# A SHORT TREATISE ON THE LAW OF BILLS OF EXCHANGE, CHEQUES, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS GENERALLY

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## FROM PREFACE TO THE FIRST EDITION

"The writer's purpose is not to say all that can be said upon the subject, but to provide a clear exposition of the main principles underlying the law of negotiable instruments and of the rules relating to Bills, Cheques and Notes as illustrative of those principles."

## PREFACE TO THE FOURTH EDITION

PREPARATION of the present edition had been commenced just before the outbreak of the war, and was then suspended. The previous edition, however, became sold out and it was thought desirable not to delay any longer the publication of a new one. The war itself, so far, has not been productive of many decisions within the province of this work—they comprise only a small handful arising from the impossibility of carrying out the duties of the holder of a bill when they are to be performed in enemy or occupied territory. Apart from these there have been, since the previous edition of this book in 1930, some twenty-five reported cases. Among them the *Slingsby* group is the most notable, partly by reason of the curious facts disclosed and partly from the number of points involved; *Hibernian Bank* v. *Gysin and Hanson* exploded a view expressed by an esteemed, if not judicial, authority; while the procession of inquiries as to whether in some particular set of circumstances a Bank has or has not been guilty of negligence in paying or receiving payment of a crossed cheque, continued to lengthen. By the Bills of Exchange Act (1882) Amendment Act, 1932, the Legislature cleared up a point relating to bankers' drafts, upon which the Courts were thought be at variance. Apart from amendments necessitated by the foregoing matters, many passages in the book have been reconsidered and revised and further sections added, including a chapter on "Equities" and a chapter on Bankers' Drafts and Dividend Warrants, in the latter of which an attempt has been made to arrive at the nature of such warrants. A few additional forms have been inserted.

This edition will be found to be slightly larger than the previous one, but the enlargement is almost entirely due to the addition of two Appendixes, one containing a reprint of the principal Act and the other some notes calling attention to such of the Emergency Legislation as refers specifically to negotiable instruments. Decisions have been noted up to November, 1943.

BERTRAM JACOBS.

LONDON.

*November*, 1943.

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White and Tudor's Equity Cases.
Willis' Lectures on Negotiable Securities.
Wrottesley and Jacobs' Law and Practice of Criminal Appeals.

# ADDENDA AND CORRIGENDA

PAGE ix.—*For* Limitation Act, 1934, *read* Limitation Act, 1939.

PAGE 5.—The statement in the text as to the validity of an equitable assignment of a legal share in action in the absence of consideration for the assignment and footnote (*s*) must be regarded as inaccurate. *Holt* v. *Heatherfield Trust* cited in the footnote in fact decided that such an assignment is valid. To be in a position to sue, however, the equitable assignee must either join the assignor in the action or obtain a legal assignment by proceedings for specific performance against the assignor.

Until *Holt* v. *Heatherfield Trust* there appears to have been a real doubt as to the validity of an equitable assignment without consideration and, as indicated in the footnote, the Bills of Exchange Act, 1882 makes the rights conferred by s. 31 (4) (set out *post*, p. 126) available to an equitable assignee *for value*.

PAGE 35.—The capital letters of the first paragraph have become displaced and, commencing second line, should read as follows:—

> matured B had become indebted to A for, say, goods sold and delivered. If B had not parted with the instrument, then upon its maturity A would be entitled by way of set-off or counterclaim to meet B's claim to the extent of any indebtedness on the part of B. C, however, is not concerned. A's "personal defence" against B is out of the picture as between A and C, however material it may be as between A and B.

PAGE 62.—In line 9 omit the word "not".

In footnote (*o*) substitute: "Although there may happen to exist person of that name".

PAGE 100.—*For* "drawee" in second line of note (*b*) read "drawer".

PAGE 124.—Footnote (*z*) should be footnote (*x*).

PAGE 159.—Insert the letter "A" between the words "but" and "happens" in the ninth line.

PAGES 186 and 187.—The paragraph headed *Rights and Powers of Holder in Due Course* should read as follows: A holder in due course has, of course, all the rights and powers of a holder as set out in Chapter XIV, *ante*. In addition the Act provides that where holder is a holder in due course

"he holds the bill free from any defect of title of prior parties, *possession* (*c*). It is, moreover, a *legal* (*d*) as opposed to an *equitable* (*e*) chose in action (*f*). To get clearly at the present distinction between the transfer (*g*) *inter vivos* of negotiable instruments and that of other legal choses in action, it is necessary to indicate shortly how the latter stood originally in respect of the quality of assignability (*g*) and the steps by which they arrived at the position in which they stand to-day.

**Assignability of Choses in Action at Common Law** (*h*).—Now, for reasons variously stated, the Courts of Common Law refused their aid (except on behalf of the Crown) to the enforcement

(*c*) "*Chose in possession*, where the person has not only the right to enjoy but also the actual enjoyment of the thing" (Wharton's Law Lexicon, *ibid*)

(*d*) "Legal choses in action are said to be those enforceable by action at law, such as debts, " (Warren, Bk I, Chap III)

(*e*) "Equitable choses in action or, as they are sometimes styled, choses in equity, which comprise choses enforceable only by suit in equity, of which kind are the following —a legacy " (Warren, *supra*)

(*f*) It must be observed, however, that intrinsically a negotiable instrument is merely a piece of paper with some writing upon it When it is said that a negotiable instrument is a chose in action, the statement has reference to the right to claim under the instrument, from a person liable thereon The instrument *itself in the hands of the person entitled to claim the performance of the obligation* is, of course, a chose in possession Indeed, as will be seen further on, a negotiable instrument might be described roughly as a chose in possession which, *merely by virtue of such possession*, confers a chose in action upon the possessor "The absolute benefit of the contract is attached to the ownership of the document which, according to ordinary rules, would be only evidence of the contract" (Pollock on Contracts) In other words, although it is convenient to speak of a negotiable instrument as a chose in action, the latter is really the obligation contained in the instrument, and not the instrument itself

(*g*) "Transfer" appears originally to have been applied to the making over of choses in possession, more particularly of land, and "assignment" to the making over of choses in action To-day, the two expressions are treated as interchangeable

(*h*) The Common Law was the name given to the collection of rules and maxims, based in part upon the old Anglo-Saxon customs, gradually formulated by the Courts which grew out of the strong central Government resulting from the Norman Conquest. "Whatever else the Norman Conquest may or may not have done, it made the old haphazard state of legal affairs for ever impossible. The natural desire of the conquerors to make the most of their new acquisition, the exceptional administrative and clerkly skill of the Normans, the introduction of Continental politics, the rapid growth of the country in wealth and civilisation, soon proved the old customs to be inadequate For some time, no one could tell what was going to take their place In the end, there emerged a new national law, some of it based on immemorial native usage, some of it unconsciously imported from foreign literature, not a little imposed by the sheer command of a new and immensely stronger central government" (Jenks' Short History of English Law). The tribunals which evolved and administered the new law were, more particularly, the Courts of King's Bench, Common Pleas, and Exchequer These remained in existence until the Judicature Acts, 1873—1875, transferred their jurisdiction to the newly established Supreme Court of Judicature, so that the Common of the transfer *inter vivos* of a chose in action (*i*), and the benefit of a contract could not be assigned so as to enable the assignee to sue on it in his own name (*j*).

The difficulty was met to some extent in practice by the assignor granting the assignee a power of attorney enabling the latter to sue the debtor in the name of the former (*k*), but the possibility of employing this expedient in no way affects the validity of the rule just stated, since technically it was not the assignee who sued, but the assignor, who did so by his attorney the assignee. The expedient, moreover, was a somewhat clumsy one, owing to the questions which might arise as to the original validity or continued efficacy of the power of attorney, *e.g.*, the death, lunacy, etc , of the assignor operated as a revocation of the power (*l*); and, of course, as the Courts took regard only to the nominal plaintiff, the debtor could set up any defence he had against the assignor without regard to the assignee.

There was available also the doctrine of *novation*, under which the debtor becomes bound to the assignee if he recognises the latter as his creditor But this, in effect, amounts to a tripartite agreement between the assignor, the debtor and the assignee, involving the extinguishment of the original obligation between the assignor and the debtor and the substitution of a fresh obligation between the debtor and the assignee, who might thus, in a sense, be said to step into the shoes of the assignor

Law, in the widest sense of the term, may be said to be that part of the law of England which, before the Judicature Acts, was administered by the three Courts referred to, as opposed to Equity, the part administered by the Court of Chancery (see note (*n*), *post*, p. 4)

(*i*) " The medieval Common Law had the greatest dislike to the assignment of rights which could only be enforced by legal proceedings, the Courts taking the view that such a transaction was, in effect, transferring a law-suit, and thus encouraging maintenance, barratry, and other evils " (Jenks' Short History of English Law) On the other hand—" The origin of the rule was attributed by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation but it is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the creditor and the debtor " (Pollock on Contracts) The foregoing do not exhaust the reasons assigned for the rule (see Warren, Bk I, Chap. I)

(*j*) The transaction, however, was not a nullity, as payment to the assignee would discharge the debtor

(*k*) See Warren, Bk. II, Chap. I

(*l*) This state of affairs was remedied to some extent by the Conveyancing Acts, 1881 and 1882, the provisions of which, in relation to powers of attorney, are now embodied in ss. 126—128 of the Law of Property Act, 1925.

and to take over his rights. The process, therefore, is not strictly assignment. The new creditor is not really assignee of the original creditor's right, but acquires a completely fresh right, although against the same debtor and co-extensive with that possessed by the original creditor (*m*).

**Assignability of Choses in Action in Equity** (*n*).—Whatever the reasons which moved the founders of the Common Law to refuse to countenance the assignment of choses in action, they did not find favour with the builders of the later jurisdiction in Equity. Not only did the Court of Chancery recognise and enforce the assignment of equitable choses in action (*o*), those, that is to say, which were of its own creation, but it went to the assistance of the helpless assignee of a legal chose in action. It recognised the assignment as valid in Equity, *i e*, as an *equitable assignment*, and enforced it by giving the assignee

(*m*) For the rules governing Novation, see Chitty on Contracts (9th ed ), p 285

(*n*) '*The most important sense of the word Equity is that in which it denotes* a part of the general law of England, as opposed to what is called the Common Law The distinction is purely historical, and arose from the fact that in former times the Common Law Courts provided no remedy in many cases where one was required Hence the custom grew up of applying for redress in such cases either to the King in Parliament or to the King in Council, who referred the matters to the Chancellor In later times petitions were presented to the Chancellor direct The Chancellor, being an ecclesiastic, and keeper of the King's conscience, did not feel bound to follow the rules of the Common Law but gave such relief as he thought the petitioner or plaintiff entitled to in equity and good conscience For a long time equity ' was an indefinite standard of right and wrong, and was regarded as having the function of mitigating the rigour and supplying the defects of the Common Law without any limitation except the personal opinions of each Chancellor, but in more modern times equity became as fixed in its principles, and as incapable of introducing new remedies without the authority of Parliament, as the Common Law itself At the time of the passing of the Judicature Acts, equity was to be regarded as part of the law of England, distinguished from the Common Law only by reason of its being, or having originally been, administered in different Courts, the principal of which was the Court of Chancery, and by a different procedure In many cases the Chancery and Common Law Courts had concurrent jurisdiction, while in other cases the same right gave rise to different remedies in law and in equity, and in others the rules of law and equity were in direct conflict . Various statutes were from time to time passed, giving the Common Law Courts jurisdiction to recognise and enforce equitable rights, and finally, by the Judicature Acts, the superior Courts of Equity and Common Law were amalgamated, the rules of law and equity on certain points were assimilated, and on all other points where there is a difference or conflict between Equity and Common Law, the rules of Equity are to prevail Every Division and Judge of the Supreme Court of Judicature is now bound to recognise and give effect to all equitable rights and liabilities appearing incidentally and in the course of any action or matter " (Byrne's Law Dictionary) .

(*o*) See *ante*, p 2, note (*e*)

the right to call upon the assignor to lend his name as nominal plaintiff in an action against the debtor in the Common Law Courts (offering him at the same time an indemnity against the costs of the action), and, if he refused, to join him with the debtor in proceedings in the Court of Chancery itself. And since the merging of the different Courts into Divisions of the same Court effected by the Judicature Acts (*p*), and the adjustments in remedies and procedure consequent thereon, the rule with regard to the equitable assignment of legal choses in action stands simply that the assignee can, with the consent of the assignor (for which the assignor is entitled to an indemnity against costs), sue the debtor in the appropriate Court by joining the assignor as co-plaintiff with himself, or, if such consent is withheld, as co-defendant with the debtor (*q*).

It is necessary to bear in mind four points in connection with the foregoing :—(i) No rules have been imposed as to the mode of effecting a valid equitable assignment. It may be formal or informal, in writing or oral, or by some evidentiary act, such as the handing over of a document witnessing the obligation assigned (*r*) (ii) If there is no *consideration* for the assignment—in other words, if the transaction is a gift—the assignee may find raised against him a question which cannot as yet be said to have been set at rest by the Courts, *viz.*, whether consideration is requisite for the validity of an equitable assignment (*s*) (iii) Although the assignment is complete, at

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(*p*) See *ante*, p 2, note (*h*)

(*q*) See Warren, Bk VII Chap I, and Chitty on Contracts (9th ed ), p 277

(*r*) "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear" *per* Lord Macnaghten in *Tailby* v *Official Receiver* (1888), 13 App Cas 523, 58 L J Q B 75, 60 L T 162, and see *Brandts* v *Dunlop*, [1905] A C 454 74 L J K B 893, 93 L T 495

(*s*) See White & Tudor's Leading Cases in Equity (9th ed ), pp 105, 106, and compare Chitty on Contracts (9th ed ), p 282 In *Holt* v *Heatherfield Trust*, [1942] 2 K. B. 1; 111 L J K B 465, 166 L T 251, 58 T L R 275, a legal chose in action had been assigned without consideration and it was submitted that as the assignment was equitable it was invalid Against this, it was contended, first, that an equitable assignment did not require consideration, and, secondly, that the assignment was a legal assignment in accordance with s 136 of the Law of Property Act, 1925 (*post*, p 6) Atkinson, J , described the first contention as raising a "difficult question", but held that he need not determine it as he was satisfied that the assignment fell within the statutory provision mentioned A discussion of the topic would be beyond the scope of this work, but it may be pointed out, as regards the equitable assignment of negotiable instruments, that it seems to have been the view of the framers of the codifying Bills of Exchange any rate as between assignor and assignee, without *notice* to the debtor, the absence of such notice may result in the assignee being deprived of the fruits of the transaction by events occurring subsequently. If the assignor should make a second assignment, and the second assignee is such for value and without notice of the first assignment, the second assignee will, if he is the first to give notice of his own assignment to the debtor, gain priority over the first assignee (*t*) (iv) Finally the assignment is *subject to equities*, that is to say, "The assignee can acquire no greater rights under the assignment than those enforceable by the assignor, and he therefore takes subject to all defences existing in respect of the right assigned which would be available against the assignor seeking to enforce the right assigned, provided that the matters on which such defences are based occurred before notice of the assignment was given to the person liable" (*x*), and, it may be added provided also that the debtor has not by the terms of his contract with the assignor precluded himself from setting up such equities against an assignee (*y*)

**Assignability of Choses in Action by Statute.**—In the latter half of the nineteenth century we get further advances, this time by the Legislature, in facilitating the assignment of legal choses in action For example policies of life and marine insurance and shares in public companies are made assignable at law, so that the assignee can sue in his own name and without joinder of the obligor More general was the provision of the Judicature Act, 1873, s 25 (6) (now the Law of Property Act, 1925 s 136) making assignable in law all debts and other *legal* choses in action, provided that (i) the assignment is not by way of charge merely, (ii) it is in writing under the hand of the assignor, and (iii) express notice in writing of it is given to

Act, 1882, that the then law in respect of equitable assignments of negotiable instruments was that consideration was essential to such assignments as s 31 (4) which provides for the case of the equitable assignee of a bill, gives him his rights only if he has given value for it (see *post* p 126)

(*t*) The rule in *Dearle* v *Hall* (1823), 3 Russ 1

(*x*) White & Tudor (9th ed ), p 136, including those which have arisen since the date of the assignment but before the notice *Stocks* v *Dobson* (1853), 4 De G M & G 11 22 L J Ch 884

(*y*) This limitation of the general rule is dealt with more fully, *post* Chap VI the debtor. Subject to these conditions, the assignee may ignore the assignor and sue the debtor in his own name; but the rule is preserved that the assignee takes subject to equities, or, in other words, the assignor cannot give a better title than he has got.

It will be seen, therefore, that in the assignment of a legal chose in action the position in ordinary cases now is that either of two courses may be adopted—

(i) The assignee may be content with an *equitable* assignment, in which case the comparatively simple conditions set out *ante*, p. 5, will apply, but which will render it necessary for him to join the assignor in proceedings against the debtor.

(ii) Or he may prefer a *legal* assignment, in which case the more stringent conditions laid down *supra* will apply, although he will, on the other hand, have the advantage of being able to sue the debtor in his own name and without joining the assignor either as plaintiff or defendant In either case, it will have been observed, the assignee takes "subject to equities".

We are now able to approach the special position occupied by negotiable instruments in respect of transferability *inter vivos* and its effects

**Assignability of Choses in Action under the Law Merchant** (*z*).—One class of chose in action, in relation to the above qualities, stood apart from the course of development pursued by choses in action generally. This class consisted of the mercantile obligations contained in the documents which came to be known as negotiable instruments. The special usages regarding them, recognised by merchants between themselves, came also to be recognised by the Courts, although they differed from the legal rules otherwise applicable to the obligations of which they formed

(*z*) "The *lex mercatoria*, or law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the Common Law, afterwards becoming incorporated into it Though part of the general law of England, it is distinguished by a separate name, because it applies to particular subjects principles more or less different from those which the Common Law recognises in other matters, and also because those principles were ingrafted into our own municipal system by gradual adoption from the *lex mercatoria* or general body of European usages, in matters relating to commerce" (Encyclopædia of the Laws of England, *sub* "Lex Mercatoria"). For an account of the Law Merchant in relation to bills of exchange in this country, see *post*, Chap VII part (*a*). By these usages, known as the Law Merchant, the obligation contained in such a document was removed from the Common Law rule, which rendered futile any attempt to assign completely a chose in action without the consent of the debtor, and it was treated as fully assignable by the simple process of delivery (or indorsement and delivery); and as it was unaffected by the Common Law rule, so the subsequent modifications of that rule in Equity and by Statute were superfluous in regard to it. Although it was a *chose in action*, it never needed the assistance of Equity to make it assignable at all, although it was a *legal* chose in action, it did not need sub-section 6 of section 25 of the Judicature Act, 1873 (now section 136 of the Law of Property Act, 1925), to make it assignable so as to enable the assignee to sue in his own name. And not only was it fully assignable at Common Law, but the Common Law never annexed to its assignability any such conditions as were annexed by Equity or Statute to their respective methods of assignment. Thus, no consideration was necessary, as was possibly the case in the former (*b*); it was not essential for it to be not by way of charge merely, and in writing, as in the latter (*c*); and notice was not material, as in each (*d*). Above all, under favourable circumstances (*e*), the assignee would take free from equities, *i.e.*, without subjection to defences with which the debtor might have met the assignor; in other words, the assignor might be able to confer a better title to the instrument and to the obligation contained in it than he himself had

(*a*) But the recognition was, itself, in accordance with normal judicial practice. " The law merchant is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interest of trade and the public convenience In thus acting, the Courts of law have proceeded on the well known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of some custom or usage prevailing generally in that particular department By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated with the Common law " see *Goodwin* v *Robarts* (1875), L R 10 Exch 337, *per* Cockburn, C.J , at p 346

(*b*) *Ante*, p. 6

(*c*) *Ibid.*

(*d*) *Ibid*

(*e*) What these are will appear, *post*, Chap IV.

got. It is this last which may be said to be the decisive attribute of negotiability as distinct from mere assignability (*f*), *i.e.*, which serves to distinguish negotiable instruments from assignable obligations generally (*g*). Bearing in mind, therefore, that the two qualities for which we must search are transferability *inter vivos* by delivery and transferability free from equities, we now reach the more precise definition of a negotiable instrument.

