY UP OF NOTES ON PAYMENT, 106-112, 243, 244
When demandable or not . . . 106-112, 243
Effect of Notes being lost or mislaid as to 106-112, 243-245, 445-450
DEMAND, NOTES PAYABLE ON 29, 30
When payment of to be demanded . . 207-209
DESTROYED NOTES,
Whether payment recoverable on at law . 107, 449, 450
DIRECTION OF NOTICE OF DISHONOR,
What is good or not 343-347
DISCHARGES AND DEFENCES. (*See* DEFENCES AND DISCHARGES.)
DISEASE, MALIGNANT
When it will excuse want of due presentment of Note for payment 205
DUE BILL, When deemed a Note or not . . . 14
DURESS, Avoids Notes 188

E.

ENEMY, ALIEN, Ability of to contract or not . 95-100
(*See* ALIENS.)
EQUITIES, When Note in hands of holder liable to . 178-180
EXCUSE FOR WANT OF DUE PRESENTMENT,
(*See* PRESENTMENT.)
What is a good excuse . . . 205, 257-286
Inevitable accident . . . 205, 257-259
Malignant disorder . . . 205, 257, 260
Political interruptions of trade . . 205, 257, 261
War and public hostilities . . . 205, 257, 262
Interdiction of commerce . . . 205, 257, 263
Impracticability of finding the maker or his residence 205, 257, 264
Impracticability to make due presentment, from receiving the Note near its maturity . 265, 266
That Note is for the accommodation of the indorser 268-270
Special agreement, waiving presentment . 271-273
Waiver of presentment . . . 276-280
Receiving other security by indorser . 281-283
Receiving Note as collateral security by holder 284, 285
What is not a good excuse . . . 286-296
That maker is bankrupt 286
Equivocal language or acts of indorser . . 287

SECTION
EXCUSE FOR WANT OF DUE PRESENTMENT, *Continued.*
That indorser knows that Note will not be paid 288, 289
That the Note is lost or mislaid . . . 290
Parol agreement between maker and holder, not to demand payment at maturity of the Note . 291
That maker and indorser are accommodation parties for subsequent indorser . . . 292
That indorser has ordered maker not to pay Note . 293
That indorser is a partner in the firm which are makers 294
EXCUSES FOR WANT OF DUE NOTICE (*See* NOTICE) 355 – 358
General excuses 355, 356
Special excuses 357, 358
What Excuses not sufficient 367
Effect of waiver of notice (*See* NOTICE, WAIVER) 358 – 368
What is a good waiver or not . . 358 – 368
What sufficient proof of waiver . . 364 – 368
EXECUTORS AND ADMINISTRATORS, When bound by a Note 63, 64
As makers 63, 64
As indorsers 120, 123
Transfers by 123
When payment of Note demandable by . . . 250
When payment demandable of 253
At what place demandable of . . . 253
When making party an executor is a discharge of his liability on a Note . . . 407, 429 – 444
(*See* CONFUSION.)
EXTINGUISHMENT OF NOTE. . . . 403, 409
(*See* DEFENCES AND DISCHARGES.)
Distinction between extinguishment and satisfaction of a Note 403, 409
Extinguishment by act of party . . 406, 408
Extinguishment by operation of law . 406, 407

F.

FAIRS, Notes payable at 32
FEMES COVERT (*See* MARRIED WOMEN) 75, 85 – 92, 124, 249, 250, 306
When makers of Notes . . . 75, 85 – 92
When payees 88, 124
When indorsers 88, 129
Presentment for payment of Notes to or by . 249, 250
Notice of dishonor to or by . . . 306
FICTITIOUS PERSONS, Effect of on Notes . . 39, 137

SECTION

FICTITIOUS PERSONS, *Continued.*
Notes payable by or to 39
Notes indorsed by or to 137
FOREIGN LAW. (*See* LEX LOCI.) . . . 154-180
FORGERY OF NOTES 379, 387
Of signature of maker . . . 379, 330, 387
Of signature of indorser . . . 39, 379, 388
Effect of on negotiation of Notes . . 379, 387
Indorser warrants genuineness of signatures of prior parties 135, 379, 380
Maker does not warrant genuineness of other signatures 135, 379, 380
Payment on forged signature . 379, 381, 387, 388
FORM OF NOTES 12, 13, 57
What is sufficient 12, 13, 16, 57
What not 14, 15
By joint promisors 57
When "I promise" by two persons . . 57
When a party is principal . . . 56, 58
When a surety only 56, 58
When a guarantor only 59, 134
When an indorser only . . . 133, 134
FORM OF INDORSEMENTS . . . 121, 153
FRAUD, When it avoids Note 188
When and between what parties inquirable into 178, 179

G.