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(*f*) "There is, of course, a great difference between negotiability and assignability, the former being a transfer in the widest sense and often giving the transferee a better title than that of his transferor. So that a transferee of a negotiable instrument for which he has given value, and which he has taken in good faith and without notice of any defect or fraud—in other words, one who is a *holder in due course*—acquires a right of action independently of privity of contract with the obligor, is not prejudiced by any defects in the title of the intermediate or of any previous transferor, and cannot be met with any of those 'equities' to which a claim under a mere ordinary assignment of a chose in action may be subject by way of defence" (Warren, Bk II, Chap I, note)

(*g*) It is, perhaps, scarcely necessary to point out that the fact that the rights under a negotiable instrument are invested with their own special mode of assignment does not deprive them of the modes of assignment attaching to choses in action generally, *e g*, the device available at Common Law of a power of attorney giving the assignee power to sue in the name of the assignor (*ante*, p 3), however archaic, is still available, as well as assignment under the Law of Property Act, 1925 (*ante*, p 6), while equitable assignment (*ante*, p 4) will arise, for instance upon declaration of trust, or where the instrument requires indorsement to effect a complete delivery and is handed over without it (see in relation to bills, *post*, p 125) In each case the appropriate conditions and limitations will, of course, apply

## CHAPTER II.

### DEFINITION OF NEGOTIABLE INSTRUMENT.

**Some Unsatisfactory Definitions** (*a*) —1. "Negotiable instruments, those the right of action upon which is, by exception from the Common Law rule, freely assignable from one to another (Wharton's Law Lexicon)

Nowadays, substantially all choses in action in writing can be described in the terms of this definition, as an instrument may be said to be "freely assignable" although some formalities are necessary to the assignment. And it omits all reference to the quality of the instrument which enables it to be assigned free from equities

2. "An instrument is, properly speaking, negotiable when the legal right to the property secured by it is transferred from one man to another by its delivery" (Smith's Mercantile Law).

This also omits the all-important point of transferability free from equities. On the other point, although it is more precise than the previous definition, it is still too wide. There are documents other than negotiable instruments the delivery of which will pass the legal right to the property secured by them, *e.g.*, bills of lading.

3. "On the important question of what is meant by a negotiable instrument, it may be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, it is also capable of being sued upon by the person holding it *pro tempore*, and it is then entitled to the name of a negotiable instrument" (*c*) (Halsbury's Laws of England).

Here, again, the definition is silent on the element of transferability free from equities. As in the previous cases, it appears to assume that, if an instrument is transferable by delivery, it follows of necessity that it is also transferable free

(*a*) The, possibly somewhat carping, criticisms which follow the definitions are not intended to suggest that the respective authors were unaware of the true qualities of a negotiable instrument the context in each case shows the contrary. They are offered merely as a device for stressing such qualities upon the attention of the reader.

(*c*) From the notes to *Miller* v *Race*, in Smith's Leading Cases, and approve in *Crouch* v *Crédit Foncier* (1873), I R 8 Q B. 373, at p 381 from equities. But this is not so. For example, a cheque deprived of its quality of transferability free from equities by being crossed "not negotiable" (*d*) remains transferable by delivery, but the assignee will occupy no better position than the assignor (*e*).

4. "A negotiable instrument is one the property in which is acquired by any one who takes it *bona fide* and for value, notwithstanding any defect of title in the person from whom he took it; from which it follows that an instrument cannot be negotiable unless it is such, and in such a state, that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument" (Willis' Lectures on Negotiable Securities).

This definition is, in a sense, the converse of the previous ones, as it assumes that, if the assignee takes free from equities, the instrument must necessarily have been assignable by delivery (*f*). But this is open to dispute, as an instrument is at least conceivable which might not be assignable by delivery, and which, nevertheless, would give the assignee a title free from equities. Apart from this, objection may be taken to the words "and in such a state", as, if they were correct, they would mean that a bill payable to the holder, and therefore requiring indorsement by him to enable him to negotiate it, is not a negotiable instrument so long as he chooses not to negotiate it and therefore holds it unindorsed—a proposition manifestly untenable.

5 Negotiable instruments are "a class of promises in writing, the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise" (Anson's Law of Contract).

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(*d*) See *post*, p 242

(*e*) *Ibid* It is the assumption in question that is involved in the expression "negotiable by delivery". But "That expression tends to mislead, it only means transferable by delivery, but as I have told you, 'transferable by delivery' is only one of the conditions of negotiability" (Willis, Lecture I). The distinction between negotiability and transferability by delivery may be further studied by a comparison of *Taylor* v *Trueman* (1830), M. & M 453, and *Taylor* v. *Kymer* (1832), 3 B. & Ad 320; 1 L J K B 114.

(*f*) And, further on, Willis expressly states his belief that the first part of his definition could be shown to involve the second part.

This seems to assume that immateriality of notice to the debtor is equivalent to assignability by delivery; but an instrument might be assignable in the way mentioned in the definition, and at the same time not be assignable by mere delivery, *e.g.*, a policy of marine insurance is assignable by indorsement or in other customary manner, but the requirement of notice to the underwriter is not imposed.

6. "An instrument is negotiable when it is such that the title to the debt or other right secured by it passes, unaffected by any defect or want of title of the deliverer, by the mere delivery of the instrument, to any one who takes it for value in good faith; that is to say, honestly believing the deliverer to be the true owner of the instrument or else to be authorised by the true owner to dispose of it" (Encyclopædia of the Laws of England).

The objections here are that "mere delivery" is not always sufficient—indorsement may also be necessary (*g*)—and in addition to "for value in good faith" the taker of the instrument must have taken it when complete and regular on the face of it (*h*).

**A Satisfactory Definition.**—"A negotiable instrument is one which is, by a legally recognised custom of trade or by law, transferable by delivery or by indorsement and delivery in such circumstances that (a) the holder of it for the time being may sue on it in his own name, and (*b*) the property in it passes free from equities to a *bona fide* transferee for value notwithstanding any defect in the title of the transferor" (Thomas's Principles of Banking).

This brings out clearly the qualities of a negotiable instrument. The only objection which can be taken is that the words "by a legally recognised custom of trade or by law" are superfluous. They are history rather than definition, inasmuch as they state how the instrument came by its qualities rather than the qualities themselves.

**Suggested Definition.**—It is submitted that the two characteristics of a negotiable instrument, *viz.*, transferability by

(*g*) See *post*, Chap IV.
(*h*) *Ibid.*

delivery and transferability free from equities, are independent, and the possession of one does not follow necessarily from the possession of the other. Further, that the qualities of such an instrument are potential, and the instrument is none the less to be described as negotiable because at the particular moment the conditions do not happen to be present which will enable the holder to transfer it by delivery or the transferee to acquire it free from equities. The following definition is accordingly suggested:—

"A negotiable instrument is a document evidencing an obligation, of such a nature that the mere delivery of it *may* operate as a complete legal transfer of both document and obligation, and the possession of which, upon such transfer, *may* enable the transferee to hold the document and enforce the obligation evidenced by it against the parties liable upon it, notwithstanding any defect in the title of the transferor"(*i*).

The word "may" in the foregoing definition is used because the characteristics mentioned only apply if certain conditions are fulfilled. What these conditions are we have still to inquire.

**Nature of Inquiry.**—It will be seen that such inquiry must range itself under three heads:—

(1) What are the instruments which are recognised by the law as negotiable?

(2) What are the conditions which will enable the mere delivery of such an instrument to operate as a complete legal transfer of both the instrument and the obligation which it embodies, and further enable the transferee to retain the instrument and enforce the obligation embodied in it, free from any defect in the title of the transferor?

(3) What is meant by a defect in the title of the transferor, otherwise an equity? and what is meant by "parties liable"?

The first of these questions will be dealt with in Chapter III, the second in Chapter IV, and the third in Chapter V.

(*i*) Or, more concisely, a negotiable instrument is an obligation in writing of such a nature that, under the requisite conditions, the mere delivery of the instrument will operate as a complete legal transfer thereof and entitle the transferee to enforce the obligation against the parties liable on the instrument free from equities.

# CHAPTER III.

## WHAT INSTRUMENTS ARE NEGOTIABLE.

NEGOTIABLE instruments are said to be (A) negotiable by statute, or (B) negotiable by usage.

### (A) Negotiability by Statute.

Although the above time-honoured classification has been adopted here, it is difficult to point to any instrument to which negotiability has been annexed in the first instance by statute, and the only thing which can be stated with certainty is that certain instruments have received statutory, in addition to judicial, recognition as possessing the quality of negotiability.

For example, bills and cheques were clearly negotiable by usage before their negotiability was recognised by statute. Promissory notes are said to have been made negotiable by the Promissory Notes Act, 1704, but the Act appears to have been passed only for the removal of doubts raised by a decision which was not generally accepted as correct at the time it was given (*a*). Bills, cheques, and notes are now all dealt with by the Bills of Exchange Act, 1882, and form the subject of Part II of this work.

Again, the bonds of "John Company" are said to have been made negotiable by the East India Company Bonds Act, 1811, and they were certainly not negotiable before (*Glyn* v. *Baker* (1811), 13 East 509). It is, however, questionable whether the statute, in terms, did more than make them transferable by delivery, and whether the incident of negotiability was not tacitly annexed by the Courts acting upon what, no doubt, was the intention of the Legislature (*b*).

And dividend warrants are negotiable instruments by usage although they have received statutory recognition as such. For example, those issued under the provisions of the National Debt (Conversion) Act, 1888, were, by section 30 (5) thereof, directed

(*a*) See remarks of Byles and of Chalmers on this statute.

(*b*) See remarks of Willis, Lecture II. For form of present bond of Government of India, see *post*, p. 24.

to be deemed cheques, and the negotiability of dividend warrants generally was recognised by section 95 of the Bills of Exchange Act, 1882, which applied to them the provisions of the Act relating to crossed cheques (*c*).

Similarly with regard to bankers' drafts which, already recognised as negotiable by usage, received statutory recognition by the Bills of Exchange Act (1882) Amendment Act, 1932, making applicable to them the above mentioned provisions relating to crossed cheques of the Act of 1882 (*c*).

Passing reference may be made to currency notes for £1 and 10s. issued by the Treasury under the Currency and Bank Notes Act, 1914, which were recognised as negotiable by being made by the Act legal tender for any amount throughout the United Kingdom. The Treasury no longer issues them, but the Bank of England, under statutory authority, now issues bank notes of the same denominations (*d*).

## (B) Negotiability by Usage.

When it is said that an instrument is negotiable by usage, what is meant is that the Courts have either recognised the instrument as negotiable or will do so if the question of its negotiability should be brought into issue before them. What, then, are the requirements of the Courts which must be satisfied before they will recognise an instrument as possessing the quality of negotiability? These requirements may be stated thus: (i) The terms of the instrument must not be incompatible with or such as to negative the idea of negotiability in association with it; (ii) the obligation evidenced by the instrument must be of a nature consonant with the commercial function of a negotiable instrument; (iii) the instrument must belong to a class which is then being treated by the mercantile community as negotiable.

**(1) Compatibility of Terms.**—The instrument may itself be so worded as to negative its negotiability either by an express statement as to its non-negotiability (*e.g.*, postal orders, which bear the legend " non-negotiable " across their face), or by other

(*c*) See *post*, Chap. XXIV.
(*d*) Previously, the lowest denomination of note issued by the Bank was £5.

words expressly or impliedly prohibiting transfer or indicating an intention that it should not be transferable at all or should not be transferable by mere delivery or should only be transferable subject to equities. Hence Post Office Orders (Money Orders) have been held not to be negotiable (*Fine Art Society* v. *Union Bank* (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536) (*e*). So, where payment is confined to a particular person named in the instrument, or where it appears that the right to enforce the obligation evidenced by the instrument can only pass by transfer in the books of a company (*London and County Bank* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232) (*f*), the instrument is not negotiable

**(ii) Compatibility of Function.**—It may be assumed that the Courts will not recognise as negotiable an instrument the obligation under which is other than monetary. This proposition has been stated thus (*g*):—

"A negotiable instrument must be a contract to pay money or deliver another negotiable security representing money (*Goodwin* v. *Roberts* (1876), 1 App. Cas. 476; 45 L. J. Ex. 748; 35 L. T. 179); therefore a promise in writing to deliver 1,000 tons of iron to the bearer is not negotiable, and gives no right of action to the possessor (*Dixon* v. *Bovill* (1856), 3 Macq. H. L. 1)."

Demur may be made to the insertion of the word "negotiable" in the expression "another negotiable security". A share certificate is not a negotiable instrument (*Colonial Bank* v. *Cady* (1890), 15 A. C. 267; 60 L. J. Ch 131; 63 L. T. 27) (*h*), although a share warrant is (*Webb, Hale & Co.* v. *Alexandria Water Co.* (1905), 93 L. T. 339; 21 T. L. R. 572) (*i*). But a scrip certifi-

(*e*) It was held that Post Office Orders require receipting by the payee except when presented for payment through a bank, and that the exception did not make them transferable by mere delivery, the Post Office regulations being such as to prevent them acquiring the character of negotiable instruments.

(*f*) Reversed on appeal on other points (1888), 21 Q. B D. 535; 57 L. J. Q. B. 601; 64 L. T. 37.

(*g*) Pollock on Contracts.

(*h*) But it may be issued in such a form as to estop the company from disputing the title of the holder for the time being (*ibid.*). See Negotiability by Estoppel, *post*, Chap. VI

(*i*) In *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch., at p. 296, Bowen, L.J., expresses a doubt as to whether either share certificates or share warrants can be entitled to the description of negotiable instrument But the cate, *i.e.*, a document giving the bearer or holder for the time being a right to shares after the instalments upon such shares are duly paid, may be negotiable whether it entitle the owner to a share certificate or to a share warrant (*Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240). The rule may, therefore, perhaps be stated thus:—

The obligation upon a negotiable instrument must be either the payment of money or the delivery of a security for money.

**(iii) Mercantile Recognition** (*k*).—As to this the following points may be noted:—

(α) Usage is a question of fact to be proved by the evidence of persons who are able to swear to the existence of the fact. But usage, whether in relation to the question of the treatment of an instrument as negotiable or in relation to any other question, differs from other questions of fact generally in that, not only is the onus of proof upon the one asserting the existence of the usage, but it must be established by evidence of a really compelling character. If the evidence for and against the existence of the usage is nearly balanced, the tribunal should prefer the negative, *i.e.*, refuse to find in favour of the usage (*l*).

(β) The evidence of usage must be that of an actual practice to treat the instrument as negotiable, and must not consist of expressions of belief that such usage exists. But the fact that

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learned Lord Justice was here classing together two documents essentially different from the point of view of the matter we are now discussing. Both share certificates and share warrants evidence the ownership of shares in a company, which shares entitle the owner to partake of the profits of the company during its life and to share in the distribution of surplus assets in winding-up But the share certificate certifies such rights only in the person named therein, and a transferee can obtain them only by getting himself substituted in the books of the company for the transferor, for which purpose he yields up to the company the old certificate and gets a fresh one in his own name. It cannot therefore be negotiable (see *London and County Bank* v *London and River Plate Bank*, *ante*, p 16) A share warrant, however, gives the above rights to the bearer or holder for the time being, and the company plays no part in any transfer. Hence it may be negotiable

(*k*) For the ensuing suggestions we are largely indebted to Aske's Custom and Usages of Trade, Part III, Chap IV, and Appendix A of which should be consulted for fuller information and authorities.

(*l*) The question put to a witness as to the usage is in a general form, *e.g.*, "Are the documents in question dealt with as negotiable instruments?" See *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; 61 L J Ch. 723; 66 L. T. 625, judgment of Herschell, L.J.

the usage can be shown to be of recent origin will not prevent the Court from giving effect to it (*Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; 67 L. J. Q. B. 987; 79 L. T. 270; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204).

(γ) The usage need not be as to the particular instrument in question, but may be directed to the class to which it belongs, *e.g.*, if it is sought to prove that instruments emanating from a certain company are negotiable, it need not be shown that the instruments of that particular company are being so treated, but it is sufficient to prove that similar instruments of other companies are being so treated (*Venables* v. *Baring Bros.*, [1892] 3 Ch. 527; 61 L. J. Ch. 609; 67 L. T. 110).

(δ) There is no distinction between an English and a foreign (*m*) instrument in respect of the ability to prove negotiability by usage. In *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; 45 L. J. Ex. 748, 35 L. T. 179, a foreign Government issued a loan, subscribers to which paid by instalments. The bonds were to be issued after the instalments were paid; but pending such issue the subscriber was given scrip, the bearer of which was entitled to the bond when the instalments were paid. Upon proof of usage of negotiability in the stock markets of Europe, it was held that a bank which had taken such scrip for value and in good faith was entitled to the same, although acquired through a person who had obtained them fraudulently. This decision did not square with the earlier one of *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374, but was approved and followed in *Bechuanaland Exploration Co.* v. *London Trading Bank*, and *Edelstein* v. *Schuler*, *supra*.

(ε) But when it is sought to prove the negotiability by usage of a foreign instrument, the usage shown must be that of the English market (see the evidence in *Gorgier* v. *Mieville* (1824), 3 B. & C. 45; 2 L. J. (o.s.) K. B. 206; 4 D. & R. 641) (*n*). The fact that an instrument is negotiable abroad will not make it

(*m*) "Foreign" includes "colonial".

(*n*) The actual decision in this case was to the effect that the bonds of a foreign Government are negotiable if they are recognised as such by the usage of merchants in this country, *provided that it be not necessary to do any act out of this country to render their transfer valid*.

negotiable here, and it must be shown to be negotiable by the usage of merchants in this country (*Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515; 56 L. J. Q B. 299). It is submitted that the foreign status is immaterial.

(3) The usage to be established in the case of any particular instrument may have become judicially noticed so as to render proof unnecessary, *e.g.*, it was held in the case of "bearer bonds" in *Edelstein* v. *Schuler*, *ante*, p. 18, that the usage had been proved so often that no further proof was now needed. But "the point at which custom ceases to require to be evidenced is not determined by any fixed rule. Its proof in a single case by no means necessarily entitles it to judicial notice afterwards. . . . Cases in which a custom has been established will naturally afford strong evidence in its support in future cases, and the oftener it is proved the less evidence will usually be adduced to prove it again. It is not enough that the custom has been admitted or stated in terms for the purpose of argument in former cases; it must have been found by a jury, or a Judge acting as a jury, as a fact on evidence" (*o*) But when once the usage has been fully recognised judicially within the meaning of this rule, such recognition is conclusive (*Edie* v. *East India Company* (1761), 2 Burrows 1216) (*p*)

**Examples of Instruments Negotiable by Usage.**—Examples of instruments whose negotiability has been recognised by the Courts so as to render superfluous further evidence in support of it are Bank Notes (*Miller* v. *Race* (1758), 1 Burr. 452); Exchequer Bills (*Wookey* v *Pole* (1820), B. & Ald. 1); Bankers' Drafts and Dividend Warrants (*q*); Share Warrants (*r*) (*Webb, Hale & Co.* v. *Alexandria Water Co.* (1905), 93 L T. 339, 21 T. L. R. 572); Scrip (*r*) (*Rumball* v. *Metropolitan Bank*, *ante*, p. 17; Circular Notes (*Conflans Quarry Co.* v. *Parker* (1867), L. R. 3 C. P. 1; 37 L. J. C. P 51; 17 L. T. 283); Bearer

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(*o*) Aske.

(*p*) No doubt an instrument which has become negotiable by usage may by usage cease to be recognised as negotiable, but the writer is unable to offer any instance of this happening

(*q*) Dealt with further, *post*. Chap XXIV

(*r*) For distinction between share *warrants* and share *certificates*, and their relationship to *scrip*, see *ante*, p. 16.

Debentures (*Bechuanaland Exploration Co.* v. *London Trading Bank*, *ante*, p. 18, followed in *Edelstein* v *Schuler*, *ibid* (s)); Treasury Bills (t); and various Colonial and Foreign Bearer Bonds (u)

## EXAMPLE 1 BANK NOTE (x).

BANK OF ENGLAND

$\frac{H}{44}$ 96734

I promise to pay the Bearer on Demand the sum of Five pounds.
1911 Oct 25 London 25th Oct 1911
£Five For the Gov[r] and Comp[y] of the Bank of England

$\frac{H}{44}$ 96734

J. G. MAINE,
*Chief Cashier.*

## EXAMPLE 2 EXCHEQUER BILL

**£100**

THIS EXCHEQUER BILL entitles * or Order to claim payment of ONE HUNDRED POUNDS, at the Bank of England, out of the Consolidated Fund, at the expiration of any period of Twelve months, not later than Five years, from the date hereof

INTEREST on this Bill will be paid half yearly, at the Bank of England, at such rate per centum per annum as shall be notified from time to time, in the London Gazette, by the Commissioners of Her Majesty's Treasury

THIS BILL may be paid for the sum of ONE HUNDRED POUNDS, and Interest accrued thereon, to the Receivers and

(s) These cases may be taken to overrule *Crouch* v *Crédit Foncier* (1873), L R 8 Q B 374, which had already been doubted in *Goodwin* v *Robarts* (1875), L R 10 Ex 337, at p 354 But a debenture is not necessarily negotiable nor is it even *prima facie* so "*Prima facie* no doubt a debenture is not a negotiable instrument, and is only assignable in like manner and subject to the like conditions as an ordinary chose in action, but the question must be determined by reference to the form of the particular instrument, the usage of the money market, and the facts of the particular case" (Chalmers) In the cases cited the debentures were payable to bearer

(t) As to these, see Encyclopædia of English Law, *sub nom*, and Chalmers.

(u) For those which have been recognised up to the present, see Chalmers, and Willis (Table at end of Lecture II)

(x) Bank notes are subject to certain statutory regulations as to issue, but apart from this are in substance promissory notes payable on demand

Collectors, in the United Kingdom, of any of the Public Revenues, Aids, Taxes or Supplies, or to the account of Her Majesty's Exchequer at the Bank of Engand, at any time in the last six months of every year, commencing from the day of the date hereof in which it shall have currency by Law.

R. E. WELBY,
*Secretary to Her Majesty's Treasury.*

* If this blank is not filled up, this Bill will be paid to Bearer.

N.B. This Bill will be paid off or exchanged on 11th March, 1897. Notice of payent or exchange and of the date when the Bill MUST be delivered for that purpose, will be published in the London Gazette not later than Twenty One days before the said 11th March.

Specimen of the ten Coupons attached to above :—

EXCHEQUER BILL INTEREST CERTIFICATE.

£100

Per Acts 29 Vic. Cap. 25 & 52 Vic Cap. 6.

This Coupon entitles the Bearer to Interest on the above sum for the half year to 11th March 1897.

R. E. WELBY,
*Secretary to Her Majesty's Treasury.*

## EXAMPLE 3. SHARE WARRANT.

William Brown & Company, Limited.

Registered under the Companies Act, 1929.

Capital £10,000 divided into 10,000 shares of £1 each.

No. 49. 100 shares.

This is to certify that the bearer of this warrant is entitled to 100 fully paid shares in the above company, numbered 501 to 600 inclusive, subject to the articles of association of the company and subject also to the conditions indorsed on this warrant.

Given under the Common Seal of the Company this 4th day of December, 1929.

The Common Seal of the Company was hereunto affixed in the presence of

L.S.

WILLIAM BROWN, } *Directors.*
CHARLES THOMAS, }
FRANK ROBERTS, *Secretary.*

## EXAMPLE 4. SCRIP.

THE COMPANY, LIMITED.

The Bearer of this Certificate has paid £3 on application and allotment.

The remaining payments, to complete the price of £96½%, are to be made at our Counting House as follows:—

£6 on 25th July 1929.
£10 6s. 0d. on 12th November 1929.

The Bearer has the option of paying in full on the 25th July 1929 under discount at the rate of 2% per annum.

The failure to pay up the remaining Instalments when due will render all previous payments liable to forfeiture.

This Scrip will be exchanged in due course at our Counting House for a £20 Bond with the half-yearly Coupons attached, the first Coupon due 14th May 1930.

(*Signature, Company or their brokers.*)

145, Leadenhall Street, E.C.
20th June, 1929,

## EXAMPLE 5 CIRCULAR NOTE.

LLOYDS BANK, LIMITED.

Circular Note for £10 Sterling. No.

To the Bankers named in our Letters of Indication. London 19

GENTLEMEN,

This Note will be handed to you by M. whose Signature you will find on our Letter of Indication of which is the holder. Be so good as to pay the equivalent of Ten Pounds Sterling according to the exchange of the day upon London against draft upon our Bank.

We have the honour to be, Gentlemen,
Your obedient Servants,
FOR LLOYDS BANK LIMITED.

Countersigned Signed

*Principal*
*Foreign Department.*

## EXAMPLE 6. BEARER DEBENTURE (y).

THE COMPANY, LIMITED.

Issue of £ in debentures of £ each.

1. The Company, Limited (hereinafter called the Company), hereby covenants to pay the bearer hereof the sum of £ on the day of , 19 or on such earlier day as the principal moneys hereby secured shall become payable in accordance with the conditions endorsed hereon.

2. The Company will in the meantime and until repayment of the said sum of £ pay interest at the rate of £ per cent. per annum on the said sum of £ by equal half-yearly payments on the day of and the day of in each year in accordance with the coupons annexed hereto.

3. The Company hereby charges by way of floating security with the payments aforesaid all its undertaking and assets whatsoever, etc.

4. This debenture is issued subject to and with the benefit of the conditions endorsed hereon.

Given under the common seal of the Company this day of , 19

## EXAMPLE 7. TREASURY BILL.

Due 8th March, 1912.

TREASURY BILL.

Per Acts 40 Vic. c. 2. and 52 Vic. c. 6.

000366 A

£1000 000366

London, 8th December, 1911.

THIS TREASURY BILL entitles* or Order to Payment of ONE THOUSAND POUNDS at the BANK OF ENGLAND out of the Consolidated Fund of the United Kingdom on the 8th day of March, 1912.

ROBERT CHALMERS,

*Secretary to His Majesty's Treasury.*

* If this Blank be not filled in, the Bill will be paid to Bearer.

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(y) Adapted from Stiebel's Company Law and Precedents. It will be observed that the instrument is in substance a promissory note with a pledge of collateral security, as authorised by s. 83 (3) of the Bills of Exchange Act, 1882 (see *post*, p. 267.

## EXAMPLE 8 BOND OF INDIAN GOVERNMENT.

No. G 39 £100 ONE HUNDRED

THE SECRETARY OF STATE FOR INDIA IN COUNCIL does Acknowledge to have received of James Dunsmure the sum of ONE HUNDRED POUNDS which the said Secretary of State in Council promises to repay to the said James Dunsmure or his Assigns with Interest for the same from the Thirtieth day of September instant after the rate of Four Pounds for One Hundred Pounds for a year at the EAST INDIA HOUSE in LONDON on TWELVE MONTHS NOTICE to be given by the said Secretary of State in Council in the London Gazette or on TWELVE MONTHS Notice to be given by the said James Dunsmure or his Assigns to the said Secretary of State in Council in writing at the EAST INDIA HOUSE aforesaid For the true payment whereof in manner aforesaid the said Secretary of State in Council does hereby bind and charge the Revenues of India in the Penal Sum of TWO HUNDRED POUNDS

In Witness whereof three Members of the said Council have hereunto set their hands this twenty second day of September, 1858

No G 39

(*Signature*) (*Signature*)

(*Signature*)

Countersigned, (*Signature*)

(*Signature*)

*Note*.—On the back hereof, Dates and amount of interest

## EXAMPLE 9 BUENOS AIRES LOAN BOND

The Government of the Province of Buenos Aires will on the 1st day of October, 1945, or on such earlier day as the principal moneys hereby secured shall become payable according to the conditions of the General Bond above referred to pay to the bearer of this Bond at the office of Emile Erlanger & Co in London or at the Credit Mobilier Française in Paris or at the Nationalbank fur Deutschland in Berlin the sum of TWENTY POUNDS STERLING and will in the meantime pay interest thereon at the rate of Five per cent per annum by equal half yearly payments to be made on the 1st day of April and the 1st day of October in each year on presentation of the Coupon corresponding to such payment.

This Bond is one of a series of Bonds of like tenor and effect in denominations of £20 and £100 each for sums amounting in the aggregate to £1,500,000 issued or to be issued by the said Government and all the Bonds of this series shall rank pari passu without preference or priority one over another whether by reason of date of issue or otherwise, and the holder of this Bond and the holders of the other Bonds of the same series are entitled alike to the benefit of the General Bond of which a copy is printed on the back hereof

## CHAPTER IV.

### CONDITIONS OF TRANSFER FREE FROM EQUITIES (a).

THE conditions which will enable the transferor of a negotiable instrument to transfer it by simple delivery so as to enable the transferee to hold it and sue upon it in his own name, free from matters which may affect the title of the transferor, are as follows: (a) the instrument must be in, or be put into, a deliverable state; (b) it must be apparently complete and regular; (c) the transfer must be for value; (d) the transfer must be *bona fide* on the part of the transferee.

(a) **Deliverable State.**—For example, if the instrument is not payable to bearer but to the transferor or to the order of the transferor it must be indorsed, *i.e.*, signed by the transferor. In *Cunliffe* v. *Whitehead* (1837), 3 Bing N. C. 828; 6 L. J. C. P. 255; 5 Scott 31; 6 D. P. C. 63; 3 Hodges 182, a statement of claim was held to disclose no cause of action because it alleged only delivery to the plaintiffs of the negotiable instrument upon which the action was brought, and not indorsement, the instrument not being payable to bearer (*b*).

The indorsement may be made after delivery, but in such case the transferee takes the instrument subject to any defects to which it may have become subject between the time of delivery and the time at which the indorsement is made. *E.g.*, in *Whistler* v. *Forster* (1863), 32 L. J. C. P. 161; 14 C. B. (N.S.) 248; 8 L. T. 317, the plaintiff had become the holder in good faith and for value of a negotiable instrument, *viz.*, a cheque. It was, however, payable to order and so required indorsement. This the plaintiff had omitted to obtain at the time. Afterwards he did obtain it, but before doing so had received notice that the

(*a*) It may be mentioned here that the implication of this heading may mislead. There are certain defects which will defeat even a *bona fide* holder for value or holder in due course. See *post*, Chap. V, under "Parties liable"

(*b*) Of course, such transfer by delivery without indorsement is not wholly void. The transferee becomes an equitable transferee of a legal chose in action whose position is described *ante*, p. 5, *i.e.*, he may sue by joining the person whose indorsement is required and his claim is subject to equities.

cheque had been originally obtained from the defendant, the drawer, by fraud. It was held that the plaintiff could not recover, as the instrument was not in a deliverable state at the time of the transfer, and had not been put into such a state before the plaintiff had received notice of the defect. "The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. . . . This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action; and it is therefore clear that, in order to acquire the benefit of this rule, the holder must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better title than his assignor" (*per* Willes, J.).

(b) **Complete and Regular.**—An instrument which is on the face of it incomplete or irregular, *i e.*, wanting in or departing from some essential feature, is not such as will enable a transferee to claim freedom from equities For example, in relation to bills of exchange, where a holder has express powers to complete an incomplete or inchoate instrument (*c*), such a holder cannot himself be a "holder in due course" (*d*). The present rule is, perhaps, only an application of the rule presently to be dealt with—that the holder, in order to claim freedom from equities, must take *bona fide* The matter was so put in a case where a bill of exchange which had been incomplete at its inception was being sued for. "As to a *bona fide* holder the question of the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he can be fastened with notice of that imperfection. If the holder has notice of the imperfection he can be in no better

(*c*) See *post*, p. 93.
(*d*) See *post*, p. 33, note (*m*), and Chap. XVII.

position than the person who took it in blank, as to any right against the acceptor or indorser who gave it in blank. But if he be a *bona fide* holder without notice, he must have taken the negotiable instrument in a perfect shape and in terms a complete contract" (*per* Stuart, V.-C., in *Hatch* v. *Searles* (1854), 2 Sm. & G. 147; 24 L. J. Ch. 22) (*e*).

(c) **For Value.**—It is unnecessary in this place to enter into a discussion of the question of what constitutes value or consideration in the eye of the law. For this reference may be made to those works which treat of the law of contract generally. But reminder may be made of two points:—

(i) That the question of adequacy is irrelevant to an inquiry into the validity of an alleged consideration, provided that it is not purely illusory. In *London and County Banking Co.* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535; 57 L. J. Q. B. 601; 61 L. T. 37, the defendants' manager stole from the defendants certain negotiable instruments and disposed of them. They were acquired by the plaintiffs *bona fide* and for value. The manager subsequently obtained them by fraud from the plaintiffs, and restored them to the defendants, who were unaware that the instruments had ever been out of their possession. It was held that the defendants were entitled to retain the instruments, as it was to be presumed that they received them in pursuance of the manager's obligation to restore them, and that they were therefore *bona fide* holders for value. Again, in *Lloyds Bank* v. *Swiss Bankverein* (1912), 28 T. L. R. 501; 17 Com. Cas. 280, the defendants entrusted H. with some securities for a specific purpose. H. used them for his own purposes. On the defendant demanding back these securities, H. gave them other negotiable securities of similar value, some of which belonged to the plaintiffs. The defendants did not know that H had no right to deal with the plaintiffs' securities. It was held that the defendants were entitled to retain these as being *bona fide* holders for value within the meaning of *London and County Banking Co.*

(*e*) In that case it was held that a person who takes a complete instrument, as to which, however, he has notice that a predecessor in title took it in an incomplete form, will not be a holder without notice of defect if it transpires that the one who completed the bill had no right to do so.

v. *London and River Plate Bank*, *supra*. The defendants also called in a loan of £15,000 from H. H. gave them a cheque which the defendants ascertained H. would not be able to meet. They thereupon gave the cheque back to H., and he gave them negotiable securities to a similar amount, which included some belonging to the plaintiffs, and with which H. was not authorised to deal. The defendants were ignorant of this want of authority. It was held that, although they were *bonâ fide* holders of these securities, they were not holders for value, as they knew that the cheque which they returned in order to obtain them was worthless. The plaintiffs, therefore, succeeded in this part of their claim.

(ii) That the question of adequacy may be a material element in coming to a decision upon the good faith of a transaction.

In relation to negotiable instruments, the above point has been stated thus: "Though, since the repeal of the usury laws, the fact of taking a bill at a considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bona fide* in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him" (headnote to *Jones* v. *Gordon* (1877), 2 A. C 616; 47 L. J. Bk. 1; 37 L. T. 477). In that case the London agent of a firm drew bills upon the firm for the amount of £1,727. The firm accepted the bills. At the time both drawer and acceptors were hopelessly insolvent and contemplating bankruptcy, and the transaction was concocted in order to defraud the creditors of the acceptors. The drawer offered the bills to the plaintiff, who before purchasing kept them for a time and made inquiries. He ascertained that the acceptors were in difficulties, but that they had some assets and might be able to pay something. He did not inquire as to the solvency of the drawer. He gave only £200 for the bills. The acceptors afterwards went bankrupt. It was held that the plaintiff had notice sufficient to put him on his guard, and that he must therefore be deemed to be affected with notice of the fraud, and that therefore he could not prove for the whole amount of the bills, but only for the £200 which he gave for them. The question of undervalue becomes, therefore, germane in connection with the condition now to be dealt with.

(d) **Bona Fide.**—Upon the question of what constitutes good faith in the taking of a negotiable instrument the following may be stated:—

(i) Good faith is a question of fact, and not of law (*f*), and relates to the state of mind of one who takes the instrument. "Good faith or bad faith is a question of fact depending on the circumstances of the individual case" (*per* Lord Mansfield, *Peacock* v. *Rhodes* (1781), 2 Doug. 633).

(ii) It means, of course, all absence of knowledge of any defect in the title of the person from whom the instrument is taken

(iii) It means, further, the absence of suspicion as to the existence of any defect. Once the taker of the instrument has a suspicion that something is wrong, he is put upon inquiry, *i.e.*, he must pursue those suspicions until they are confirmed or allayed. If they are in fact allayed, although upon evidence that might not have satisfied an acuter person, nevertheless the condition of *bona fides* is satisfied. But if he suspects that there is something wrong, and refrains from inquiries lest his suspicions should be confirmed, he is not acting in good faith. "If the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions not because he was an honest blunderer, but because he thought in his own secret mind: I suspect there is something wrong, and if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty" (*per* Lord Blackburn in *Jones* v. *Gordon*, *ante*, p 28).

(iv) The knowledge of facts from which defects might have been inferred or which should have excited suspicion, will not

(*f*) "It may be stated generally that the words 'good faith' have no technical legal signification, but are to be taken in their ordinary signification and mean simply honesty in belief, purpose, or conduct" (Encyclopædia of the Laws of England, *q.v.* "Good Faith") See also Stroud's Judicial Dictionary.

constitute bad faith, if in fact there was no such inference or suspicion. "The question is not whether the person who took the instrument *ought* to have suspected, but whether he *did* suspect, and I believe the view I am now presenting has been recognised by the decision of the House of Lords in *Simmons* v. *London Joint Stock Bank* (*g*). In considering whether a man is a *bona fide* holder you are to determine what knowledge he had, not what knowledge he might or ought to have had, or what inquiries he ought to have made. You are to determine what was the state of *his* mind, not what would have been under the circumstances the state of another person's mind, or what course another person would have pursued" (Willis, Lecture I). In other words, it is an error to suppose "that the doctrine of *constructive notice* enters into the consideration of the meaning of *bona fides* when we speak of a *bona fide* holder" (*ibid.*).

(v) Negligence, however gross, is not *mala fides*. "I fully recognise the importance of maintaining the well-established principle that negligence or carelessness on the part of the holder of a bill is not of itself sufficient to deprive him of his remedies for procuring its payment" (*per* Baggallay, L.J., *Re Gomersall* (1875), 1 Ch. D., at p. 146) (*h*). In *Raphael* v *Bank of England* (1855), 17 C. B. 161; 25 L. J. C. P. 33, some bank notes had been stolen and a circular notifying the theft, with a list of the stolen notes, sent to bankers and money changers, including Messrs. V & Co., who duly received it One of the notes was changed by V. & Co. The head of the firm, who carried out the transaction, swore that he did not call to mind the circular at the time he changed the note, and, this being believed, was found as a fact at the trial. It was held that the note was taken *bona fide* within the meaning of the rule (*i*). Again, in *Venables* v. *Baring Bros.*, [1892] 3 Ch. 527, 61 L. J. Ch. 609; 67 L. T. 110, American railway bonds, acknowledging indebtedness to

(*g*) *Post*, p 33, *sub nom* *London Joint Stock Bank* v *Simmons*.

(*h*) See also *per* Byles, J., in *Swan* v *North British Australian Co.* (1863), 2 H & C 184

(*i*) The effect of this case has been stated thus "That a man who takes a note or bill of exchange honestly and truly for value, although he had the means at his command of determining whether the note or bill was one that he ought to take, but for the moment forgot to use those means, is entitled to assert himself to be the true owner, and to assert his right in the instrument against every other person" (Willis, Lecture I) "bearer" and promising to pay the "holder" the principal and the "bearer" the interest on presentation of coupons, were stolen and came into the hands of the plaintiff for value. The theft had been advertised, and the plaintiff would have known of the theft before he purchased had he not been negligent. It was held that the instruments were negotiable, and that the negligence did not disentitle the plaintiff from claiming as *bona fide* holder.

(vi) But the matters dealt with in the two preceding paragraphs may be elements in the consideration of the question of whether there was bad faith, although they will not of themselves constitute bad faith. "I consider it to be fully established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange" (*per* Lord Blackburn in *Jones* v. *Gordon* (*ante*, p. 28), at p. 629 of 2 A. C.).

(vii) When, however, there is knowledge or suspicion of a defect, it need not be in respect of any particular defect, or it may be suspicion of some other than the actual defect. "I do not think it necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth, he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that it would not have made any difference if he knew there was something wrong about it and took it. If he take it in that way, he takes it at his peril" (*per* Lord Blackburn in *Jones* v. *Gordon* (*ante*, p. 28), at p 629 of 2 A. C.).

(viii) The adequacy of the value paid for the instrument may be a very important consideration in the determination of the question of good faith. In other words, if the price paid by the holder is wholly incommensurate with the value of the instrument as known to the holder, the fact points to knowledge or at least suspicion of some defect on his part. On the other hand, where the price given is a really good one, that of itself will go far to negative bad faith in the transaction, so far as the purchase was concerned. In *Raphael* v. *Bank of England* (*ante*, p. 30), for example, the fact that the bankers had given the full face value for the note was deemed substantially conclusive as to their *bona fides* (see *per* Jervis, L.C.J.).

(ix) When the holder has not purchased outright, but has merely advanced money upon the security of the instrument, he can only be a *bona fide* holder for value to the extent of his charge. This is, of course, an application of the ordinary rule as between mortgagor and mortgagee (*k*). But if he transfers the instrument to a person who takes it *bona fide* for value without knowledge that the transferor had only a limited interest in it, the transferee can claim upon the instrument to its full amount.

(x) When the holder, otherwise *bona fide* and for value, takes from a person whom he knows or suspects to have merely a limited interest, he acquires no larger interest than that of him from whom he has taken In *Sheffield* v. *London Joint Stock Bank* (1888), 13 A. C. 333; 57 L J. Ch. 986; 58 L. T. 735, a money dealer deposited securities with a bank to cover his general overdraft. The Court found as a fact that the bank knew that the securities were not the absolute property of the customer, but that he had, or probably had, only made advances upon them Furthermore, the Court came to the conclusion that the bank officials, when they took the instruments, knew that the person from whom they took them was not the owner and had only a limited interest therein. "He was a money dealer; he lent money to customers on securities which they deposited with him. He pledged those securities to the banks who supplied him with the money. The banks knew that in most cases, if not in all, the securities which he deposited with them were not his own absolute property. That information was conveyed by the nature and extent of his business" (*per* Lord Macnaghten).

(*k*) It may be mentioned that a banker has a general lien upon securities deposited by a customer. But such lien may be negatived, as, for example, where the securities have been deposited merely for safe custody. See *Brandao* v. *Barnett* (1846), 3 C. B. 519; 12 Cl. & F 787.