GAMING, When consideration of Notes, effect of . . 192
GENUINENESS OF SIGNATURE, . . 135, 379
Indorser warrants . . 135, 379, 380, 387
Maker does not warrant . . . 135, 379, 380
GOVERNMENT, Notes made payable to . . . 41
Notes assignable to 41
GRACE, DAYS OF (*See* DAYS OF GRACE) . 215-225
Meaning of 215
What allowable 216
Operation of Lex Loci on 216
How calculated 217, 218
How affected by Sundays or holydays . 219-223
GUARANTY, What it is 455, 457
When indorsement deemed a guaranty, or not 133, 134
Guaranty of Notes . . . 454-480
Nature and obligation of . . 457, 460, 461
Consideration of . . . 458, 459

SECTION
GUARANTY, *Continued.*
Whether consideration should appear on the face of the instrument, or not . . 458, 459, 469
Difference between guaranty and suretyship 462, 466
How guaranty created 463
By independent instrument . . 363 - 465, 484
By writing on the Note itself . . 463, 466
Construction of terms of . . . 466 - 469, 478
Distinction between guaranty of *payment*, and guaranty of *collection* of Note 478
When the words make a joint promise 466, 467, 469, 470
When a suretyship 467
When a guaranty . . 367, 470 - 474, 476, 477
Interpretation of written guaranty on back of a Note 468 - 480
At time when Note is made . . . 468
At a subsequent time . . . 468, 470 - 472
Guaranty on back of non-negotiable Notes in blank 473 - 475, 479
At time when the Notes were made . 473, 475
At a subsequent time . . . 474 - 475
When the signer treated as a second indorser . 134 - 476
Guaranty on back of negotiable Notes . . 476 - 480
At time when the Notes were made . 476 - 479
At a subsequent time . . . 477 - 479
When negotiable or not . . . 481, 483
On a separate paper . . . 483, 484
On the Note itself . . . 583, 484
How guaranty extinguished or discharged . 485, 486
By want of due presentment . . . 485
By a release of maker of Note . . . 485
By giving time to maker of Note . . 485
By giving up collateral security . . . 485
Guarantor, how he may waive his rights . . 486
GUARDIANS, When bound by Notes . . . 63, 64
When parties to Notes 63, 64

H.

HOLDER, BONA FIDE,
Rights, obligations, and duties of . . . 115
Who is deemed a bonâ fide holder . . . 195
Holder not bound to sue the maker at the request of any antecedent indorsor . . . 115 *a*, 419
HOLYDAYS, What are . . . . 220 - 222, 321
Effect of, as to demand and payment of Notes . 219 - 223
Effect of, as to giving notice 321

SECTION

HUSBAND AND WIFE, Parties to Notes . . . 85–93
(*See* MARRIED WOMEN.)
Payment of Note by or to . . . 249, 250
Indorsement of Notes by or to . . . 88, 124, 129
Notice of dishonor by or to 306

I.

ILLEGALITY,
Of consideration, effect of . . . 189, 190
When it avoids Notes 190, 192, 193
When it avoids indorsements 193
IMPOSITION AND CIRCUMVENTION, When it avoids Notes 188
IMPOSSIBILITY, MORAL OR PHYSICAL,
Effect of, on presentment of Notes for payment 205, 257–259
IMPRACTICABILITY OF MAKING DUE PRESENTMENT,
In what cases an excuse . . . 264, 265
Absconding of maker 264
Residence of maker being unknown . . . 264
Receiving Note on eve of its maturity . . 265, 266
INDORSEMENT, Rights, duties, and obligations of indorsers 120, 123, 135
(*See* TRANSFERS OF NOTES.)
Form of indorsement 121, 152
Upon blank Notes, effect of 122
For the use of a third person 125
By whom may be made . . . 120–125
To whom may be made 120
Official indorsement 127
Non-negotiable Notes, effect of indorsement of . 128–131
Effect of assignment of 128–131
Of Notes payable to bearer 132
Fictitious indorsement, effect of . . . 137
When a person is deemed an indorser or not . . 133
What the indorser warrants,
Genuineness of antecedent signatures . . 135
Good title to pass the Note . . . 135
His own competency to indorse . . . 135
Competency of maker to give and pay the Note . 135
Due payment of Note at maturity, on due presentment 135
Payment by himself upon due notice of dishonor . 135
INDORSEMENT, DIFFERENT SORTS OF,
In blank 138, 140
In full 138–141
Absolute 138, 141
Restrictive 138, 141–145, 158