It was held that the bank were holders only to the extent of the advances made by the customer to his clients, and not to the extent of the advances made by the bank to their customer.

(xi) When the holder, otherwise *bona fide* and for value, takes from a person whom he knows to be an agent, this fact alone will not limit his interest to the extent of the interest which the agent had authority to convey, but such interest will be co-extensive with what the holder believed to be comprised in the authority of the agent. For example, in *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; 61 L. J. Ch. 723; 66 L. T. 625, a broker deposited negotiable instruments with his bank as security for advances. The bank did not know whether the instruments belonged to the broker, or whether they belonged to the broker's clients, or whether in the latter case he had authority to deal with them, and they made no inquiries. In fact they belonged to clients, and he had no authority to deal with them. It was held that the mere fact that the bank knew that their customer was a broker and that the instruments might have come within either of the above categories did not of itself constitute a sufficient warning to the bank to put them on inquiry and prevent them from becoming holders in good faith (*l*).

(xii) A holder is in the position of a *bona fide* holder for value, if he claims through a *bona fide* holder for value, although he himself has not taken for value and has notice of the defect in title, unless he is *particeps criminis* in regard to the fraud or other irregularity constituting the defect. In *May* v. *Chapman* (1847), 16 M. & W. 355, a partner got the acceptance of a bill by the firm and fraudulently indorsed it to X in payment of his private debt. X indorsed it to Y, who took it *bona fide* and for value and without notice of the fraud. Y indorsed the bill to Z, who took with notice of the fraud, but without in any way being a party to it. It was held that as Z was not a party to the fraud he was entitled to the benefit of the manner in which Y took the bill, and that he could therefore recover it from the firm (*m*).

(*l*) The Court felt that it was difficult to reconcile its decision with that in *Sheffield* v. *London Joint Stock Bank*, *ante*, p. 32, and so it held that the earlier case turned upon its own special facts.

(*m*) In the case of instruments falling within the Bills of Exchange Act, 1882, a holder who takes *bona fide* for value is called a "holder in due course". The term is frequently employed in connection with negotiable instruments in general.

# CHAPTER V.

## THE "EQUITIES": THE "PARTIES LIABLE".

It will be recalled that the outstanding attribute of a negotiable instrument, apart from the simplicity of its method of transfer, is that if acquired *bona fide* for value, it is held free from equities, *i.e.*, defects in the title of the transferor, and the holder can claim upon it against all parties liable upon it. It remains to inquire what is meant by the expressions "equities" and "parties liable" respectively.

### "*Equities.*"

The nature of an equity, and why it is so called, may be indicated by a simple illustration. A holds the bond of a foreign government (the negotiability of which has been admitted or is proved) expressed to be payable to A. By fraudulent misrepresentation, B gets A to transfer the instrument to B by indorsement and delivery. A, on discovering the fraud, is entitled, pursuant to the rule derived from the equitable jurisdiction of the Courts, to avoid the transaction and get back the instrument from B. In other words, B's title is subject to a defect which, from the nature of it, is shortly described as an "equity". But before A is able to exercise his rights, B transfers the instrument by indorsement to C. When the instrument matures, the foreign government defaults and B is not worth suing, and the only solvent party from whom C can hope for payment is A. Can C sue A? The answer is that if C did not give value for the instrument, or if at the time he acquired the instrument he was aware of B's fraud, he took the instrument subject to the equity mentioned and he has no claim against A. On the contrary, he must yield up the instrument to A. But if C acquired the instrument *bona fide* for value he is not affected by the equity and can recover from A.

It may be mentioned that a *bona fide* holder for value is not only unaffected by equities but (in common with any holder for value) he is not affected by what are called the "personal defences" of prior holders or "collateral equities" (*a*). Adapting the illustration given above, suppose that B did not

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(*a*) See *post*, p. 123, note (*t*)

acquire the instrument by fraud, but that before the instrument matured A had become indebted to him for, say, goods sold and delivered. If B had not parted with the instrument, then upon its maturity B would be entitled by way of set-off or counterclaim to meet A's claim to the extent of any indebtedness on the part of A. C, however, is not concerned B's "personal defence" is out of the picture as between A and C, however material it may be as between A and B

The various equities from which a *bona fide* holder for value holds free may be stated as follows (*aa*) —

(i) Where (*b*) a prior party has been induced to adhere to the instrument through misrepresentation or fraud (*c*), mistake of fact (*d*), insanity (*e*), drunkenness, duress, undue influence, or for an illegal or immoral consideration (*f*)

(ii) Where a prior party is mortgagee of the instrument but has allowed the mortgagor to retain it, thus enabling him to transfer it to a third party without notice of the mortgage

(iii) Where a prior party has taken the instrument knowing that it was transferred to him in breach of faith (*g*).

(iv) Where a prior party has wrongly filled in blanks in the instrument (*h*)

(v) Where a prior party has been discharged by renunciation or material alteration (*i*)

(*aa*) The completeness of this list, or of the one later in the chapter relating to Parties liable", is not guaranteed

(*b*) The scope of this work does not permit of a sufficient treatment of most of the topics arising in this chapter For this, the reader must have recourse to more comprehensive works, such as Byles or Chalmers

(*c*) This case, where the party actually intended to bind himself in the first instance, must be distinguished from that coming within the doctrine of "*non est factum*" dealt with later in the chapter

(*d*) The mistake of fact must be fundamental to the transaction see *Ayres v Moore*, [1940] 1 K B 278 109 L J K B 91, 163 L T 337, 56 T L R 145.

(*e*) Provided the insanity was known to the party in whose favour the instrument was executed *Imperial Loan Co v Stone*, [1892] 1 Q B 599, 61 L J Q B 499, 66 L T 556 The case of a lunatic "so found" is on a different footing see later

(*f*) Mere absence of consideration is not a defect in title, since a transferee who takes an instrument with knowledge that it is given without consideration can recover upon it if he himself gave consideration see *post* Chap XII, and note (*e*), p. 52

(*g*) For illustration, see *post*, p 185

(*h*) See *post*, pp 93 *et seq* under "Inchoate Instruments", and note (*e*), p 52.

(*i*) See *post*, Chap XVIII, under "Renunciation" and "Alteration" respectively, and note (*e*), p 52

*"Parties liable."*

The *bona fide* holder for value of a negotiable instrument may enforce it against every person who appears to have adhered to it in any capacity, whether as maker, indorser, or, in the case of a bill of exchange, as drawer or acceptor (*k*). There are, however, certain exceptions, *viz.*—

(i) Where a party has expressly negatived any personal liability, *e.g.*, by signing "sans recours" (*l*).

(ii) Where a party enjoys immunity from legal preceedings in our Courts, *e.g.*, a foreign government or a diplomatic agent (*m*).

(iii) (*n*) Where a party lacks legal capacity to bind himself by contract or at any rate to bind himself by negotiable instrument, *e.g.*, infants (*o*), certain corporations (*o*), persons of unsound mind whose property is under the control of the Court under the Lunacy and Mental Treatment Acts (*p*), felons (*q*), and "enemies" (*r*).

(iv) Where a party becomes bankrupt, claim for then existing liabilities can only be made, so far as he is concerned, upon his estate in the hands of his trustee in bankruptcy and a dividend received upon the claim. But an undischarged bankrupt has contractual capacity, although if he signs an instrument for

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(*k*) This lets out a bearer, since he is not a signatory. A bearer, who does not indorse the instrument, is merely deemed to have given certain warranties to his *immediate* transferee. These warranties are, in relation to bills of exchange, set out in s 58 of the Bills of Exchange Act, 1882, *post*, p 110, but they apply to all negotiable instruments

(*l*) Title may, however, be traced through such a party.

(*m*) But such a party may waive the immunity, and he can sue when he cannot be sued

(*n*) It is believed that title may be traced through all the parties mentioned in this paragraph, although they are not themselves liable, and except in the case of infants and corporations, cannot sue on the instrument. At any rate, such is the case with infants and corporations without capacity These can sue but cannot be sued

(*o*) *Post*, Chap. X, under "Capacity of Parties". What is there said applies to all negotiable instruments.

(*p*) See Chitty on Contracts (9th ed ), p. 377.

(*q*) That is to say, a person under sentence of death or penal servitude But under the Forfeiture Act, 1870, an administrator may be appointed, and if the person signed the instrument before conviction, his estate remains liable.

(*r*) The paragraph puts the matter with the crudest brevity, *e.g* , a British subject may be an "enemy" if he is in enemy territory The position depends mainly upon the special emergency regulations made for the purpose of any particular war If the party became such before the war, his liability on the instrument is merely suspended for the duration.

£10 or upwards he is guilty of an offence if he has not disclosed the fact of his bankruptcy—Bankruptcy Act, 1914, s. 155 (*s*)

(v) Where a person has signed the instrument but his mind did not go with his signature the rule *non est factum* (*t*) applies and the signature is void (as distinct from merely voidable) for all purposes. The familiar example is where the signatory intended to put his name to an entirely different instrument. In *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310; 20 L. T. 887, a person signed a bill upon being told, and in the belief, that it was a railway guarantee which he had promised to execute. It was held that he could not be sued by a *bona fide* holder for value. In *Lewis* v. *Clay* (1897), 67 L. J. Q. B. 224; 77 L. T. 653; 14 T. L. R. 149, the defendant executed a promissory note upon a representation, which he believed, that he was merely signing as attesting witness of a document. An action against him by a person who discounted the note in good faith and for value failed.

(vi) Where the apparent signature on the instrument is unauthorised or forged. In *Morris* v. *Bethell* (1869), L. R. 5 C. P. 47; 21 L. T. 323, the defendant paid a bill of exchange (of which the plaintiff was the holder) upon which the defendant's name had been written as acceptor without his authority. In an action against him upon another bill similarly accepted, the jury found that the acceptance was not the defendant's signature, nor written with his authority, that the forged signature was not adopted by the defendant, that the defendant did not know that the plaintiff was the holder of the former bill, and that he did not lead the plaintiff to believe that the acceptance on the bill sued upon was his. It was held that the fact of the defendant having paid the earlier bill did not estop him from setting up that

(*s*) The whole subject is beyond the scope of this work. Byles deals with it fully in a chapter under "Bankruptcy of Parties to a Bill", and see Chalmers under s. 38 of the Bills of Exchange Act, 1882.

(*t*) This expression is, of course, strictly applicable only to the plea of non-execution, or in effect of non-execution, of documents under seal, but its conciseness has tempted its employment in a more general sense, so as to include the analogous defence in the case of other documents. Some justification may, perhaps, be found in the fact that apparently the rules applicable in the former case are equally applicable in the latter. In *Foster* v. *Mackinnon* (*supra*) Byles, J., referring to the cases of *non est factum* cited by him, says: "These cases apply to deeds, but the principle is equally applicable to other written contracts."

the later bill was not accepted by him or with his authority. And the rule will apply where there has been no delivery of the instrument, *e.g.*, " B, who owes C £100, makes a note for the amount payable to C. B dies, and the note is afterwards found among his papers. C has no right to the note, and if it be given to him he cannot enforce it " (*u*). It must be observed, however, that in such cases the person to whom the defence now being dealt with would be open may lose the benefit of it by conduct estopping him from denying his adhesion to the instrument. In *Foster* v *Mackinnon* and *Lewis* v. *Clay* (*ante*, p. 37) it was found as a fact there had been no negligence on the part of the defendant; otherwise presumably the result of those cases would have been different.

A merely unauthorised signature may be ratified and the position is then the same as if the owner of the signature had originally affixed it himself. Even where the signature is forged, although strictly it cannot be ratified (*x*) (*Brook* v. *Hook* (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 50; 24 L. T. 34), or, in the strict legal sense, adopted (*y*), nevertheless the person whose signature has been forged may represent the forged signature as his own and by thus inducing subsequent holders to take the instrument upon the assumption of its genuineness he may be estopped from setting up the fact that it is counterfeit and so become liable upon it. Even mere non-disclosure of the forgery may estop where there is a duty of disclosure as in the instance of a customer in relation to his banker. In *Greenwood* v *Martins Bank*, [1933] A. C. 51; 101 L. J. K. B. 622; 147 L. T. 441—H. L., the customer's wife forged his name to a number of cheques which were paid by the bank and debited to the customer's account. Upon discovering his wife's delinquency he did not inform the bank and kept silent until her death when, the claim being in tort, the bank lost its right of action against the wife and also the right of action which the law then gave the bank, against the

(*u*) Illustration by Chalmers, based on *Bromage* v *Lloyd* (1847), 1 Exch. 32.

(*x*) Firstly, because (as a rule) the so-called ratification would be for the purpose of screening the forger, and therefore against public policy; and, secondly, because the power to ratify only applies where the doer of the act to be ratified purported to act on behalf of the ratifier *Brook* v. *Hook*, *supra*, *per* Kelly, C.B.

(*y*) Because " adoption as understood in English law requires valuable consideration "—Lord Tomlin, in *Greenwood* v. *Martins Bank*, *infra*.

customer as a husband responsible for his wife's torts. It was held that the customer could not now be heard to say that his signature was forged and claim to be re-credited with the amount of the forged cheques. And in *Leach* v. *Buchanan* (1802), 4 Esp. 226, where the signature of a party to a negotiable instrument was forged, a holder had doubts as to the signature, and asked the party whether it was his signature, receiving an answer in the affirmative. The holder then negotiated the bill, the transferee assuming the signature to be genuine. It was held that the transferee could recover on the bill from the party in question on the ground that by his statement he had credited the bill and induced others to take it. An *unauthorised* signature may, in certain circumstances, amount to a *forged* signature—see *Robinson* v. *Midland Bank* and *Kreditbank Cassel* v. *Schenkers*, *post*, p. 81, where the facts are set out shortly.

(vii) Where a party is made not liable on the instrument by some special statute and extends the non-liability even against a *bona fide* holder for value, *e.g.*, the Betting and Loans (Infants) Act, 1892, and some others, for which see *post*, p. 191.

It will be seen from the foregoing that the position of a *bona fide* holder for value is not unassailable, and that his defences may be breached where he little expects it.

## CHAPTER VI.

### NEGOTIABILITY BY ESTOPPEL (a).

THE maker or true owner of a non-negotiable instrument may be precluded by the form in which it is drawn or by his conduct in relation to it from disputing against a *bona fide* holder a defect in the title through which it has come into his hands. "Although the rule generally holds good, that whoever takes an assignment of a *chose in action* takes it subject to all its equities, it has been held that the rule must yield where a contrary intention appears from the nature or the terms of the contract" (White & Tudor, L.C. (9th ed.) p. 139). "There is nothing to prevent a debtor from contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his" (*Re Goy & Co*., [1900] 2 Ch. 149; 69 L. J. Ch. 481; 83 L. T. 309, *per* Stirling, J.). "If an instrument purporting to pass by delivery is placed by the true owner in the hands of an agent or mortgagee, who delivers it to a *bona fide* holder for value, the true owner is estopped from denying that the instrument is negotiable" (*Goodwin* v. *Robarts* (1876), 1 A. C. 476, *per* Lord Cairns). In that case the plaintiff was claiming some scrip held by the defendants. The House of Lords held, in the first place, that the defendants were entitled to retain the instruments on the ground that they were negotiable (b); but secondly, that apart from this, the plaintiff was estopped by reason of the form of the instrument. In it he had, in effect, represented when he placed it on the market that he would meet the obligation contained in it when such obligation was claimed by the holder for the time being, and the defendants had taken the instrument in good faith and for value in reliance upon such representation. Again, in *Merchant Banking Co.* v. *Phœnix Bessemer Co.* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418; 36

(a) "An estoppel is an admission, or something which the law treats as equivalent to an admission, of so high and conclusive a nature that any one who is affected by it is not permitted to contradict it" (Encyclopædia of the Laws of England, *sub nom* "Estoppel", where see further on the topic).

(b) See *ante*, p. 18.

L. T. 895, the plaintiffs were the holders of certain warrants issued by the defendants for steel rails expressed to be deliverable to S. & Co. or their assigns by indorsement thereon. On the warrants were the words "The undermentioned rails will not be delivered to any party but the holder of this warrant". Such instruments could not be negotiable, since, *inter alia*, the obligation contained in them was not for the payment of money or for the delivery of a security for money (see *ante*, p. 18). S. & Co. transferred the warrants to the plaintiffs, who received them in good faith and for value. While the plaintiffs were holding the warrants S. & Co. became bankrupt, and the question was whether the plaintiffs were entitled to the goods, or whether the defendants, who had not been paid by S. & Co., were entitled to retain the goods for their lien for the unpaid purchase money. It was shown that by the usage of the iron trade such warrants were considered to pass to holders for value free from any vendor's lien, and it was held that by reason of such usage, as well as by the intention of the parties as shown by their course of dealing, the plaintiffs, as holders for value, were entitled to the goods free from the vendor's lien. And in *Re General Estates Co.* (1868), L. R. 3 Ch. App. 758, a company issued an instrument under the seal of the company and stamped as a deed by which the company undertook to pay to the order of J H. on July 1, 1867, £1,000 with interest half-yearly, on presentation of the annexed interest warrants. There was no evidence of negotiability by usuage. It was held that an indorsee for value and in good faith of this instrument was entitled to prove on it against the company free from equities as between J. H. and the company (c). The instrument in these various cases is commonly said to possess the attribute of "negotiability by estoppel". The term is, however, a misnomer. The very

(c) Both of the Judges who constituted the Court appear to have thought that the document was a promissory note, but this did not affect their decision. "The better opinion seems to me to be that this is a promissory note, but if it be not so, the authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own and say that because the person who makes the order is indebted to them they will not pay" (*per* Page-Wood, L.J., at p. 762). *Re Agra Bank* (1867), 36 L. J. Ch. 222; L. R. 2 Ch 391, and *Re Imperial Land Co. of Marseilles* (1870), L. R. 11 Eq. 478, furnish other instances of the doctrine.

quality in the instrument which brings the doctrine of estoppel into play is the non-negotiability of the instrument. A less misleading term with which to express the attribute of an instrument in such form that the maker is estopped from denying the title of a holder for the time being is, perhaps, "quasi-negotiability". The expression "negotiability by estoppel" has been thus animadverted upon: "I have heard people recently talk of negotiability by conduct and negotiability by estoppel, as if there were another distinct head of negotiability and a separate kind of estoppel. The negotiability of which I am speaking has nothing to do with the conduct of the true owner and nothing to do with the doctrine of estoppel. If you can rest your client's claim upon the negotiability of the instrument, you have nothing to do with conduct or estoppel or any such principle. The doctrine of estoppel may serve you if the property is not negotiable, but if negotiable it is unnecessary to consider the conduct of the true owner. 'Title by estoppel' is what men mean when they speak of 'negotiability by estoppel', but title by estoppel is a different thing altogether from negotiability" (*d*).

(*d*) Willis, Lecture I.

# CHAPTER VII.

## SEMI-NEGOTIABLE INSTRUMENTS—I.O.U.'S.

CERTAIN documents which possess some only of the features of negotiable instruments have been styled "semi-negotiable". It may help to bring out the qualities of an instrument fully negotiable if we glance at the meaning of the expression in question in connection with one class of the documents to which it has been applied—*viz*, Bills of Lading. To this may be added some consideration of the I.O U, a document which, while it embodies none whatever of the distinctive attributes of a negotiable instrument, is, on account of a certain freedom in use, regarded by many laymen as invested with a similar legal magic.

**Bills of Lading.**—A bill of lading is an acknowledgment given by the master of a vessel of goods received by him for the purpose of carriage by the vessel. Its form may be indicated as follows —

EXAMPLE 10 (*a*)

Shipped in good Order and well conditioned by William Brown & Co. in and upon the good Ship called the *Saucy Sally* whereof is Master for this present Voyage Thomas Bowling and now riding at anchor in the Port of Manchester and bound for Rotterdam 1,000 bales of Cotton Goods being marked and numbered as in the Margin, and are to be delivered in the like good order and well conditioned at the afresaid Port of Rotterdam the Act of God, the King's Enemies, Fire, and all and every other Dangers, and Accidents of the Seas, Rivers, and Navigation of whatever nature and kind soever excepted unto P. M. Vanderlinde or to his Assigns he or they paying Freight for the said Goods with Primage and Average accustomed. In witness whereof the Master or Purser of the said Ship hath affirmed to three Bills of Lading all of this Tenor and Date the one of which three Bills being accomplished the others to stand void

Dated in Manchester the 25th day of March, 1923

(*a*) This pre-1924 example will serve the present purpose but it should be observed that if the voyage is within the Carriage of Goods by Sea Act, 1924 (*i e*, from any port in Great Britain or Northern Ireland to any other port, whether in or outside Great Britain or Northern Ireland), the bill of lading must comply with the provisions of that Act as to form and contents if it is to possess the quality of semi-negotiability about to be described

The bill of lading is usually drawn in three parts, of which one is retained by the master, and two are handed to the consignor, who forwards one to the consignee.

The bill is also a contract to carry the goods to the place and upon the conditions expressed and to give delivery of them to the consignee or the transferee of the bill.

The consignee may assign his bill by mere indorsement and delivery, so that it may be said to possess one of the qualities of a negotiable instrument. The assignee will acquire by the Common Law a right to the goods and, by the Bills of Lading Act, 1855, a right to enforce the contract implied in the bill as though it had been made with himself.

But as regards the other quality of a negotiable instrument —*viz.*, the right of a transferee acquiring *bona fide* and for value to take free from equities, a bill of lading differs substantially from a negotiable instrument. His rights in the goods will be no more than those of the consignor. He will acquire no rights if his title to the instrument be defective, if, for example, he acquires it through one who has stolen or obtained it by fraud from the consignee. There is just one exception to this rule. The consignor has the right, by notice to the carrier, to prevent the delivery of the goods to the consignee if the latter becomes insolvent while the goods are still in the course of transit. But if before this right has been exercised the consignee has transferred the bill of lading, the consignor's right of stoppage *in transitu* will be defeated and be unexercisable against the transferee of the bill (*Lickbarrow* v. *Mason* (1793), 6 East 21, and *Leask* v. *Scott* (1877), 2 Q. B. D. 376; 46 L. J. Q. B. 576; 36 L. T. 784).

The negotiability of a bill of lading, therefore, resolves itself into a facility for transfer by mere indorsement and delivery and the quality of overriding an anticipatory remedy of the consignor in the event of the financial discredit of the consignee, a quality which it has been made to share with other documents of title to goods (see Factors Act, 1889, s. 102, and Sale of Goods Act, 1893, s. 47) (*b*).

(*b*) It may be mentioned here that " Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer

**I.O.U.'S.**—An I.O.U. is an instrument given by a debtor to his creditor acknowledging the debt. The following will indicate its form:—

EXAMPLE 11.

Manchester, 29th April, 1929.

*To* MR. EDWARD FAMER

I.O.U. £250.

WILLIAM STRAKER.

*Prima facie*, an I.O.U. is the mere acknowledgment of a debt and evidence of an "account stated". An account stated is an admission by one party against whom another has a money claim, or set of money claims, that there is a balance due from him to the other. There arises from such admission a contract to pay the balance on request. Thus A lends B various sums at interest and receives sums from time to time on account Eventually A renders an account showing a balance due to him, and B acknowledges to A the correctness of the balance. This acknowledgment is, firstly, an admission of the amount due; and, secondly, an implied promise to pay it on demand. A can sue B either for balance due for money lent or upon "account stated", that is, upon the implied contract contained in the admission of the amount due. An I.O.U. is, however, not in itself an account stated, but merely evidence of it. In other words, it is not in itself a contract. Accordingly, if B gives A an I.O.U. for the balance of the account, the document need not be stamped (*Childers* v. *Boulnois* (1822), Dow. & Ry. N. P. C. 8), and it cannot be a negotiable instrument (see *ante*, p. 1). If therefore, A desires to transfer to C the debt owing to him by B, he must do so in accordance with and subject to the conditions of the Law of Property Act, 1925, s. 136 (*ante*, p. 6) He will merely hand the I.O.U. to C for the same purpose as that for which he obtained it, *viz.*, to facilitate proof of the debt.

But an I.O.U. may contain something more than a bare acknowledgment, and in such case the additional words may suffice to bring the document within the category of an agreement,

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is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him" (Sale of Goods Act, 1893, s. 19 (3)).

or even of a negotiable instrument. Thus in *Evans* v. *Phillpotts* (1840), 9 Car. & P. 270, an I.O.U. contained special terms that the sum to be paid should be reduced in a certain event, and that part of the sum should be disposed of in a particular manner, and it was held to require an agreement stamp. Again, in *Brooks* v. *Elkins* (1836), 2 M. & W. 734; 6 L. J. Ex. 6, the document ran, " I.O.U. £20 to be paid on the 22nd inst.", and was held to be a promissory note.

On the other hand, it must be borne in mind that the mere addition to an I.O.U of some words which are familiar in negotiable instruments will not make the document a negotiable instrument, *e.g.*, where the document ran, " I.O U. the sum of £200 *for value received* ", it was held that the words italicised did not make it a promissory note (*Gould* v. *Coombs* (1845), 1 C. B. 543; 14 L. J. C. P. 175). The test is whether the instrument does or does not contain a promise to pay. If it does, and such promise is unconditional (*c*), it is a promissory note (*Brooks* v. *Elkins*, *supra*), but not otherwise.

We have now completed our survey of negotiable instruments in general. Of all the documents which are comprised under that head, by far the most important are those denominated bills of exchange. It is in connection with them that the law has most fully worked out, in addition to certain attributes which apply to them alone, the characteristics of negotiable instruments in general. Bills of exchange, together with their sister instruments, cheques and promissory notes, form the subject of the next ensuing Part of this work

## NOTE ON THE USE OF THE TERM "NEGOTIABLE".

It was emphasised in Chapter II, *ante*, that the term " negotiable " when used to describe an instrument indicates (A) that

(*c*) See *post*, p. 267.

the instrument is transferable by delivery (with indorsement if the instrument is not payable to bearer), and (B) that, if the transferee receives the instrument *bona fide* and for value, he is entitled to hold it free from equities. When, however, it is once accepted that the instrument is a negotiable instrument, the word "negotiable" is used in a different sense in relation to it, that is to say it is used to indicate merely (A); and (B) is left out of the picture. To "negotiate" the instrument means merely to transfer it by delivery (with indorsement if necessary) and an instrument is "negotiated" when it is transferred by delivery, without prejudice, etc., to the question whether the transferee takes it free from equities. This is convenient inasmuch as it condenses a lengthy phrase into a single word, but it is apt to mislead unless the distinction between the two different uses of the word "negotiable" is borne in mind For example, in the Bills of Exchange Act, 1882, the instruments which fall within the definitions of bills of exchange, cheques and promissory notes respectively are nowhere stated to be negotiable instruments. They are assumed to be such, and the Act goes on to provide, *inter alia*, in effect that these instruments are "negotiated" by simple delivery when payable to bearer and by delivery plus indorsement when not so payable. When the Act desires to indicate that one of the instruments in question has been transferred in the required manner to a person *bona fide* and for value, it says that it has been "negotiated" to a "holder in due course" This phraseology has been lifted from the Act and is often applied to negotiable instruments which do not fall within the statute, *e.g.*, if X delivers a bearer bond to Y who receives it *bona fide* and for value, X is quite commonly said to have negotiated the bond to a holder in due course. The Act makes one exception to this user of the word "negotiable". In those sections (76 to 82, *post*, Chap. XXII) which provide for the crossing of cheques, the crossing "not negotiable" means, without prejudice to the transferability of the cheque, that the transferee cannot take it free from equities. In other words the phrase "not negotiable" has reference to (B) above mentioned and not to (A). The matter has been put concisely thus: "When an instrument is said to be negotiable, the word "negotiable" may bear one of two different meanings it may merely mean that the instrument is one which may be validly transferred by delivery, coupled with indorsement when necessary, or it may be used in a special sense (*d*) to express that the transfer is free from equities. Except in the case of cheques (*e*) the word is used in the Code (*f*) in the first meaning " (Byles)

(*d*) But this sense is closer to its proper sense At any rate it emphasises the more striking of the two characteristics of a negotiable instrument

(*e*) And also dividend warrants and bankers' drafts—see *post*, Chap XXIV

(*f*) *I e*, the Bills of Exchange Act, 1882

# PART II.

# BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES.

*Note*—Throughout this Part, " Act " means the Bills of Exchange Act, 1882. Also, as in the Act itself, " ' bill ' means bill of exchange, and ' note ' means promissory note " (s 2).

## CHAPTER VIII.

### FUNCTION: HISTORY: STATUTES.

**Function.**—The object of a bill of exchange (and of its off-shoots, the cheque and promissory note) has been described as " to settle a debt in manner most convenient to the parties concerned " (*a*). Its two principal uses may be exemplified thus: B owes A, A owes C. Instead of B making payment to A, and A making payment to C, A " draws " upon B in favour of C, *i.e.*, A orders B in writing to pay to C what he (B) owes A. B undertakes to comply with this order, such undertaking being expressed on the document by B, who thereupon becomes liable to C if C is given possession of the document. C is thus enabled to obtain payment from B, who upon payment discharges simultaneously his own debt to A and A's debt to C. Again, Y may owe X and X may desire to give Y six months' credit, but not be in a position to forgo the present use of the money. He may satisfy both himself and Y by " drawing " upon Y, *i.e.*, obtaining a bill from Y containing Y's present undertaking to pay in six months the then holder of the bill. X may then (if Y's credit be good) " discount " the bill, *i.e.*, get Z to purchase the bill for the amount of it less a sum to remunerate Z for the six months which he will have to wait before he gets his money back and for the risk Z runs in not getting paid through the possible insolvency of X and Y. " Thus a bill of exchange performs two kinds of offices in commerce: it saves the transmission of coined

(*a*) Blackwood's Encyclopædia (1906 ed.), *sub tit.* " Bills of Exchange ".

money, and it enables creditors not only to fix down debtors to a day of payment, but to get the use of a sum equivalent to the debt (less a small discount) before it is properly due" (*b*).

**History.**—"The origin of this important mercantile instrument is usually attributed to the Jews and Lombards, when banished from France and England in the thirteenth century. It is certain that hitherto no trace of such bills has been discovered in the Roman Code, or in any other system of ancient jurisprudence. The first notice of them in modern times occurs about the middle of the twelfth century, and by the end of the fourteenth they had got into general use in all the commercial States of Europe. In England, from about the middle of the fourteenth century down to the time of James I, and for many years after, bills of exchange were restricted to the purposes of foreign commerce. What are called inland bills—*i.e.*, bills drawn by and upon persons resident in this country—were not employed much earlier than the reign of Charles II, and even then they were regarded with distrust and jealousy by the English Judges. Another restriction upon bills of exchange was that the privilege of their use was confined to merchants. But all such restraints gradually yielded" (*c*). To the foregoing we may add the account of the origin and history of bills given by Cockburn, L.C.J., in *Goodwin* v. *Robarts* (1875), L. R. 10 Ex., at pp. 346—358): "Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled 'Specimen of a Digest of the Law of Bills of Exchange', that Richard Malynes, a London merchant, who published a work called the Lex Mercatoria, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that

(*b*) Blackwood's Encyclopædia (1906 ed.), *sub tit* "Bills of Exchange".
(*c*) *Ibid.*

promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, ' the introduction and use of bills of exchange in England ', as indeed it was everywhere else, ' seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom '. With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin* v. *Boure* (Cro. Jac. 6), in the first James I. Up to this time, the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the pratice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently (*dd*) published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica in 1607. Savary, cited by Mons. Nouguier, in his work ' Des Lettres de Change ', had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first, the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not " (*d*).

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(*d*) See further, Chalmers' Introduction, and Jenks on " The Early History of Negotiable Instruments ", Law Quarterly Review, Vol IX, p. 70.

(*dd*) *Circa* 1873.

**Bills of Exchange Acts, 1882 to 1932.**—The earliest incursion by the Legislature into the Common Law relating to bills appears to have been the statute of 9 Will. 3, c. 17, "an Act for the better payment of Inland Bills of Exchange". Then followed some sixteen Acts dealing wholly or partly with the subject, which, together with the first-mentioned, are set out in the Second Schedule to the Bills of Exchange Act, 1882, and are, by section 96, repealed so far as they relate to the subject. This last-mentioned statute, however, which is entitled "An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes", re-enacts the substance of the repealed enactments and takes in also the rules underlying the multitude of the then existing decisions on the subject (*e*). The Act, nevertheless, was not intended to be exhaustive, and it is expressly provided by section 97 (2), that

> "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques" (*f*).

The Act of 1882 has been amended by the Bills of Exchange (Crossed Cheques) Act, 1906, the Bills of Exchange (Time of Noting) Act, 1917, and the Bills of Exchange Act (1882) Amendment Act, 1932.

**Previous Decisions.**—For a statement of the rule for the construction of this and other codifying statutes in relation to the decisions upon which the statutes are based, see *per* Lord Herschell in *Bank of England* v. *Vagliano Bros.*, [1918] A. C. 107, at p. 144. Shortly, the rule may be stated thus:—

(a) Do not start with inquiring into the state of the law previous to the statute, upon the assumption that it was probably intended to leave such law unaltered.

(*e*) Apart from certain provisions relating exclusively to the specific instruments dealt with, the Act is really a concise statement of the law relating to all negotiable instruments, and, in consequence, the comments appended hereafter to the provisions of the Act is, for the most part, of general application

(*f*) "This provision preserves a foreign drawer's right to prove for re-exchange against an English acceptor. So, too, it preserves the general rules of law relating to estoppels, and the rules of private international law, e.g., the rule according to which the transfer of personal property is governed by the law of the country in which the property is transferred" (Chalmers).

(b) But, in the first instance, examine the language of the statute and ascertain its natural meaning uninfluenced by considerations derived from the previous state of the law

(c) If, however, a provision be of doubtful import, resort may be had to the previous decisions for the purpose of aid in its construction. Or, again, if a word had previously acquired a technical meaning, or it has been used in a sense different from its ordinary one, the same meaning may well be assumed to have been intended in the statute These are merely examples, and do not exhaust the category of cases where recourse might reasonably be had to the previous law.

**Scope of Acts.**—The Act of 1882 is divided into five Parts. Part I is entitled " Preliminary ", and gives merely the short title and interpretation of certain terms Part II deals with bills of exchange generally. Part III relates to cheques, and provides, *inter alia* (section 73, *post*, p. 224), that the provisions of Parts I and II, so far as they are applicable to bills payable on demand, shall apply to cheques. Part IV deals with promissory notes, and provides (section 89 (1), *post*, p. 272) that the provisions of Parts I and II shall with necessary modifications apply to promissory notes. Part V contains certain important supplementary matter. The Acts of 1906, 1917 and 1932 are " one clause " Acts, the first extending the operation of section 82 (*post*, p. 245), the second modifying section 51 (4) (*post*, p. 174) of the principal Act, and the third extending the provisions of sections 76 to 82 (*post*, p. 254) of the principal Act to bankers' drafts.

# CHAPTER IX.

## BILLS OF EXCHANGE: DEFINITION AND FORM.

**Definition.**—A bill of exchange is defined by the Act as

> "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer"

(section 3 (1)) (*a*). It is further provided that

> "an instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange"

(section 3 (2)).

**Analysis of Definition.**—Analysing the foregoing we get the following as the requisites of a bill: (1) It must be an order, (2) which must be unconditional, (3) and in writing, (4) and addressed by one person to another, (5) and signed by the person giving it, (6) and requiring the payment of money, (7) which money must be a sum certain, (8) and payable (a) on demand or (b) at a fixed or determinable future time, (9) and payable (a) to or to the order of a specified person or (b) to bearer.

It may be as well, before considering these requirements in detail, to set out one or two examples of bills whose form is in compliance with them.

EXAMPLE 12.

£500 : 0 . 0                London, January 1st, 1929.

Stamp.

Six months after date (*aa*) pay to Henry Robinson or order the sum of five hundred pounds, value received.

To William Jones,                JOHN BROWN.

155 Change Alley, London, E.C.

(*a*) If the bill is addressed to a bank and payable on demand, it constitutes a cheque—s 73, *post*, p. 222. The fact that a cheque is a bill must be borne in mind in connection with the decisions referred to in the present and succeeding chapters, as such decisions frequently relate to cheques.

(*aa*) Or " after sight "

EXAMPLE 13.

£240 : 3 : 9. London, February 5th, 1929.

Stamp.

On demand pay bearer the sum of two hundred and forty pounds, three, shillings and ninepence, with interest at 6 per cent., value received.

To William Jones, JOHN BROWN.

155, Change Alley, London, E.C.

In both the above "John Brown" is the person addressing the order, and "William Jones" is the person to whom the order is addressed. John Brown is said to draw upon William Jones, and he is called the "drawer". Conversely, William Jones is the "drawee" Hence an alternative name for a bill is "draft". If William Jones undertakes in the prescribed manner (as to which see section 17 (2), *post*, p. 86) to comply with the order, thereby making himself liable upon the bill, he is thereupon called the "acceptor". Hence a further alternative name for a bill, *viz.*, "acceptance". It will be observed that the document is in each case an order addressed to William Jones by John Brown, whose signature appears in the lower right-hand corner. In 12 the order is to pay a "specified" person, *viz.*, "Henry Robinson" or his order, and in 13 it is to pay to "bearer" a sum of money. The sum is to be paid in 13 "on demand", and in 12 at a "determinable future time", *viz.*, six months after date (or "after sight").

The foregoing complete the requirements of the Act, but certain features are to be remarked not demanded by the definition, but which are customarily to be found in bills:—

(i) The sum appears in figures at the top left-hand corner, as well as in words in the body of the bill. This is merely for the convenience, in computation and reference, of persons, such as bankers and brokers, who have to handle bills in bulk. It must be observed that the Act provides that

> "where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable"

(section 9 (2)).

(ii) The date of the bill appears (top right-hand corner). The convenience of dating the bill is obvious, *e.g.*, in example 12 for fixing the date when the bill "matures", *i.e.*, becomes payable. The Act provides, not only as to drawing, but also as to acceptance and indorsement, that

> "where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be"

(section 13 (1)) (*b*). Moreover, the date expressed need not be the actual date, or it may be a *dies non*, the Act providing that

> "a bill is not invalid by reason only that it is ante-dated or post-dated (*c*), or that it bears date on a Sunday"

(section 13 (2)). Nevertheless, however desirable dating may be,

> "a bill is not invalid by reason that it is not dated"

(section 3 (4) (a)) In such case the question is, what will be deemed to be its date for any purpose for which a date is necessary? "If there be no date it will be considered to be dated as of the time at which it was made, or, rather, it is suggested, at which it was issued" (Byles (*d*)). The latter suggestion receives support from the provision of the Act that upon an undated bill interest expressed to be payable runs from issue of the bill (see section 9 (3), *post*, p. 64, note (*r*)).

As to the insertion of date by the holder, see section 12, *post*, p. 97.

(iii) The place of drawing appears (top right-hand corner). *Inter alia*, this helps towards fixing the bill as "inland" or "foreign" (*post*, p. 169). However,

> "a bill is not invalid by reason that it does not specify the place where it is drawn or the place where it is payable"

(*b*) It is not usual, however, to express the date of acceptance or of an indorsement, except, in the case of acceptance, where the bill is payable a fixed period after sight (see *post*, p. 91, and s. 39 (1), *post*, p. 138)

(*c*) But post-dating may not be without its effects See article on post-dated cheques in Law Times newspaper, Vol. 186, p. 59. For the effect of post-dating a cheque in relation to holding in due course, see *post*, pp. 182, 183.

(*d*) Citing *De la Courtier* v. *Bellamy* (1860), 2 Shaw 428; *Hague* v. *French* (1802), 3 B. & P. 173; *Giles* v. *Bourne* (1817), 6 M. & S. 73.

(section 3 (4) (c)) (*e*). When the place of drawing does not appear, and it becomes necessary to ascertain it, it must be shown by extrinsic evidence.

(iv) The bills are expressed to be for "value received". This statement is superfluous In the first place, the Act provides that

"a bill is not invalid by reason that it does not specify the value given, or that any value has been given therefor"

(section 3 (4) (b)) Secondly, value is presumed (see section 30 (1), *post*, p. 112). Thirdly, value given for the bill upon any transfer thereof will cure absence of value on the original issue of the bill (see section 27 (2), *post*, p 113). Fourthly, "whether a bill expresses that value has been given or not extrinsic evidence is admissible between immediate parties and those in priority with them to impeach the consideration, and to show its absence, failure, or illegality" (Chalmers (*f*)).

(v) It will have been observed that stamping is also indicated in the above forms of bills. Stamping is not merely customary, but essential, and, in the case of inland bills, as a rule, before execution (*g*) A bill not stamped as required cannot be used in evidence except in criminal cases

We may now proceed to a detailed consideration of the minimum requirements of a bill, set out *ante*, p. 54.