SECTION

INDORSEMENTS, DIFFERENT SORTS OF, *Continued.*
Qualified 138, 146, 147, 150
Conditional 138, 149, 150
With enlargement of liability 148
Successive indorsements, effect of . . . 151
Rights, duties, and obligations of indorsee, or holder . 153
Lex Loci, operation as to indorsements . . 154, 173-180
Effect of time, as to 178, 180
When Notes cease to be negotiable . . . 180
Indorsement of overdue Notes . . . 190, 191
Indorsement on Note, when a guaranty or not . 473-479
(*See* GUARANTY.)
INDORSERS, SUCCESSIVE, Rights and duties of, as to notice of dishonor 331-333
Within what time they must give notice . 331-334
INEVITABLE ACCIDENT,
When it excuses non-presentment of Note for payment 205, 257-289
INFANTS, When bound by Note or not,
As makers 75, 77, 78
As indorsers 78, 79
As payees 79
Indorsements by, effect of 80-82
When holders, who to present Note for payment . 249
Who to give notice of dishonor . . 306
INITIALS, When sufficient signing of a Note . . . 121
When sufficient indorsement of a Note . . . 121
INSANE PERSONS, Notes made by, or to . . . 75, 101
(*See* CAPACITY.)
As makers 75, 101
As indorsers 75, 101
INSOLVENCY (*See* BANKRUPTCY) . 203, 241, 249, 252, 305
INTERDICTION OF COMMERCE,
Effect of, on rights of parties 205
When an excuse for want of due presentment of Notes for payment . . . 205, 257, 261, 263
INTERPRETATION OF CONTRACTS,
Governed by Lex Loci 161, 168

J.

JOINT INDORSERS, Notice of dishonor to . . 308, 329
JOINT MAKERS, Presentment for payment to . . 239, 255
Effect of release of one joint maker . . 409, 423, 425
When indorsement makes a joint maker or not . 473-479
JOINT PAYEES, Indorsement by 125

Section

K.

KNOWLEDGE that Note will not be paid is no excuse
for non-presentment 288, 289

L.

LACHES,
In non-presentment of Notes for payment . 205, 257 – 286
(*See* PRESENTMENT.)
In omission to give due notice (*See* NOTICE) . 355 – 367
LETTERS OF CREDIT, ... 482
LEX LOCI, Its operation on contracts . . . 154 – 170
As to their validity . . . . 155 – 157, 165
As to their nature 159, 160, 165
As to their obligation . . 160, 165, 170 – 173, 175, 176
As to their interpretation . . . 161 – 168
As to payment of interest . . . 166, 167
As to their effects and incidents . . 168 – 170
As to remedies 173, 174, 176
As to indorsement of Notes . . . 154, 173 – 180
As to demand of payment 171
As to rights of holder 172
As to negotiability of Notes . . . 173 – 176
As to notice of dishonor . . . 177, 339
As to days of grace 216
LOST OR MISLAID NOTES,
Effect on rights of parties 106 – 112, 243 – 245, 290, 445 – 451
No excuse for non-presentment for payment, that
Note is lost or mislaid . 106, 112, 244, 290, 445
Whether payment demandable, unless Note produced to be delivered up 106, 112, 243 – 245, 445 – 451
Lost non-negotiable Note, effect of . . 450, 451

M.

MAIL, Notice of dishonor by . . . . 312, 341 – 344
MAKER OF NOTE, Rights, duties, and obligations of 103 – 114
The primary debtor 4
Not to pay Note before maturity . . 113, 114
Fictitious person, effect of 39
MALIGNANT DISEASE,
When it excuses non-presentment of Note for
payment 205, 257, 260
MARRIED WOMEN, Parties to Notes,
When bound as makers or not . . 75, 85 – 87, 89 – 92
When bound as indorsers or not . . . 88, 124
Survivorship as to Notes 88

SECTION

MARRIED WOMEN *Continued.*
By whom presentment of Notes to be made for payment in case of 249, 250
Cannot make or indorse Notes after marriage . . 124
Holders of Notes, who to give notice of dishonor . 306
MATURITY, Effect of receiving Note near its maturity 257, 265
MEMORANDUM CHECKS,
Their nature, and character, and effect . . . 500
MESSENGER,
When notice of dishonor may be by . . 324, 338, 340
When expense of notice by messenger is to be paid by indorser 338, 340
MONEY, Notes must be for . . . . . 17 – 19
In what currency Notes must be payable . 389 – 400
MONTHS, How calculated on Notes 213
By calendar months 213

N.

NATURE AND REQUISITES OF NOTES. . . 1 – 60
(*See* PROMISSORY NOTES.)
NEGOTIABILITY OF NOTES,
Origin of . . . . . 5 – 7, 41
Effect of 41, 42
Payable to bearer 43, 44
Payable to order 43, 44
Payable to A. or assigns 44
To government 41
By government 41
What Notes not negotiable 128
When Notes cease to be negotiable . . . 180
When after payment by maker . . 180
Fictitious persons, parties to Notes . . . 39, 137
NON-NEGOTIABLE NOTES 128
Rights, duties, and obligations of parties . . 128
Indorsement of, effect of . . . 128, 129
Assignment of . . . . . 128 – 131
NON-PAYMENT OF BILLS (*See* NOTICE)
Proceedings on . . . . . 257 – 355
NON COMPOS, Party to a Note 75, 101
As maker 101
As indorser 101
NOTARY, Not required to protest Promissory Notes generally 297
But is required by the foreign law . . 298
NOTE (*See* PROMISSORY NOTES)
When a Note is conditional payment or not 104, 105, 117, 404, 438

Section

NOTICE, What is constructive notice of defect of title to Notes 197
Notice of dishonor of Note . . . 297-355
When required 298, 299
By whom notice is to be given of dishonor . 300, 301
By any party to and liable on the Note, or his agent or representative . . . 301-303
But not by a stranger 301
In case of death of holder 304
In case of bankruptcy of holder . . . 306
In case of infancy of holder . . . 306
In case of partners 304
In case of joint holders 304
In case of marriage of holder . . . 306
To whom notice of dishonor is to be given . 307-312
To the indorser or his agent . . 307, 309
In case of bankruptcy 307
In case of partnership 308
In case of absence of indorser . . . 309
In case of death of indorser . . . 310
In case of death of partner . . . 311
In case of joint indorser . . . 308, 329
At what place notice is to be given . . . 312
Where party lives in same town or city . . 312
Where he lives in another town or city . . 312
When notice to be personal . . . 312
When at dwelling-house 312
When at counting-house or place of business . 312
When party lives in one town and does business in another 312
What is the domicil or place of business . . 313
Within what hours to be given . . . 315
At place of business 315
At dwelling-house 315
What is to be done, when place of residence unknown 316-318
What is to be done, where party is abroad or lives in a foreign country 316-318
When and within what time notice is to be given of dishonor 319-340
Where parties live in the same town or city 320-322
Where parties live in different towns or cities 320, 324
When notice must be on the same day or next day after the dishonor . . 320-322
Effect of religious and other festivals and holidays on 321
When notice must be personal, or be left at place of business, or domicil . . . 322

SECTION

NOTICE, *Continued.*
When it may be by the mail or post . 322, 324
When it may be by private messenger or conveyance 324
At what time notice must be sent by mail or post 324, 325, 327
Effect of two posts on the same day . 324, 325
All holders, whether principals or agents, entitled to benefit of the rule . . . 326
If notice duly sent by mail or post, its arrival immaterial 328, 329
Notice in case of joint indorsers . . 308, 329
By and to successive indorsers . . 330, 331
Within what time each indorser must give notice 331-334
When residence of party unknown . . 335
When party resident in a foreign country . 336
In what manner notice to be sent to foreign country 337
When no regular conveyance . . . 340
Notice of dishonor, operation of the Lex Loci on 177, 339
The mode or manner of giving notice . . 340-354
When personal 340
When at domicil or place of business . . 340
When oral or verbal . . . 340, 341
When in writing 340, 341
To what place to be sent when it goes by mail or post 341
In case no post-office in the town, where the party resides 343
Or where he receives his letters from the post-office of another town . 342, 343
Or where he receives indifferently from two post offices . . . 342, 343
Or where he resides in the country on a plantation 342, 343
When the post-office, to which the party's letters are sent, is unknown . 343, 344
Mode of address, and direction of the letter of notice of dishonor . . . 345-347
Name of party 346
Name of place, how designated . . 346
Whether street, where party lives, need be stated, when he lives in a large city . 346
Mistake in spelling of name, effect of . 347
Mistake in abbreviating name . . . 347
Direction, where there are two places of the same name 347

SECTION

NOTICE, *Continued.*
Form of . . . . . . 348 – 354
Description of the Note in notice . . . 349
What facts it should state . . . 350, 351
Should state due presentment and dishonor 350 – 352
Whether necessary to state, that holder looks to indorser for payment . . 353, 354
Effect of mistake or misdescription . 349, 350
Effect of defective statements in . . 351 – 354
Excuses for omission of notice, what sufficient . . 355
Inevitable accident 356
Malignant disease 356
Political obstructions 356
War, and interdiction of commerce . . 356
Impracticability of giving notice . . . 356
Special excuses 357
Note for accommodation of indorser . . 357
Agreement to dispense with notice . . 357
Receiving security from party . . 357, 367
Receiving money to pay Note . . 357, 367
Receiving Note as collateral security . . 357
Order by indorser, for maker not to pay the Note 357
Waiver of (*See* WAIVER) . . 358 – 366, 368
What is a good waiver . . . 358 – 362
What is sufficient proof of waiver . 360, 364 – 366
What is not a good waiver of . . 361, 363 – 366
What not a sufficient excuse for omission of notice . 367
Bankruptcy of maker 367
That indorser knows the Note will not be paid . 267
That indorser has received conditional security . 367
That indorser has received money for part payment 367
That maker is insolvent 367
That the maker and indorser are accommodation parties for a third party . . . 367
That an original parol agreement exists between maker and holder, not to demand payment at maturity of Note . . . 367
That Note is given by one firm and indorsed by another firm, one person being a partner in each 367
NOVATION, In foreign law 438
Effect of 438

SECTION

O.

OVERDUE NOTES,
Effect of, as to parties 190
Effect of, as to indorsements 190
ORDER, Notes payable to 43, 44
Effect of 43, 44

P.