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(*e*) Place of *payment* is frequently fixed by the form of acceptance, see examples 21 and 22, *post*, pp 90, 91

(*f*) Citing *Abbott* v *Hendricks* (1840), 1 M & Gr 791, at p 796 See further on this subject, *post*, Chap XI

(*g*) The details of the stamp laws as regards bills, cheques and notes lie outside of the scope of this treatise, but the reader may consult Byles, Chap IX, and Chalmers, Appendix II It may be mentioned, however, that the definition of bill in the Stamp Acts is wider than that in the Bills of Exchange Act, and that therefore an instrument may require to be stamped as a bill under the former, although it is not a bill within the meaning of the latter, and in fact may not be a negotiable instrument at all—see *Midland Bank* v *Inland Revenue Commissioners*, [1927] 2 K B 465, 96 L J K B 1006, 137 L T 817, 43 T L R 754 where an unstamped document devised by the bank to be used in place of a cheque in cases under £2, although not a bill of exchange, was held liable to be stamped as such under s 32 of the Stamp Act, 1891 It may be mentioned, further, that the stamp duty on a bill payable on demand, or at sight, or on presentation, or within three days after date or sight (which will include a cheque but not a promissory note, see *post*, p 266, note (*c*)), is 2d, while that on any other bill or promissory note is as follows not exceeding £10, 2d, exceeding £10 and not exceeding £25, 3d.; exceeding £25 and not exceeding £50, 6d, exceeding £50 and not exceeding £75, 9d, exceeding £75 and not exceeding £100, 1s, exceeding £100, for every £100, and also for any fractional part of £100 of such amount or value, 1s Finally, the fact that interest is payable by a bill does not affect the stamp

(1) *A Bill must be an Order.*

**"Order."**—A bill "must in its terms be imperative, and not precative" (Chalmers). A mere request is not sufficient; but a request may amount to a polite command, *e.g.*, in *Little* v. *Slackford* (1828), 1 M. & M. 171: "Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. Slackford", was held not to be a bill; while in *Ruff* v. *Webb* (1794), 1 Esp. 129, "Mr. Nelson will much oblige Mr. Webb by paying to J. Ruff, or order, twenty guineas on his account" was held to be a bill.

(2) *The Order must be Unconditional.*

**"Unconditional."**—The meaning of this expression may be elucidated by two contrasting decisions, both involving the familiar device by which the debtor who pays by cheque obtains a receipt upon the instrument itself by combining the cheque and form of receipt to be signed by the creditor in one document. In *Bavins* v. *London and South-Western Bank*, [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655, the intended cheque contained after the words "Pay, etc.", the words "Provided the receipt form at foot hereof is duly signed, stamped and dated". The case involved more than one point; but upon the point in question it was admitted in argument that the instrument was not a cheque since the bank could not pay, except conditionally, *i. e.*, upon obtaining the receipt of the payee. On the other hand, in *Nathan* v. *Ogdens* (1905), 93 L. T. 553; 21 T. L. R. 775 (*h*), the instrument contained at the foot the words, "The receipt at back hereof must be signed"; and it was held that, as they were not addressed to the bank, but to the payee, the bank was unaffected by them, the order to pay was unconditional, and the instrument was a cheque (*i*). In the same way in *Robert & Co.*

(*h*) Affirmed on appeal upon other points (1906), 94 L. T. 126; 22 T. L. R. 57.

(*i*) The signature to a form of receipt upon a cheque may operate as an indorsement of the cheque if the form so states. Where a customer desires to use cheques with receipt indorsed, the bank now requires an indemnity from the customer against the possibility of the instruments coming within *Bavins* v. *London & South-Western Bank*, *supra*, and so depriving the bank of the protection given to bankers set out in Chaps. XXI and XXII, *post*. The form of indemnity, however, presented to the customer for signature requires careful scrutiny as it is apt to be drawn in terms so wide as to protect the bank from acts or omissions not falling within the original purpose of the indemnity.

v. *Marsh*, [1915] 1 K. B. 42; 84 L. J. K. B. 388; 111 L. T. 1060, the words upon a cheque, "To be retained" (by which was meant that the cheque was not to be presented for payment until the fulfilment of certain conditions), were held not to render the order contained in the instrument conditional, as they were not addressed to the bank, but to the payee.

The Act itself makes express provision for certain cases on each side of the line drawn by the definition. On the one hand, it provides that

> "An order to pay out of a particular fund is not unconditional within the meaning of this section"

(section 3 (3)). An example is furnished by *Fisher* v. *Calvert* (1879), 27 W. R. 301, where M. gave to a creditor an order addressed to the trustee of his father's will to pay the creditor a sum "out of monies now due or hereafter to become due to me under the will of my late father and before making any payment to me thereout", and this was held not to be a bill (*k*). On the other hand, the sub-section continues

> "but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional".

In interpretation of (a) reference may be made to *Re Boyse* (1886), 33 Ch. D. 612; 56 L. J. Ch. 135; 55 L. T. 391, where the instrument contained, after the order to pay, the words "which you will please charge to my account and credit according to a registered letter I have addressed to you", and was held to be unconditional. And, again, in *Guaranty Trust Co. of New York* v. *Hannay*, [1918] 2 K. B. 623; 87 L. J. K. B. 1223; 119 L. T. 321, the order to pay was followed by a direction to charge the amount "to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton", and held to be unconditional. As regards (b), there has apparently been no decision upon the Act itself, but, as the provision in question merely embodied the previously existing rule, the case of

(*k*) But it was held to be an equitable assignment. It may be observed that, had the order been simply to the trustee to pay and reimburse himself out of the moneys in question, or to charge the sum against such moneys, it would have been unconditional within the later part of the sub-section and therefore a bill.

*Macleod* v. *Snee* (1728), 2 Stra. 762, may be called in aid. There the order to pay was followed by the words " as my quarterly half-pay due 1st February by advance ", and was held unconditional.

The general principle upon which this sub-section is founded would appear to be this: Will the holder of the bill be dependent for payment upon other than the solvency of the person to whom the order is addressed? If yes, then the order is conditional. Hence an order to pay out of a particular fund is conditional because it is dependent upon the existence or availability of the fund, as, for example, when made payable out of freight, which may never be earned or which, if earned, may be liable to a maritime lien (*Banbury* v. *Lisset* (1744) 2 Stra. 1211). On the other hand, the indication of a particular fund out of which the person ordered to pay is, after payment, to repay himself is a matter which cannot concern the holder of the bill. The same applies to the indication of a particular account to be debited, and, *a fortiori*, to a mere recital of the transaction which resulted in the bill.

(3) *The Order must be in Writing.*

**" Writing."**—The Act provides that

> " 'written' includes printed, and 'writing' includes print "

(section 2).

(4) *The Order must be addressed by one Person to Another.*

**" Person."**—The Act provides that

> " 'person' includes a body of persons whether incorporated or not "

(section 2). In other words, drawer, drawee, and payee may be, a partnership, or company, or corporation.

It is further provided by the Act that

> " the drawee must be named or otherwise indicated in the bill with reasonable certainty "

(section 6 (1)), so that if no drawee is mentioned a person who accepts it in that form is not liable *qua* acceptor (*Peto* v. *Reynolds*

(1854), 9 Exch 410), although such a bill may be treated by the holder as a promissory note and the acceptor sued as the maker (*Fielder* v *Marshall* (1861), 30 L J C P 158, *Mason* v *Luck* (1929), 140 L T 696, 45 T L R 363) (*l*) And where the drawee's name was omitted but his residence given, and he accepted the bill, he was held suable as acceptor, as presumably, the order was meant to be addressed to the occupant of such residence (*Gray* v *Milner* (1819), 8 Taunt 739)

It must be observed that although there may be several drawees, these must be joint, and cannot be alternative or successive

For example —

EXAMPLE 14

£250 Liverpool, 9th June, 1942

Six months after date pay to Charles Robinson or order two hundred and fifty pounds value received

To Ralph Tompkins and
Algernon Ross CHEERYBLE BROTHERS

is a bill, but if it were drawn upon "Ralph Tompkins or Algernon Ross" or upon "Ralph Tompkins and if he refuses to accept, then Algernon Ross" it would not be a bill

The Act provides that

> "a bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange"

(section 6 (2)) "Alternative or successive drawees would give rise to difficulty as to the recourse if the bill was dishonoured" (Chalmers (*m*)) But the addition of an alternative drawee in the shape of a "referee in case of need" (see section 15, *post*,

(*l*) Of course, if the drawee's name were filled in before the bill came to the hand of a *bona fide* holder for value, the latter could then sue the acceptor *qua* acceptor (see s 20, *post*, pp 93, 94)

(*m*) This difficulty does not arise in the case of a note, consequently the makers of a note may be liable jointly, or jointly and severally according to its tenour (s 85), while the acceptors of a bill can only be liable jointly" (Chalmers, and see *post*, p 267)

p. 97) may be made. But "his status is wholly different from that of an ordinary drawee" (Chalmers, and see *post*, p 98).

**"To Another."**—In the first place, the order must be directed to some person other than the drawer himself. Secondly, the other person must be a real person and one possessing capacity to contract by bill The definition of a bill provides clearly that the order in it must be addressed "by one person to another", but if the drawer addresses it to himself he is not addressing it to another, if to an unreal person, he is not addressing it to a non-entity; if to a person lacking in contractual capacity for the purpose of accepting a bill, he is addressing it to a shadow. A case in which drawer and drawee are the same person is provided by the familiar banker s draft (*n*) Examples of unreal drawee or drawee without the necessary contractual capacity are furnished by a bill drawn upon "Samuel Pickwick, Esq ", an invention of the drawer's (*o*), or drawn upon the "Chartered Institute of Froth Blowers", whose charter does not confer power to contract by bill and which is not a trading corporation

In such cases, however, the instruments are by no means nullities, the Act providing that

> "where in a bill (*p*) drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note"

(section 5 (2)) In these cases there is in effect no drawee, but the document is regarded as a promise to pay by the drawer, *i.e.*, as a promissory note In other words, the drawer who, in the case where there is an acceptor, is only secondarily liable on the bill and largely in the position of a surety for the acceptor (*post*, p 99), becomes primarily liable, like the maker of a promissory note (*post*, p 264) In *Miller* v. *Thomson* (1841), 3 M & Gr 576, a bank carried on business in London and

(*n*) *Post* Chap XXIV

(*o*) Although these may happen to assist a person of that name

(*p*) It is curious that the sub s should describe the instrument as a "bill" when the whole point of the sub-s is that the "holder" (not anyone else) may "treat" it as a bill (not that it shall be *deemed* a bill) The words "a bill" should read "an instrument in other respects a bill"

Liverpool, and the London branch drew a bill on the Liverpool branch, which was accepted by the latter. It was held that the holder could treat the bill as a promissory note made by the London branch and payable at the Liverpool branch. As to "fictitious person", a person may be fictitious, although there may actually exist some one of that name, and the question in such cases would appear to be whether the real person was actually intended by the drawer to be a party to the bill (*q*). "Not having capacity to contract" must, obviously, mean not incapacity to contract at all but incapacity to contract by bill. On this, see section 22, *post*, pp. 77 *et seq*.

(5) *A Bill must be Signed by the Drawer.*

"**Signed.**"—The drawer's signature need not be appended at the time the bill is drawn; for example, the Act expressly provides that acceptance may take place before signature by the drawer (see section 18 (1), *post*, p. 87), but until this is done the bill is inchoate only and ineffective. In *M'Call* v. *Taylor* (1865), 34 L. J. C. P. 365, it was held that no action could be brought by the holder against the acceptor upon a bill unsigned by the drawer.

For what constitutes signature and as to signature by agent, etc., see *post*, pp. 79, 80.

(6) *The Order must be to pay Money.*

"**Money.**"—This means *in specie* or currency, *i.e.*, in legal tender, *e.g.*, an order to pay in "East India Bonds" would not comply with the rule (Buller's Nisi Prius (7th ed.) 272*b*). But the money need not be expressed in English currency, even in the case of an English instrument (see *Cohn* v. *Boulken*, *post*, p. 64). And the order must be for the payment of money only. For example, in *Martin* v. *Chauntry* (1747), 2 Stra. 1271, an order to pay money and to deliver up a wharf and horses was held not to constitute a bill. Again, an order to pay money and also hand over a security would not be within the rule (*Follett* v. *Moore* (1849), 19 L. J. Ex. 6). An order to pay money or, in the alternative, to do something other than the

(*q*) The meaning of "fictitious" is more fully discussed in connection with s. 7 (3) (fictitious payee), upon which the cases have arisen. See *post*, p. 72

payment of money, is not a bill (*Smith* v. *Boheme* (1724), Gilbert, Cases in Law and Equity (ed. 1760), 93, cited 2 Lord Raymond's Reports, at p. 1396).

(7) *The Order must be for a Sum Certain.*

"**Sum Certain.**"—"And the sum must be certain, not susceptible of contingent or indefinite additions" (Byles); *e.g.*, a sum of "£65 and all other sums which may be due" would not be within the rule (*Smith* v. *Nightingale* (1818), 2 Stark. 375); nor would a sum "and all fines according to rule" (*Airey* v. *Fearnsides*, 4 M & W. 168; 7 L. J. Ex. 288; 2 Jur. 596); nor where the order to pay a sum "first deducting thereout" moneys due to the drawer (*Barlow* v. *Broadhurst* (1820), 4 Moore C. P 471). But a sum is not uncertain because expressed in foreign currency, *e.g*, a cheque drawn in England on an English bank, for "7,680 francs (Paris)", was held valid (*Cohn* v. *Boulken* (1920), 36 T. L. R. 767)

It is specifically provided by the Act that

> "the sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—(a) with interest (*r*); (b) by stated instalments; (c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; (d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill"

(section 9 (1)). (a) is illustrated by example 13 (*ante*, p. 55), (b), (c) and (d) are shown in the following:—

EXAMPLE 15.

**£300:0:0** **Sheffield, 4th June, 1920.**

**On demand pay to my order the sum of three hundred pounds by three equal quarterly instalments on the 4th Sept. 1920, 4th Dec. 1920, and 4th March, 1921, value received.**

To Colin Carnt, HARRY CARNT.
Old Street, London, E.C.

(*r*) "Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof" (s 9 (3)). "When the rate of interest is not expressed, five per cent. is understood" (Chalmers).

### EXAMPLE 16.

£500. London, 5 May, 1929.

*On demand pay to me or my order the sum of five hundred pounds value received by five equal monthly instalments on the 5th of each month the first instalment being payable on the 5th June, 1929, and upon default in the payment of any instalment the whole balance then unpaid to become forthwith due and payable.*

To Lord Fitznooks HOWARD DE MONTMORENCY.
The Moat,
Wessex.

### EXAMPLE 17.

£200 0 0. London, 7th July, 1929.

Pay to our order or bearer the sum of five hundred pounds payable in London or Paris at the option of the holder according to the course of exchange upon Paris.

To Messrs. Schaffer & Co., GOLDBLUM & WILLIAMS.
London & Paris.

### (8) *The Sum must be payable* (a) *on demand or* (b) *at a fixed or determinable future time*

**"On Demand."**—The Act provides that

"a bill is payable on demand: (a) which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed" (s)

(section 10 (1)). As to (a), see example 13 (*ante*, p. 55), and read "at sight" and "on presentation" as alternatives to "on demand". As to (b), see example 17 (*supra*). In such a case it is not necessary, in order to sue the drawer or antecedent indorsers, to present the bill for acceptance, and afterwards make demand for payment or give a further view of the bill or present for payment, as the case may be, since no presentment for

(s) A bill, otherwise within the sub-s., is not taken out of the sub-s. because it happens to be post-dated: *Robinson* v. *Benkel* (1913), 29 T. L. R. 475.

acceptance is necessary (see section 39, *post*, p. 138). The Act further provides that

> "where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand"

(section 10 (2)).

**"At a fixed or determinable Future Time."**—It is provided by the Act that

> "a bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable —(1) at a fixed period after date or sight; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain"

(section 11). As to (1), see example 12 (*ante*, p. 54); as to (2), see *Colehan* v. *Cooke* (*infra*). With reference to (1), it will be observed that a bill cannot be drawn "*after* sight" merely, but must state a period after sight for payment. "The expression *after sight* on a *bill of exchange*, means after acceptance, or protest for non-acceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way (*t*) But if a *note* is made after sight, the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker (*u*); for a note being incapable of acceptance, the word 'sight' must, on a note, bear a different meaning from the same word on a bill" (Byles). In other words, in the case of a promissory note, the mere execution of the document is not "sight". An instance of an instrument good within (2) is furnished by *Colehan* v. *Cooke* (1742), Willes 393; 2 Str. 1202, where it was held that a "note to pay to A or order, six weeks after the death of the maker's father, is a negotiable note, for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight". On the other hand, in *Beardsley* v. *Baldwin*, 2 Str. 1151; 7 Mod. 417, it was decided

(*t*) Per Lord Kenyon in *Campbell* v. *French* (1795), 6 T. R. 200, at p. 212.
(*u*) *Holmes* v *Kerrison* (1810), 2 Taunt. 323.

that a note to pay money within so many days after the maker should marry was not negotiable.

The Act further provides that

> "an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect"

(section 11). By "contingency" is here meant an event which may or may not happen, *e g.*, marriage, as in *Beardsley* v. *Baldwin*, *supra*. An illustration of what is meant would be as follows: A bill is expressed to be payable six months after marriage. Marriage takes place. The time of payment has now become certain and determinable. Nevertheless the bill could not be sued on as a bill. The Court would regard the matter as it would have appeared at the time the bill was made.

It must be observed that if a bill names alternative times for payment, one of which is contingent, *e.g.*, "ninety days after sight, or when realised", the bill is bad, as the latter alternative makes the sum payable on a contingency (*Alexander* v. *Thomas* (1851), 16 Q. B. 333).

### (9) *The Bill must be payable* (a) *to or to the order of a Specified Person or* (b) *to Bearer.*

**"To or to the Order of."**—The Act provides that

> "a negotiable (*v*) bill may be payable either to order or to bearer"

(section 8 (2)), and that

> "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable"

(section 8 (4)). A bill will thus be payable to order when it is made payable "to X or order", or "to the order of X", or, simply, "to X". This, however, is subject to the instrument not being made non-transferable by its terms. As to this the Act provides that

> "when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable,

(*v*) See note on next page.

it is valid as between the parties thereto but is not negotiable " (*v*)

(section 8 (1) ). Having regard to the sense in which the word " negotiable " is used in the Act, the words " but is not negotiable " seem redundant, and the provision merely to come to this, that if the instrument itself provides that it shall not be transferable at all, it is not transferable by delivery (*w*). And, of course, there is no reason why its validity as between the actual parties to the instrument should be affected by the fact that it is not transferable The real question that arises in each case is as to the sufficiency of the words employed to prohibit transfer or indicate an intention of non-transferability. If the instrument states in so many words that it is not to be transferable or, if it states that it is payable to none other than the payee mentioned (*e.g* , " to X only " or " to payee only ") no trouble can arise. But sometimes words are used which are in themselves ambiguous, or two expressions are used. one of a prohibitory nature, the other suggestive of transferability, and then occurs a difficulty of interpretation. In *Hibernian Bank* v. *Gysin & Hanson*, [1939] 1 K B. 483; 108 L. J. K. B. 214; 160 L. T. 233; 55 T. L. R. 347, a bill was made payable " *to the order* of the Irish Casing Company Limited *only* " and it was crossed (*x*) " not negotiable ". The Court had no difficulty in holding that as the instrument was a bill and not a cheque, the expression " not negotiable " had *prima facie* the same meaning as in section 8 (1) of the Act (*supra*), not, as was argued, the same meaning as in section 81 (*post*, p. 242) which relates exclusively to cheques, and that the expression was equivalent to non-transferable. The Court had, however, to consider also the

(*v*) As these are the earliest occasions on which the word is employed in the Act, its restricted meaning, *i e.*, transferable by delivery, should be noted—see note, *ante*, p 46.

(*w*) And in whatever sense the term " negotiable " is used, the instrument cannot be negotiable, since transferability by delivery is fundamental to the conception of a negotiable instrument—see *ante*, Chap. II.

(*x*) It should be observed that in the case of a bill (or promissory note) there appears no special significance in writing words across the instrument, whether between or without transverse lines—the words might just as well be written in the body of the instrument and the transverse lines have, it is submitted, no meaning The case is different in relation to cheques, where the manner and effect of crossing are defined and limited in ss. 76 to 82 (*post*, Chap XXII) relating to crossed cheques effect of the words "to the order of . . . only" italicised above. It was argued that as these were words of transfer they, in effect, negatived the words "not negotiable" and made the intrument transferable. The Court held that (without stressing the word "only" which appeared to make the phrase equivalent to "payee only") the words in question were governed by the words "not negotiable" and were insufficient to render the instrument transferable. In an earlier case, *National Bank* v. *Silke*, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199; 63 L. T. 787, the question had arisen in a different form A cheque, payable to the order of J Moriarty, was crossed "Account of J. Moriarty, Esq., National Bank, Dublin". The payee paid it into his account at the bank referred to and, being overdrawn, the bank became holders for value. The cheque had been obtained by the payee from the drawer by false pretences. The drawer's bank dishonoured the cheque, and the National Bank thereupon sued the drawer. The drawer set up that the above words prohibited transfer, and that the National Bank was, therefore, not the "holder" so as to be entitled to sue the drawer as holder in due course It was held that the words in question were merely a direction to the National Bank to place the proceeds of the cheque to the account of the payee, and were not prohibitive of transfer within section 8 (1), *ante*, pp. 67, 68.