PACKET SHIPS,
When notice of dishonor may be sent by . . 337
Within what time 337
PAR OF EXCHANGE 396, 397
PARTIES TO NOTES, How described
Maker 3
Payee 3
Indorser 3
Holder 3
PART PAYMENT OF NOTES, Effect of . . . 386
PARTNERS TO NOTES, When and how far liable . . 72, 73
Indorsements by 125
Rights of partner indorsing Note of the firm . . 294
Notice to, when necessary and how . . 294, 367
Presentment for payment, by or to . . . 239
Death of partner, effect of . . . 125, 255, 256
PAYEE, How described 35, 36
On Notes payable to order 36
On Notes payable to bearer 36
Who competent or not 79, 84, 87, 99
When blank for name of 37
Fictitious payee 38
Duties and obligations of . . . 106 – 112, 115
PAYMENT OF NOTES (*See* PRESENTMENT FOR PAYMENT.)
Must be fixed, and in money 20, 21
Must be absolute . . . . . 22 – 24
Must not be payable out of a particular fund . . 26
Must be at a fixed time 27, 28
What is a fixed time for payment . . . 27 – 29
When a Note is absolute or conditional payment of a debt 104, 105, 405
Delivery up of Note payment . . . 106 – 112
In what coin or currency 389
In case of debasement of coin or currency . 390 – 400
By maker, when good or not . . 373 – 384, 386 – 388
By indorser, when good . . . 400 – 402
By whom generally to be made . . . 374

SECTION

PAYMENT OF NOTES, *Continued.*
To whom to be made . . . 375–378, 381
In cases of forgery of signatures . . 379–381
In cases of lost or stolen Notes . . . 382
At what time payment to be made . . . 384
Partial payments, effect of 386
Mode of payment 389, 400

PAYMENT, When a Note is absolute, and when a conditional payment . . 104, 105, 117, 404, 438
Receiving part payment, effect of as to other parties . 422
Receipt, whether party on payment may insist on it . 452
Proceedings on non-payment of a Note . 297–355
Payment in Bank-notes, when absolute or not 119, 389, 500–502

PENCIL SIGNATURES to or on Notes in, effect of . . 11

PENNY POST, When notice good sent by . . . 323

PLACE of making Notes 49
Of payment of Notes . . . 49, 50, 227–230, 243
Of presentment for payment . . . 227–238
(*See* Presentment for Payment.)

POLITICAL OBSTRUCTIONS AND CIRCUMSTANCES,
When they will excuse non-presentment of Note 205, 257, 261

POSSESSION OF NOTES,
When evidence of title 381

POST (*See* Mail,)
Notice by when necessary or proper . . 312, 341–344

POST-DATING NOTE, Effect of 48

PRESENTMENT OF NOTES FOR PAYMENT,
At what time 200, 207, 211, 212
Must be on the day when due . . . 200–202
Of Fotes payable at or after sight . . 207–209
Of Notes payable on demand . . . 207–209
Months, how calculated 213
Days of grace 213, 215–225
Difference of style 214
At what time and hours of the day . . . 226
At what place 227–231, 251, 253
When demand at place dispensed with or not . 227–231
When payable at one of two places, where to be demanded 231
When payable at a bank, or either of two banks 232–234
Mode, in which payment to be demanded . . 235
When personally 235
When at domicil 235
When at place of business . . . 235
When domicil changed 236

SECTION
PRESENTMENT OF NOTES FOR PAYMENT, *Continued.*
When maker has absconded . . . 237
When domicil unknown 238
In case of death of party 253
What will excuse the want of due presentment 205, 257-286
Sudden illness 205, 257
Absconding of maker . . . 205, 237
Receiving Note near its maturity . . 265, 266
Residence of maker being unknown . 205, 264
Malignant disease 205, 237, 260
Moral or physical impossibility . 205, 257, 261, 263
War and interdiction of commerce 205, 257, 261, 263
Accident and irresistible force . . 205, 257-259
Public holydays and festivals . . 205, 221, 222
What will not excuse 286-296
Not that maker is bankrupt . 203, 204, 241, 286
Not death of maker . . . 254, 256
Not where the conduct, or acts, or words of indorser are equivocal . . . 287, 289
Not that indorser knows, that Note will not be paid 287-289
Not that Note is lost or mislaid . . . 290
Not a parol agreement to postpone payment . 291
Not that the Note is an accommodation Note . 292
Not that indorser has requested maker not to pay the Note 294
Not that indorser is one of the firm, who are makers 294
To whom to be presented . . . 239, 251
In case of partnership . . . 239, 255
In case of death of party . . . 250, 253, 254
In case of bankruptcy . . . 203, 241
Mode of 242
Personally 242
In writing 242
When Note lost or mislaid . . . 245, 445
Production of Note . 106-112, 243, 245, 445
By whom presentment to be 246
By person in possession of Note . . 243, 245-248
By person sui juris and competent . . 249
By agent or sub-agent 246
In cases of bankruptcy . . . 249, 252
Of marriage 249
Of infancy 249
In cases of death of party . 250, 253, 254, 256
In cases of partnership . . . 250, 255

SECTION

PRESENTMENT OF NOTES FOR PAYMENT, *Continued.*
In cases of joint Notes . . . 239, 255
Of Notes not negotiable 247
PRIVILEGES OF PROMISSORY NOTES . . . 7, 41, 42
PRODIGALS AND SPENDTHRIFTS, Parties to Notes 83, 84, 181
PRODUCTION OF NOTES, When necessary . 243, 245
On payment 243, 245
PROMISE, Whether in a Note the promise must be express . 14
Promise to pay Note, when a waiver of notice or not 360 - 368
PROMISSORY NOTES, Definition of 1, 2
Nature and requisites of . . . . 1 - 59
Negotiable, when or not 3
Distinction between Notes and Bills . . . 4
Origin of 5, 6
Origin of negotiability, in England and America . 6
Privileges of 7, 41, 42
Requisites of . . . . . . 8 - 59
Must be in writing 9, 10
Need not be negotiable 9
Signatures on blank paper 10
May be in pencil 11
How signature on 11
Form of 12, 13, 57
What form sufficient . . . 12 - 14, 16
When by several persons 57
Must contain an express promise to pay . . 14, 15
Ambiguous language, how construed . . . 16
Must be for payment of money only . . . 17 - 19
May be payable in any currency or denomination of money 17, 18
Must be for payment of a fixed sum of money . 20, 21
Must be for absolute payment, and not conditional 22, 23
Sufficient, if no condition or contingency on, or accompanying 24
Must not be payable out of a particular fund . 25, 26
Not material that fund is referred to, as the consideration 26
Must be payable at all events 27
What certainty as to time of payment sufficient . 27 - 29
At death of party 27
At sight 29
After sight 29
On demand 29
On a particular festival, or known holyday 30, 31
At a particular fair 32
Must be payable by a particular person . . 33, 34

SECTION

PROMISSORY NOTES, *Continued.*
And to a particular person . . . 33, 35
Names of maker and payee must be on the face of 34, 35
Or implied by law 36
Payable to the order of a person 36
Payable to the order of the maker . . 16, 36 *a*
Payable to bearer 36, 43, 44
Payable to a blank payee, good when blank filled . 37, 38
Payable when blanks may be filled . . 37, *a*
Payable to a fictitious person, effect of . . 39, 137
Payable to a payee, whose name is forged . . . 39
Statute regulations of 40
Negotiability of 3, 41
Not essential 3, 41
When negotiable 41, 43, 44
When not 41
Effect of, when assigned to king or government . . 41
Mode of negotiation of 43, 44
Date of 45
How computed 45, 46, 47
Effect of omission of 45
Ante-dated 48
Post-dated 48
Place of payment 49, 50
Where in general payable 49
Effect of being payable at a particular place . 49, 50
Value received 51, 52, 53
Not essential to be expressed 51
Attestation of 54, 56
Effect of 54
When sealed, effect of 55
By several persons 57
When joint and several 57, 88
By principal and surety 57
When party is a surety or not . . . 58, 59
When a guarantor or not 59
Competency of parties . . . . 60 – 62
When trustees bound 61, 63, 69
When guardians bound 61, 63, 64
When executors and administrators bound . 61, 63, 64
When agents bound . . . . 65 – 71
When principal only bound . . . 66 – 69
When partners bound 72, 73
When partners not bound 73
When corporations bound 74

SECTION

PROMISSORY NOTES, *Continued.*
Who may be parties to or not 61
Infants 76-82
Persons interdicted 83, 84
Persons under guardianship 83
Married women 85-93
Aliens 94, 96-98
Alien enemies 94-100
Persons insane 101
Bankrupts 102
Rights and duties of parties to . . . 103-116
Of the maker 104, 113, 114
Of the holder 106-115
Delivery up of, on payment . 106-112, 115, 243-245
In what currency payable . . . 115, 389-400
Rights and duties of parties on transfers of . 116-180
On transfers by delivery . . . 117-119
On transfers of Bank-notes . . . 119
On transfers by indorsement . . . 120
Of Notes, payable to order . . 120
Of Notes payable to bearer . . 132
When indorsement may be compelled . . 120
Form of indorsement . . . 121, 122, 152
In full 121
In blank 121
In pencil 121
By initials 121
By allonge 121, 151
Rights and duties of parties on indorsement . 123-127
Who competent to make indorsement . . 123-125
By whom indorsement may be made . . 123-125
In case of bankruptcy 123
In case of marriage 124
In case of death of payee or holder . . 124
In case of trustee 125
In case of partnership 125
To whom transfer may be made . . . 126-132
To an infant 126
To a married woman 126
To a person non compos . . . 126
To cashier of a bank officially . . 127
To assignee of Notes not negotiable . . 128, 129
To an agent 137
Effect of assignment of non-negotiable Notes 128, 129, 131
Effect of assignment of, to the government . 130