**"To a Specified Person."**—In order to be "specified" the person must be designated with some certainty, the Act providing that

> "where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty"

(section 7 (1)). "Reasonable certainty" means reasonable certainty on the face of the bill. A latent uncertainty may be explained by extrinsic evidence, but if the uncertainty is patent, *i.e.*, apparent on the face of the bill, extrinsic evidence to explain it is not admissible (z). Hence where the payee is wrongly named, evidence is admissible to show the person intended (*Willis*

(z) This is in accordance with the general rule as to the admissibility, or otherwise, of extrinsic evidence to explain ambiguities in documents.

v. *Barrett* (1816), 2 Stark. 29), and this would apply, where the payee is designated by description only (*Holmes* v. *Jacques* (1866), L. R. 1 Q. B. 376); while, on the other hand, in the case of a bill payable to "—— or order", it was held that evidence was not admissible to fill in the blank (*R.* v. *Randall* (1811), Russ. & R. 195), the uncertainty here being patent (*a*). In *Chamberlain* v. *Young*, [1893] 2 Q. B. 206; 63 L. J. Q. B. 28; 69 L T. 332, a bill in the form "pay to —— order" (not "—— *or* order", as in *R.* v. *Randall*, *supra*) was held to be valid, the Court, ignoring the blank, read the words in question as "pay to order" and treated them as equivalent to "pay to my order", *i.e.*, to the order of the drawer and in accordance with section 5 (1) (*post*, p. 71). In *Daun and Vallentin* v. *Sherwood* (1895), 11 T. L. R. 211, where a promissory note ran, "We separately and conjointly promise to pay the day after demand", it was held that the note ought to be treated as payable to bearer. It will be observed that neither in *Chamberlain* v. *Young* nor in *Daun and Vallentin* v. *Sherwood* was there any question of the admission of extrinsic evidence. In the earlier one the Court regarded the bill as having indicated the payee with reasonable certainty. In the later case the Court regarded the note as payable to bearer. Both instruments fell, therefore, within section 7 (1). Where the payee is designated by description only, he must be a person capable of being ascertained at the time the bill was drawn, and not one who can only be ascertained when the time for payment arrives (*Yates* v. *Nash*, 8 C. B. (N.S.) 581; *Cowie* v. *Stirling*, 6 El. & Bl. 333) (*b*). The Act, however, makes one exception in the provision that

> "a bill may also be made payable to the holder of an office for the time being"

(section 7 (2)), *e.g.*, "the Secretary of the X Company", or "the Treasurer of the Y Hospital" (*c*).

(*a*) If the blank occurred through an error instead of deliberately, the Court might perhaps rectify by filling it in (see *In the Goods of Boehm*, [1891] P. 247), but that would not be the clearing up of a patent ambiguity, but the rectification of a document on the ground of mistake.

(*b*) In referring to these two cases, however, it must be borne in mind that, although the general principle enunciated therein still holds good, the decisions themselves would, on the actual facts, be different to-day, owing to the provision in the Act next set out in the text.

(*c*) Business firms frequently fill in the blank for the payee's name in an uncrossed cheque form with some word indicative of the purpose for which the

The "specified person" may be the drawer himself or the drawee himself, the Act providing that

> "a bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee"

(section 5 (1)). In other words, the drawer and payee (see example 15, *ante*, p. 64), or the drawee (or acceptor) and payee (thus "pay to yourself or order"), may be the same person. The latter may occur "when the drawee acts in two different capacities, *e.g.*, if he be in business on his own account, and also agent for some other person's interest in the bill (*d*). In such case it is clear that the instrument is not a bill which can be enforced until the drawee has indorsed it away (*e*) (Chalmers). Another example of drawee and payee as the same person is furnished when a customer draws a cheque upon his banker in favour of the banker himself, as is sometimes done in obtaining a banker's draft. See *post*, Chapter XXIV, p. 253.

Joint or alternative persons may be specified, the Act providing that

> "a bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees"

(section 7 (2)). For example, "pay to Henry Robinson and Frederick Chalmers", or "pay to Henry Robinson and Frederick Chalmers or either of them", or "pay Henry, Frederick, or Charles Robinson or the order of either of them".

The "specified person" may be fictitious or non-existent. See section 7 (3), *post*, p. 72.

A bill is payable to a "specified person", although not expressed to be payable to him, but to his order, the Act providing that

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money is required, *e.g.*, "wages" or, most frequently, "cash". In such cases the purported payee is not a person, specified or otherwise, and therefore the instrument is not a bill or cheque. Banks, however, treat it simply as a direction to them to pay the cash to the bearer of the document, without any indorsement, and they have been held entitled to do so—*North & South Insurance Corporation* v. *National Provincial Bank*, [1936] 1 K. B 328; 105 L. J. K. B. 163, 154 L. T. 255: 52 T. L. R. 71.

(*d*) See *Holdsworth* v. *Hunter* (1830), 10 B. & C. 449.

(*e*) Cf. *R.* v. *Bartlett* (1841), 2 M. & R. 362.

> "Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option"

(section 8 (5) ), *i.e.*, "to the order of X" = "to X or order" and "to my order" = "to me or my order" (see examples 15 and 16, *ante*, pp. 64, 65).

**"To Bearer."**—The Act provides that

> "a bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank"

(section 8 (3) ). For examples of bills payable to bearer, see example 13, *ante*, p. 55, and example 17, *ante*, p. 65 As to what is meant by an "indorsement in blank" see section 34 (1), *post*, p. 120.

Further,

> "where the payee is a fictitious or non-existing person (*f*), the bill may be treated as payable to bearer"

(section 7 (3) ). The importance of this provision lies in this—that the forgery of the indorsement of such a fictitious or non-existent payee will not affect subsequent holders, as, the bill being deemed payable to bearer, such indorsement is merely superfluous. In other words, so far as indorsement by the payee is concerned, the bill will not come within the operation of section 24 (*post*, p. 80). It has been held that a payee may be "fictitious", although the name may be that of an actually existent person In other words, whenever a name is inserted in a bill as that of payee by way of pretence merely, without any intention that payment shall be made in conformity therewith, the payee is a "fictitious" person within the meaning of the provision. Whether this is the case is to be decided upon the particular facts In *Bank of England* v. *Vagliano Bros.*, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353, a clerk of Messrs. Vagliano made out bills of exchange in the name of a customer

(*f*) In connection with the drawee, the expression used is merely "fictitious person" (see *ante*, p. 62), and the expression "fictitious or non-existing person" occurs only in the above sub-section. It is dificult to see how the latter expression enlarges the former.

of his employers as drawer, and the names of other customers as payees, and by an elaborate scheme of deception obtained Messrs. Vagliano's signature as acceptors. The bills were accepted "payable at the Bank of England", at which bank Messrs. Vagliano kept their account. Upon the bills maturing, he obtained payment of them from the Bank across the counter by forging the indorsement of the payees. It was held that the payees, although in a sense actual persons, were nevertheless "fictitious" within the meaning of section 7 (3); and further, that the fact that the acceptors were not cognisant of the fictitious character of the payees did not prevent the operation of that sub-section. The bills were therefore to be deemed payable to bearer, and the Bank had not really paid upon a forged indorsement. Consequently the loss fell upon Messrs. Vagliano (g) Again, in *Clutton* v. *Attenborough*, [1897] A. C 90; 66 L. J. Q. B 221; 75 L. T. 556, a clerk represented that B had done work for his employer, and got his employer to sign cheques in favour of B. The clerk forged B's indorsement, and negotiated the cheques to the defendant, who took them in good faith and for value. The defendant obtained payment from the employer's bank. It was held that the employer could not recover back the amount of the cheques from the defendant, as the defendant did not have to rely upon a forged indorsement, but upon section 7 (3): B, although an actual person, was in this connection a fictitious person, which made the cheques bearer cheques and therefore negotiable by mere delivery without indorsement within section 31 (2) (*post*, p. 118). On the other hand, in *Vinden* v. *Hughes*, [1905] 1 K B. 795; 74 L. J. K. B. 410, it was the duty of a cashier to fill up cheques in favour of customers of the firm for amounts due to them, obtain the firm's signature to the cheques, and post them to the customers. The cashier filled in a number of cheques with the names of customers for various amounts, obtained the firm's signature thereto, forged the indorsements, and negotiated them with H. H, who took in good faith and for value, obtained payment of the cheques from the

(g) A later chapter may be anticipated here by the observation that, had the instruments been payable on demand or crossed cheques, the bank could further have claimed the protection of s 60 (*post*, p. 230) or s. 80 (*post*, p. 240), as the case might be.

firm's bankers. The firm now claimed the amount thus obtained from H. H's contention was that the forged indorsement could be disregarded, and the cheques regarded as payable to bearer in accordance with section 7 (3). It was held that the question of whether a name filled in as payee was that of a fictitious or non-existing person was to be decided upon all the circumstances of the particular case, and that in the present case the payees could not be regarded as fictitious or non-existing. And, again, in *North and South Wales Bank* v. *Macbeth*, [1908] A. C. 137; 77 L. J. K. B. 464; 98 L T. 470, M was induced by W to draw a cheque in favour of K. When M signed the cheque he intended it for K or his transferee. W forged the indorsement, and transferred to a holder in due course. It was held, following *Vinden* v. *Hughes* (*supra*), that K was not a fictitious person. Distinguishing *North and South Wales Bank* v. *Macbeth* from *Bank of England* v. *Vagliano Brothers*, and *Clutton* v. *Attenborough* (*ante*, pp. 72, 73), the Court pointed out that *Bank of England* v. *Vagliano Brothers* was a case in which the drawer never intended the payee to receive the proceeds of the bill, while in *Clutton* v. *Attenborough* the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque; and it adopted the following as the rule: "When there is a real drawer who has designated an existing person as the payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious." And once a real payee, always a real payee: *e.g.*, in *Goldman* v. *Cox* (1924), 40 T. L. R. 744, C. A., the plaintiff signed cheques made out by his clerk in favour of "A. Cohen" to whom the plaintiff owed money for goods supplied. The clerk inserted an "S" in the name of the payee (so that it read "S. A. Cohen"), forged the indorsement and got the defendant to cash the cheques. The defendant obtained payment of the cheques from the plaintiff's bank. It was held that where, before signature, a bill is made payable to a real payee, such payee is not converted into a "fictitious or non-existing person" by an unauthorised alteration in the name, and therefore the plaintiff was entitled to recover from the defendant the amount of the cheques as money had and received by the defendant to the use of the plaintiff.

When a bill is payable to bearer, the question arises as to who is to be recognised as answering to that description. Upon this the Act provides that

> "'bearer' means the person in possession of a bill or note which is payable to bearer" (*h*)

(section 2). It must be observed, therefore, that if A is in possession of a bill drawn, or by indorsement made, payable to A, A is the "holder" (*i*) of the bill, but not the "bearer". To make himself the latter he must bring himself within the latter part of section 8 (3) (*ante*, p. 72) by indorsing the bill in blank.

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(*h*) Or, presumably, which may be treated as payable to bearer by virtue of section 7 (3) (*ante*, p. 72).

(*i*) As to meaning of "holder", see *post*, p 130

# CHAPTER X.

## THE PARTIES TO A BILL.

In this connection we shall consider—(I) who are the parties to a bill, (II) who are capable of becoming parties, and (III) how a person makes himself a party.

### I.—*Who are the Parties to a Bill.*

A person may be liable upon a bill in one or more of the following capacities—drawer, acceptor, indorser

**Drawer.**—The drawer is, of course, the person who has addressed the order contained in the bill (see *ante*, pp. 54, 55).

**Acceptor.**—The acceptor is the drawee (*i.e.*, the person to whom such order has been addressed) after he has undertaken in the prescribed manner to obey the order (*ibid.*).

**Indorser.**—An indorser is primarily the holder who signs a bill, originally or subsequently made payable to his order, for the purpose of putting it into a proper state for transfer by delivery (*post*, p. 119), and the Act defines "indorsement" as

"an indorsement completed by delivery"

(section 2). But the term is also employed to include a "stranger", *i.e.*, a person not a party to the bill, who signs a bill with the intention of making himself liable upon it to a holder, *e.g.*, the bearer (whether in the case of a bill originally made payable to bearer or in the case of a bill which has become payable to bearer by "indorsement in blank" (see *post*, p. 120) or a complete outsider. Such a "stranger" to the bill is said to "back" the bill, although it is not essential that the signature which constitutes such "backing" should be on the back of the bill (*Ex p. Yates* (1858), 2 De G. & J. 191). See further as to such *quasi*-indorsement, *post*, pp. 105, 106.

II.—*Who are capable of becoming Parties to a Bill.*

**Capacity of Parties** (*a*).—The Act provides that

> "capacity to incur liability as a party to a bill is co-extensive with capacity to contract"

(section 22 (1)). That is to say, merely, that a person unable to contract cannot contract upon a bill. (For such persons, see *ante*, Part I, Chapter V.) But although such a person cannot be made liable as a party, he may act effectively as drawer and sue on the bill, and may give a good title to it by indorsement This rule is general, although the Act enacts it expressly only in two cases, in providing that

> "where a bill is drawn or indorsed by an infant, minor (*b*), or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto"

(section 22 (2)). A few remarks may be devoted to these two classes of persons.

**Infants.**—An infant may sue on a bill (*Warwick* v. *Bruce* (1813), 2 M. & Sel. 205), but he cannot be made liable upon a bill, even though the bill be given by way of payment in a transaction upon which the infant could have been, and can be, sued, *e.g.*, the supply of necessaries (*Re Soltykoff*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339). In other words, although he may be liable, in a proper case, upon the consideration for the bill, he cannot be sued upon the bill itself. This applies even though he misrepresented himself as of full age upon giving the bill, as to make him liable in such case by estoppel would defeat the rule (*Bartlett* v. *Wells* (1862), 1 B & S. 836; *Ex p. Jones* (1881),

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(*a*) Sometimes confused are "capacity" to make oneself a party to a bill, and "authority" to make someone else a party "Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law Authority is derived from the act of the parties themselves. Want of capacity is incurable Want of authority may be cured by ratification Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact" (Chalmers). The main provisions of the Act relating to authority will be found in s. 3 of the present Chapter, *post*, pp. 79 *et seq*.

(*b*) Scots for "infant".

18 Ch. D 109). A person cannot after attaining his majority ratify a bill given during infancy (Infants' Relief Act, 1874, s. 2), or accept a bill for a debt incurred during infancy upon which he was not liable (*Smith* v. *King*, [1892] 2 Q. B. 543; 67 L. T. 420), or be made liable upon a bill given before attaining his majority, but post-dated to a date afterwards (*Hutley* v. *Peacock* (1913), 30 T. L. R 42); but he would apparently be liable *to a holder in due course* upon a bill given after attaining his majority in payment of a debt, whether good, void, or voidable, contracted during infancy (*Belfast Banking Co.* v. *Doherty* (1879), 4 Ir L. R. C L. 124), except where such debt was in respect of a loan (Betting and Loans (Infants) Act, 1892, s 5). Except where otherwise indicated, all the foregoing applies even against a "holder in due course" (*c*).

**Corporations.**—In order to make a corporation liable upon a contract it is necessary, first, that the constitution of the corporation should expressly or impliedly invest it with the power to enter into such contract; and, secondly, that the contract should be entered into in such form as is requisite to bind a corporation or that particular class of corporation The former of these rules is preserved in the case of bills by the provision in the Act that

> "nothing in this section (*d*) shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations"

(proviso to section 22 (1)). The topic appertains to the general subject of "*ultra vires*" (*e*), but the rule as applicable to bills may be stated thus: "Without a special authority, express or implied, a corporation has no power to make, accept, draw, or indorse bills or notes. Such authority will be implied in the case of a company incorporated for the purposes of trade, the very object of whose institution requires that it should exercise

(*c*) For definition of this term, see *post*, Chap XVII

(*d*) *I e*, s 22

(*e*) The rule which, subject to exceptions, renders void the undertakings of persons and associations which derive their powers from statute when such undertakings exceed the powers so derived. See further on this doctrine, Encyclopædia of the Laws of England, *sub tit* "*Ultra Vires*" this privilege " (Byles). Whether the privilege is one required for the purposes of the trade of the company, or whether the company is trading within the meaning of the foregoing rule, is a question of construction in each case. Thus a company formed under the Joint Stock Companies Acts for the purpose of working a railway concession abroad was held to have an implied power of binding itself by bill (*Re Peruvian Rys.* (1867), L. R. 2 Ch. App. 617; 36 L. J. Ch. 864) (*f*); while the contrary was held in the case of a company incorporated by a private Act to construct and work a railway in England (*Bateman* v. *Mid-Wales Ry.* (1866), L. R 1 C. P. 499; 35 L. J. C. P. 205). The rule applies to ordinary limited liability companies formed for trading purposes, although they invariably expressly take the necessary powers in their memorandum of association. As in the case of infants, the fact of drawing or indorsing by a corporation, as to whom such act is *ultra vires*, does not affect the liability of other parties to the holder (see section 22 (2), *ante*, p 77).

As to the form in which a corporation binds itself as a party to a bill, see section 91 (2), *post*, p. 85.

III.—*How a Person becomes a Party to a Bill.*

Two things are necessary before a person becomes bound as a party to a bill, (A) signature, (B) delivery of the instrument.

(A) *Signature.*

The Act provides expressly that

"no person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such"

(section 23).

**May be by Mark, etc.**—The signature may be by mark (*George* v. *Surrey* (1830), M. & M. 516), and perhaps by means of an instrument such as an impress or lithograph stamp (*Re London and Mediterranean Bank* (1868), L. R. 3 Ch. App., at p. 654)

(*f*) Apart from this, it was held in the case that the power conferred by the memorandum of association to do everything incidental or conducive to the main object of the company was sufficiently wide to cover the issue of negotiable instruments.

**Need not be by Party himself.**—The signature need not be written by the person to be made liable, the Act providing that

> "where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority"

(section 91 (1)). This provision has nothing to do with the question of signature by an agent or purported agent, "on behalf of" or "per procuration" or "as attorney for". It relates to the writing on a bill by B of a signature purporting to be that of A. If the act was authorised by A, the signature is effective for all purposes as the signature of A. If not authorised by A the position is as stated below.

**Forged or Unauthorised Signature.**—Where, however, a person's signature is written upon a bill without his authority, such signature is ineffective, the Act providing that

> "subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded (*g*) from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery"

(section 24). With reference to the expression "subject to the provisions of this Act", section 54 (2) (*post*, p. 102) estops the acceptor from denying the genuineness of the drawer's signature, and section 55 (2) (b) (*post*, p. 105) estops an indorser from denying the genuineness of the drawer's signature, in each case as against a "holder in due course" (*h*). Further, sections 60 (*post*, p. 230), 80 (*post*, p. 240), and 82 (*post*, p. 242)

(*g*) *I.e.*, is estopped. "Precluded" was used in the Act because the word "estopped" was not known to Scots law.

(*h*) For definition, see s. 29 (1), *post*, p. 180.

give protection to bankers in relation to the payment of bills payable on demand, and crossed cheques, with forged indorsements. Upon the proviso to the section, it should be observed that an unauthorised signature may be ratified, but not a forged one (see *ante*, Part I, Chapter V). And an unauthorised signature will amount to forgery if placed upon the bill for a fraudulent purpose, see *Robinson* v. *Midland Bank* (1925), 41 T. L. R. 402 (C. A.), where conspirators obtained a cheque from A in favour of B, specially indorsed (*i*) it to C, indorsed it with C's name, opened an account in name of C at defendant bank, and drew upon the account by means of cheques purporting to be signed by C. The conspirators acted without authority from B or C, but C afterwards purported to ratify. It was held that he could not do so as the use of his name amounted to forgery (*k*). And see *Kreditbank Cassel* v *Schenkers*, [1927] 1 K. B. 826; 96 L J. K. B. 501; 136 L. T. 716; 43 T. L. R. 237, where the defendants' branch manager fraudulently drew bills in the name of the defendants and gave them in payment of goods supplied to a company in which he was interested. The signatures placed by the manager upon the bills were held to be forgeries.

In spite of the above provision a person here may acquire a good title to a bill negotiated by means of a forged indorsement abroad in a country where a person may acquire a good title through a forged indorsement (see section 72 (2), *post*, pp. 218, 219). See also *ante*, pp. 72—74, as to forgery of indorsement of fictitious or non-existing payee.

**Trade or Assumed Name.**—The Act further provides that

> "where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name"

(section 23 (1)) (*l*).

(*i*) For meaning of special indorsement, see *post*, pp 120, 121

(*k*) But although a forged signature (or one amounting to forgery) cannot be ratified or adopted, it may be treated as genuine by the party whose signature has been forged so as to estop him from denying the genuineness of the signature, and, therefore, render him liable to subsequent holders of the bill; see *Leach* v. *Buchanan and Greenwood* v *Martins Bank*, *ante*, pp. 38, 39

(*l*) As to enforcing a bill in a trade name, see *post*, p. 133, note (*i*).