SECTION

PROMISSORY NOTES, *Continued.*
Effect of indorsement by fictitious indorser . 132
Effect of indorsement of Notes payable to bearer 132
When a person is deemed an indorser 128, 133, 134
When a person is deemed a guarantor . 59, 133, 134
Rights, duties, and obligations arising from indorsement 135, 136
Warranty of genuineness of Notes . . 135, 379
Warranty of competency of indorser . . . 135
Warranty of good title in indorser . . 135
Warranty of competency of maker, and of due payment by him 135
Warranty, on non-payment by maker and due notice, that indorser will pay . . 135
Blank indorsement, effect of . . . 137, 147
When Notes lost or stolen . . 137, 138, 140
Indorsement, different kinds of . . . 138
Blank or full 138–140
General or restrictive . . 138, 141–144, 150
Absolute or conditional . . 138, 141, 149, 150
Qualified . . . 138, 141, 146, 147, 150
Liability on, when enlarged . . . 147, 148
Guaranty by indorser 147, 148
When negotiable or not . . . 147
By allonge 121, 151
Time of transfer by indorsement, when material 178–180
Reindorsement, effect of 151
Rights, duties, and obligations of indorsee . 153
Lex Loci, operation of, in cases of Promissory Notes 154–180
In cases of indorsements . . 171–177
Consideration of 181–197
Promissory Notes import a consideration, primâ facie 181
In what cases necessary . . . 181, 190
Between what parties . . 181, 190–192, 194–197
What consideration sufficient . . 183–186
What is a mere moral consideration . . 185
What a valuable consideration . . . 186
Failure in part of consideration . . . 187
What consideration void or voidable . 188, 189, 193
Presentment for payment of . . . 198–256
At what time . . . 200, 207–209, 240
Days of grace 211, 215–225
Months how calculated 213
Different styles 214

SECTION

PROMISSORY NOTES, *Continued.*

At what place 227-235
By whom presented . . . 246-250
To whom presented . . . 241, 251-253
What will excuse want of presentment 236-238, 241, 257-270, 282-284
What not . . 202-205, 241, 286-296
Mode of presentment . . . 226, 242, 243
At what time of day 226
How to partnership . . . 242, 245, 246
How in case of bankruptcy . . . 241, 252
How in case of death of party 241, 250, 253, 254, 256
How in case Note lost or mislaid 243-245, 445-451
In case of joint Notes . . . 256
Waiver of due presentment . . . 271-281
Taking security, when it excuses . 282, 283, 285
Proceedings on non-payment
Notice 297-354
Notice, personal . . . 320-323, 340
Notice by post . . . 324, 327, 328, 336-344
Notice by packets 337, 340
Notice by messenger 339, 340
By whom notice is to be given . 301-306, 326, 334
For whose benefit notice will inure . . 326, 334
To whom notice is to be given . 307-312, 330, 331
To joint indorsers 329
To successive indorsers . . . 330-333
At what place notice is to be given . . 312-318
At what time notice is to be given 319-328, 335, 336
In what mode notice is to be given . 319, 324-328
Notice, how effected by Lex Loci . . 339
Mode or manner of giving notice . . . 340-355
Personal 320, 323, 341
Oral or in writing 341
By post 342-344
Address of written notice . . . 345-347
Form and substance of notice . . : 348-355
Omission or neglect to give notice . . . 355-369
What will excuse 356-360
What is a waiver of notice . . . 358-363
What is proof of waiver of notice . . 364-369
Matters of defence and discharge . . . 370-453
When payment is a discharge or not . . 372-374
By whom payment is to be made . . 374
When good by maker . . 374-400

SECTION

PROMISSORY NOTES, *Continued.*
When good by indorser . . . 400, 401
To whom payment is to be made . . 375-382
Forgery of indorsement, effect of . . 379
Payment, when not valid . . . 386-388
At what time payment is to be made . . 384
Partial payments, effect of . . . 386, 421
Mode or manner of payment . . . 389-399
In what coin or currency . . . 389-400
When by Check 389
When by Bank-notes . . . 389
When by substituted Note . . . 404, 405
Satisfaction of Note (otherwise than by payment,) what is, or not 402, 403, 409, 425, 426, 429-444
Extinguishment of Note, what is, or not 402, 403, 407, 425, 426
Extinguishment by operation of law 406, 407, 444
By bankruptcy 407, 428
Extinguishment by act of party . . . 408, 409
As to the maker 400-411
By accord 408
By release 400, 410
By higher security 400, 408
By covenant not to sue . . . 400, 408
By substitution of a new debt or security . 408
By taking collateral security . 400, 411, 425
Extinguishment as to the indorsers . . 413-429
By giving time or new credit to maker after Note is due 413, 414
When such agreement valid, or not . 414-418
When giving time not an extinguishment . 415-419
What parties discharged by giving time, or not 420
Effect of giving time to one joint maker or indorser 421
Effect of giving time in cases of accommodation Note 418
Effect of receiving partial payments . 380, 422
Release, effect of . . 423-425, 430-435
What parties discharged thereby, or not . 423
Release of one joint maker or indorser . 425, 435
Composition by holder, effect of . 426, 427
Extinguishment or satisfaction of Note by the foreign law 430-445
Release or other discharge, effect of, as to other parties 430-435

SECTION

PROMISSORY NOTES, *Continued.*
Compensation, or set off, in foreign law, effect of . . . 437
Novation, effect of 438
Confusion, effect of 439-444
Guaranty of Promissory Notes 454-486
(*See* GUARANTY.)
PROTEST OF NOTES, Not necessary by our law . . . 29
Is necessary by foreign law 298
No acceptance supra protest of Notes . . . 453
PURCHASER OF NOTES,
Who is deemed a bonâ fide purchaser . . . 195
Effect of Notes being overdue when purchased . . 190

Q.

QUALIFIED INDORSEMENTS, What are 138, 146, 147, 150

R.

RATE OF EXCHANGE 396, 397
RECEIPT, Whether party may, on payment, insist on a receipt 452
RE-INDORSEMENT OF NOTES, Effect of . . . 15
RELEASE, Effect of 408, 423-426
Parol release, effect of 408
Of maker, effect of as to other parties . 409, 423, 425
Of joint maker 409, 423, 425
Of indorser 423
Of prior parties, effect as to subsequent parties on the Note 423
Of subsequent parties, effect as to prior parties . 423
Effect of, as to accommodation parties . . 423
Effect of, by foreign law 429-435
RESTRICTIVE INDORSEMENTS, What are 138, 141-145, 151

S.

SATISFACTION OF NOTE 402, 403
Distinction between satisfaction and extinguishment of Note . . . 403, 409, 425, 426
What is a satisfaction of or not 402, 409, 425, 426, 429-445
Note of the maker or of a third person, when a satisfaction or not . . . 104, 404, 408, 438
What is a satisfaction of Note in the foreign law 430-445
SECURITY,
Receiving security by indorser, when a waiver of due presentment or not . . . 278, 281-283
Collateral security, effect of taking . . . 282, 283

SECTION

SECURITY, *Continued.*
Collateral security, effect of Note being received as . . . 284
SHIPS, When notice of dishonor may be sent by . . . 337
Within what time 337
SIGHT, Notes payable at or after . . . 29, 30, 207-209
When due and payable 207-209
SIGNATURE, How made to a Note . . . 11
How to indorsement 121
By initials 121
STAMPS ON NOTES 40
STYLE, NEW AND OLD 214
SUB-AGENT (*See* AGENT) 246
Presentment for payment by 246
SUCCESSIVE INDORSEMENTS (*See* INDORSEMENTS) . 151
SUNDAY, Not a business day . . . 219-223, 321
SUPRA PROTEST, No acceptance supra protest allowable on Notes 453
SURRENDER OF NOTE (*See* DELIVERY UP OF NOTE)
Duty of party on payment . . 106-112, 243-245, 445

T.

TIME, Agreement to give time, effect of . . 413-422
When it discharges other parties or not . 413-422
When agreement valid . . . 413, 414
When not valid 415
When agreement discharges an indorser, or not 413, 414, 416, 417, 419, 420
Effect of agreement as to accommodation parties . 418
Effect of, when made by holder with one joint maker or indorser 421
Notice of dishonor, time of . . . 315, 319-340
(*See* NOTICE.)
Months, how calculated 213
Time on Notes computed exclusive of day of date . 211
TITLE TO NOTES,
What is notice of defect of title or no . . 197
TRANSFERS, Rights, duties, and obligations of parties on transfers of Notes 116-180
(*See* INDORSEMENT.)
On transfers by delivery 117-120
On transfers by indorsement 120
Form of transfer 121, 122
Rights and duties and obligations of indorsers . 123
By whom transfers may be made . . . 120-125
To whom transfers may be made . . . 126

SECTION

TRANSFERS, *Continued.*
Of transfers by officers 127
By Cashiers of banks 127
(*See* CAPACITY AND COMPETENCY.)
TRUSTEES, When bound by a Note 63, 64

V.

VALUE RECEIVED, When required to be expressed on Note or not 51-53

W.

WAIVER OF DUE BRESENTMENT . . . 271-280, 295
(*See* PRESENTMENT.)
Effect of agreement of, before maturity of Note 271-273
Effect of after maturity of Note . . . 274-278
What sufficient proof of . . . 276, 279, 280
When not binding 275-278
Promise to pay Note, when a waiver . . 279, 280
Of Notice (*See* NOTICE.)
What is sufficient 358-368
What is not 364-366
What is sufficient proof of waiver . . 364-366, 368
By guarantor, of his rights . , . . 486
WAR, Effect of on rights of parties . . 94, 98, 100
(*See* ALIEN ENEMIES.)
When an excuse for want of due presentment of Notes for payment . . . 205, 257, 262
WRITING, Notes must be by 10, 11
Notes need not be in ink 11
Notes good in pencil 11