**In Name of Firm.**—Also

> "the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm"

(section 23 (2)). The firm will, however, only be bound if the partner has express or implied authority to execute bills on behalf of the firm. Whether a partner has or has not such implied authority depends upon the nature of the partnership business. Generally, a partner in a "trading" concern has such implied authority, provided, however, that the delivery and accepting of bills is normally necessary to a concern of that nature. It might, *e.g.*, be held either way in a mining concern, the circumstances varying (cf. *Greenslade* v. *Dower* (1828) 7 B. & C. 635, and *Dickinson* v. *Valpy* (1829), 10 B. & C. 128, with *Brown* v. *Kidger* (1858), 3 H. & N. 853, at p. 859). But a partner in a non-trading business has not such implied authority, *e.g.*, a member of a firm of solicitors (*Hedley* v. *Bainbridge*, 3 Q. B. 316; 11 L. J. Q. B. 293) (*m*).

**Signature "per procuration".**—The case of signature "per procuration" is provided for by the Act thus,

> "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority"

(section 25). In *Reid* v. *Rigby*, [1894] 2 Q. B. 40; 63 L. J. Q. B. 451, the manager of the defendant (trading as "Rigby & Co.") signed a cheque "Rigby & Co., 'per pro' J. Allport, Manager". The plaintiff cashed the cheque, and the manager employed the proceeds for the benefit of the defendant's business. The manager had no authority to sign cheques. It was held that the plaintiff could not recover on the cheque (*n*). In *Morrison* v. *Kemp* (1912), 29 T. L. R. 70,

(*m*) It should be observed that "All cheques are bills of exchange, but all bills of exchange are not cheques; therefore an authority to draw cheques will not necessarily include an authority to draw bills" (Chalmers).

(*n*) It was held, however, that the plaintiff could recover the amount of it as money received by the defendant to the use of the plaintiff. It should be observed also that the manager might be liable personally for a false representation of fact in representing himself as having authority to sign: *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360; 53 L. J. Q. B. 345; 50 L. T. 656.

A, a manager in the service of the plaintiffs, who were insurance brokers, gave cheques drawn "per pro" the plaintiffs to the defendant in payment of his (A's) racing debts. A had authority to sign cheques "per pro" the plaintiffs for the purposes of the latter's business. There was no evidence that the plaintiffs had held out A as having authority to draw the cheques in question. It was held that the plaintiffs were entitle to recover the amount of the cheques from the defendant inasmuch as the defendant must be taken to have had notice that the cheques were signed for purposes outside the plaintiff's business, and that A had only power to draw cheques confined to that business. A signature by an attorney is a signature "by procuration", and the principal is not liable unless the power of attorney clearly authorises the signature (*Midland Bank* v. *Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 297; 148 L. T. 374; 48 T. L. R. 271 (*o*)).

**Agents and Representatives.**—As regards agents or representatives, the Act provides that

> "where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon"

(section 26 (1)). But he must be careful to make it clear that he is not merely an agent or representative, but is actually signing as such, the Act providing that

> "the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability"

(*ibid.*) (*p*). For example, in *Landes* v. *Marcus* (1909), 25 T. L. R. 478, a cheque drawn in favour of the plaintiff was stamped near the top with the words "B Marcus & Co., Limited". It was signed thus, "B. Marcus, Director, S. H. Davids, Director". It was held that these two directors were

(*o*) It was further held that the position was unaffected by the presence in the power of the usual undertaking that the principal would ratify "whatever the attorney shall do or purport to do by these presents", as such an undertaking does not extend the actual authority given by the power.

(*p*) See also s. 31 (5), *post*, p. 128, enabling a person *under obligation* to *indorse* in a representative capacity to negative expressly his personal liability.

personally liable on the cheque. On the other hand, in *Chapman* v. *Smethurst*, [1909] 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465, the execution of a note appeared thus: "J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director", and it was held that J. H. Smethurst was not personally liable It will be observed that the difference in the two cases was that in the latter the name of the company immediately against the signature of the director made it reasonably clear that the latter had signed as agent and not otherwise (*q*).

**Ambiguous Signature by Agent.**—Signature by an agent is sometimes ambiguous in that it is a question whether the signature is to be regarded as that of the principal by the hand of the agent, or that of the agent naming a principal. The Act provides for such cases as follows:—

> "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted"

(section 26 (2)) (*r*). For example, since a bill cannot be accepted (except "for honour") by other than the drawee (see observations on section 17 (1), *post*, p. 86), the signature in acceptance would be presumed to be that of the principal, so as to provent the bill from being void. Evidence of the circumstances under which the bill was given is admissible to construe the language of the parties used in the bill, and so help to determine (where the language is ambiguous) whether the signature (with consequent liability or right to sue upon the bill) is to be deemed that of the signatory personally, or that of the signatory merely for and on behalf of the principal: see *Elliot* v. *Bax-Ironside*, [1925] 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631, for case of signatory held personally liable, and *Kettle* v. *Dunster and Wakefield* (1927),

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(*q*) It should be observed that where a person signs clearly as agent so as to exclude his own liability but he had in fact no authority to sign, although he cannot be made liable on the bill itself, he can be sued by the holder for the amount of the bill in an action of "warranty of authority": *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.

(*r*) This is the ordinary rule of construction "*ut res magis valeat*".

138 L. T. 158; 43 T. L. R. 770, for case of signatory held entitled to sue, in both cases on the ground of "surrounding circumstances".

**Corporations.**—As regards signature by corporations, the Act provides that

> "In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal"

(section 91 (2)). Apart from the case of corporations thus expressly provided for, it may be taken that bills cannot be under seal (see *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B., at p. 384, citing, with approval, statement in the then current edition of Byles (published 1870)) The result is that a corporation may execute a bill either under seal or under signature of its agent or agents Whether the agent has authority to sign depends upon the ordinary rules as to agency, as well as, of course, upon whether the corporation has power to enter into a contract by bill (see *ante*, pp. 78, 79) (s). The foregoing applies to companies, which, however, are expressly provided for by their own statute (t).

**Acceptance: Definition and Requisites.**—The Act contains some special provisions in relation to acceptance. Firstly, it provides that

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(s) "In order to determine whether a company or other corporation is liable on a bill, three questions must be asked 1. Has the company the requisite capacity to bind itself by bill? 2 Is the signature on the bill sufficient in form to bind the company? 3. Was the signature placed there by a person having authority to sign bills for the company?" (Chalmers) The answers to 2 and 3 may depend partly upon the provisions of the articles of association and partly upon the express, implied or apparent authority with which the directors have invested the signatory; see *Houghton & Co* v. *Nothard*, [1927] 1 K. B. 246; 96 L. J. K. B 25; 136 L. T. 140, followed in *Kreditbank Cassel* v. *Schenkers*, cited *ante*, p. 81.

(t) The Companies Act, 1929, s. 29, provides in effect that companies may enter into contracts in the same manner as private persons, and s. 30 of the same statute provides that "A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company, by any person acting under its authority". *This, of course, refers only* to the manner of contracting, and is subject to the doctrine of *ultra vires* and the rules as to agency—see preceding note.

> "the acceptance of a bill is the signification by the drawee of his assent to the order of the drawer"

(section 17 (1)). It must be observed that acceptance can only be by the drawee, *i.e.*, only a drawee can make himself liable *as acceptor*, and not a stranger (*Davis* v. *Clarke* (1844), 13 L. J. Q. B. 305) (*u*). In *Re Barnard* (1886), 32 Ch. D. 447; 55 L. J. Ch. 935; 55 L. T. 40, a bill was drawn upon "Barnard & Co." One of the partners accepted the bill thus: "Accepted; payable at the Imperial Bank, Lothbury. BARNARD & Co. W. A. M. BARNARD." It was held that the effect of section 17 (1) is that acceptance can only be made by the drawee, and that the addition by the partner, who accepted on behalf of the firm, of his own name did not make him an acceptor. In *Odell* v. *Cormack* (1887), 19 Q. B. D. 223, Cormack Brothers, of which Margaret Cormack was a member, dissolved partnership and appointed one Richard Carter to wind up the affairs of the firm. Carter accepted a bill drawn on Cormack Brothers thus: "Accepted, etc., Margaret Cormack, Richard Carter." It was held that Margaret Cormack was not liable, as Carter had no authority to accept bills either in her name or in that of the firm of which she was a partner, and the bill had therefore not been accepted by or on behalf of the drawees within section 17 (1). Secondly, it is provided that

> "an acceptance is invalid unless it complies with the following conditions, namely: (a) it must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money"

(section 17 (2)) (*x*). Of course, the first provision in (a) does not mean that the signature must be affixed by the drawee himself. What has been stated before as to the affixing of the signature by some one else, or execution by agent or per procuration (*ante*, pp. 82 *et seq.*), applies to acceptance. The name in the acceptance need not exactly correspond with that

(*u*) The only exception is that of "acceptance for honour", as to which see *post*, Chap. XIX.

(*x*) "The acceptance of a bill is, therefore, in plain terms, a written engagement to pay the bill when due in money, and by no other means" (Byles).

given as drawee so long as the drawee and acceptor are in fact the same person, *e.g.*, a bill was addressed to a company "limited", and by an accident the word "limited" was omitted from the acceptance. It was held that the acceptance was valid (*Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510). Where there is a "mere signature of the drawee without additional words" it would presumably be a question of fact (upon which extrinsic evidence would be admissible) as to whether the signatory had signed as acceptor or merely as indorser. No doubt if the signature appeared across the face of the bill in the manner usual for acceptance (see examples, *post*, pp. 90, 91), the presumption would be that it was affixed for the purpose of acceptance. As an instance of (b) may be mentioned *Russell* v. *Phillips* (1850), 14 Q. B. 891, where an acceptance to pay in bills was held invalid.

**Acceptance: Time for.**—The Act provides, firstly, that

> "a bill may be accepted before it has been signed by the drawer, or while otherwise incomplete"

(section 18 (1)). This does not mean that the acceptance will bind even though the drawer never signs or the bill remains otherwise incomplete (*M'Call* v. *Taylor* (1865), 34 L. J. C. P. 365). Moreover, when the bill is completed, the acceptance will date as from then, and not as from the actual date of the bill (*Ex p. Hayward* (1871), 6 Ch. App. 546) (*y*). Secondly, a bill may be accepted

> "when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment"

(section 18 (2)). It will be remembered that by section 10 (2) a bill accepted when overdue is deemed, as regards the acceptor, to be payable on demand (see *ante*, p. 66). Thirdly,

> "when a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance"

(section 18 (3)). This "was intended to secure that, apart from special agreement, the holder should be put, as far as

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(*y*) Further as to execution of inchoate instruments, see s. 20, *post*, pp. 93, 94.

possible, in the same position as if the bill had not been dishonoured" (Chalmers).

**Acceptance: General and Qualified.**—The Act provides that

> "(1) an acceptance is either (a) general or (b) qualified. (2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn"

(section 19 (1) and (2)).

As to the meaning of the word "express" in the foregoing it may be noted that an ambiguous acceptance is, if possible, to be treated as general (*Fanshawe* v. *Peet* (1857), 26 L. J. Ex. 314; 2 H. & N. 1); and any words added to the acceptance must be clearly opposed to the tenor of the bill to constitute a qualification. In *Decroix* v. *Meyer*, [1891] A. C. 520; 61 L. J. Q. B. 205; 65 L. T. 658, a bill was drawn on Messrs. Meyer to the order of L. Delobbel Flipo. The acceptance, which was in the usual form, contained an addition in the shape of the words "In favour of Mr. L. Delobbel Flipo only". Messrs. Decroix became holders of the bill, and Messrs Meyer refused to pay them on the ground that they had accepted in favour of Mr. Flipo only and were bound only to pay him. It was held that the words in question could be construed as a mere memorandum, that, accordingly, the acceptance was not qualified within the meaning of section 19 (2), and that if an acceptor desires to qualify his acceptance he must do so in terms so clear and unequivocal that a holder could not fail to understand that the acceptance was subject to qualification (*z*). And where a bill was accepted in England payable at a named bank in Amsterdam *in Dutch currency*, it was held that the acceptance was general, the specifying of the currency not being equivalent to the qualification required by the sub-section (*Banku Polski* v. *Mulder*, [1942] 1 K. B. 497; 111 L. J. K. B. 481; 166 L. T. 259; 58 T. L. R. 178) (*a*).

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(*z*) Chalmers is of opinion that the decision would have been different had the words in question been actually included in the words of acceptance, *e.g.*, "Accepted in favour of L. Delobbel Flipo only".

(*a*) The specifying of the currency means nothing in the present connection. A bill may be made payable in any country in the currency of any other country—see *Cohn* v. *Boulken*, *ante*, p. 64.

The Act deals with five sorts of qualified acceptance, *viz.*, (a) conditional, (b) partial, (c) local, (d) qualified as to time, and (e) by less than the whole of the drawees (section 19 (2)).

(a) A conditional acceptance is one

> "which makes payment by the acceptor dependent on the fulfilment of a condition therein stated"

(section 19 (2) (a)); for example, an acceptance conditional upon delivery up of bills of lading (*Smith* v. *Virtue* (1860), 30 L. J. C. P. 56).

(b) A partial acceptance is

> "an acceptance to pay part only of the amount for which the bill is drawn"

(section 19 (2) (b)). This may be exemplified by a bill drawn for £127 and accepted for £100 (*Wegersloffe* v. *Keene* (1719), 1 Stra. 214).

(c) A local acceptance is

> "an acceptance to pay only at a particular specified place"

(section 19 (2) (c)). The emphatic word is "only", as the Act provides that

> "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere" (*b*)

(*ibid.*). Therefore an acceptance payable at a particular bank is unqualified, but one payable at a particular bank only is qualified (cf. *Halstead* v. *Skelton* (1848), 5 Q. B. 86).

(d) An acceptance

> "qualified as to time"

(section 19 (2) (d)) may be exemplified by a bill drawn for three months, and accepted for six months, after date, or accepted subject to renewal (*Russell* v. *Phillips* (1850), 14 Q. B. 891).

(e) More precisely this is

> "an acceptance of some one or more of the drawees, but not of all"

(section 19 (2) (e)). Of course, there may be an acceptance by

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(*b*) It is assumed in practice that "only" and "and not elsewhere" are alternatives and that either is sufficient to render the acceptance local (cf. *Siggers* v. *Nicholls* (1839), 3 Jur. 341, under earlier statute). But why? The Act seems to require both "only" *and* "and not elsewhere".

one drawee on behalf of all, *e.g.*, in case of partners, the necessary conditions being present (see *ante*, p. 82).

For the effect of a qualified acceptance, see section 44, *post*, p. 144.

The usual position for the acceptance of a bill is transversely across the face of it. The following are general or qualified acceptances in accordance with the foregoing rules:—

EXAMPLE 19.

£500. London, January 1st, 1929.

Six months after date pay to Henry Robinson or order the sum of five hundred pounds, value received.

m Jon

To William Jones,
155 Change Alley,
London, E.C.

JOHN BROWN.

EXAMPLE 20.

Wi

EXAMPLE 21.

Accepted payable at Lloyds Bank, Ltd.
William Jones.

EXAMPLE 22.

Accepted payable
at Lloyds Bank,
Limited, Cardiff
branch only (*c*).
William Jones,
4th March,
1929 (*d*).

### (B) *Delivery.*

In addition to signature, delivery is necessary to constitute a party's liability upon a bill. The Act provides that

> "every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto"

(section 21 (1)).

**Definition of delivery.**—Delivery is defined as meaning

> "transfer of possession, actual or constructive, from one person to another"

(section 2). "A person is said to have constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession in three cases, namely: (1) a bill is held by C on his own account; he subsequently holds it as agent for D; (2) a bill is held by C's agent, who subsequently attorns to D, and holds it as his agent; (3) a bill is held by D as agent for C; he subsequently holds it on his own account" (Chalmers).

**Effectual delivery.**—But the delivery must be effectual, *i.e.*, certain conditions must be present before it will bind the party delivering. The Act provides that

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(*c*) See note (*b*) on p. 89

(*d*) It is proper to date the acceptance where the bill is payable *after* sight, so as to fix the date of maturity of the instrument: see s. 39 (1), *post*, p. 138.

"as between immediate parties (*e*), and as regards a remote party (*e*) other than a holder in due course (*f*), the delivery—(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be; (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill" (section 21 (2)).

(a) The question of what constitutes "authority" belongs to the subject of agency generally, but the rule may be illustrated by the case of *Bromage* v. *Lloyd* (1847), 1 Exch. 32, where A indorsed a note to B, but did not deliver it. After his death A's executor handed the note to B. It was held that B could not sue on the note, as an executor is not the agent of his testator.

(b) An instance within this rule is furnished by *Lloyd* v. *Howard* (1850), 15 Q. B. 995. A person drew a bill (which was duly accepted by the defendant) and indorsed it, and handed it to M so that the latter might *discount* it on behalf of the drawer M did not discount the bill, but merely indorsed it to the plaintiff, who did not take it as a holder in due course. It was held that there was no delivery, *i.e.*, effectual delivery (in other words, there was only conditional delivery, with the condition unfulfilled) to the plaintiff, and as he was not a holder in due course he could not sue the defendant upon the bill (*g*).

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(*e*) "By the term 'immediate parties' is meant parties who are in direct relation with each other. Thus the drawer and the acceptor, the drawer and the payee, the indorser and the next indorsee are immediate parties" (Chalmers). Examples of remote parties would be drawer and the payee's indorsee, indorser and the next indorsee but one.

(*f*) For definition of this term, see *post*, Chap. XVII.

(*g*) It should be pointed out that there is a distinction between a contemporaneous oral condition suspending the coming into operation of a bill and one in defeasance of the bill after it has come into operation In the latter case, the condition is ineffective in accordance with the rule that evidence of a contemporaneous oral agreement is inadmissible to vary or contradict the terms of a written instrument. In *Hitchings and Coulthurst Co.* v. *Northern Leather Co of America*, [1914] 3 K. B. 907; 83 L. J. K. B. 1819; 111 L T 1078, N. bought goods from the plaintiffs and gave a promissory note in payment which D. indorsed as surety. N. did not meet the note, and D., before being sued, pleaded an oral agreement with the plaintiffs that he was not to be called upon to pay the note unless the goods were up to sample. He proved that the goods were, in fact, not up to sample. It was held that evidence of the oral agreement relied upon by D

The exception made above in favour of a holder in due course is enlarged by the express provision that

> "if the bill be in the hands of a holder in due course (*h*) a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed" (*i*)

(section 21 (2)).

In the case of a holder other than a holder in due course the Act raises a presumption of effectual delivery by the provision that

> "where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser a valid and unconditional delivery by him is presumed until the contrary is proved"

(section 21 (3))

In the case of acceptance, an alternative to delivery by transfer of possession is offered by the proviso that.

> "Where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable"

(section 21 (1)), and the definition of acceptance given in the Act provides expressly that it shall mean

> "an acceptance completed by delivery or notification"

(section 2).

### *Incomplete Bills.*

**Inchoate Instruments.**—The Act provides that

> "(1) where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover,

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was not admissible, as it was not an agreement suspending the coming into force of the contract contained in the promissory note, but was an agreement in defeasance of that contract, and that, therefore, he was liable on the note. By the same rule, in *New London Credit Syndicate* v *Neale*, [1898] 2 Q B 487, 67 L J Q. B. 825, 79 L T. 323, evidence of a contemporaneous oral agreement to renew a bill was held inadmissible, as its effect would be to vary the terms of the instrument.

(*h*) For definition of this term see *post*, Chap. XVII.

(*i*) *I.e.*, there is an irrebuttable presumption of valid delivery

> using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit. (2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given"

(section 20).

The following points may be observed in respect of the foregoing provisions:—

(a) The blank instrument must be already stamped.

(b) It may be filled up to the extent which the stamp will cover, and the signature may be used as that of any party to a bill.

(c) It must not only be signed but delivered (*k*).

(d) It must have been delivered for the purpose of conversion into a bill (*l*).

(e) The authority to fill it up as a complete instrument is prima facie only, and may therefore be rebutted. The same applies to the authority to fill up the omission in a bill wanting in a material particular by the person in possession of it.

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(*k*) For definition of delivery, see *ante*, p. 91.

(*l*) Including the purpose of *issue as a bill*. In *Smith* v. *Prosser*, [1907] 2 K. B. 735; 77 L. J. K. B. 71; 97 L. T. 155, the defendant, on going from Cape Town to England, left with T. & W. a power of attorney to manage his affairs and some signed unstamped forms of promissory notes, with, however, directions that they were not to be used without instructions from him. T. filled them in and discounted them, and they were in the hands of the plaintiff, who took in good faith and for value. They were stamped on arrival in England. It was held that as the documents were never delivered to T. for the purposes of issue, they never became negotiable instruments at all, quite apart from the fact that they were originally delivered unstamped. The defendant was therefore not estopped from denying that the notes were issued without his authority.

(f) It must be filled up within a reasonable time. In *Griffiths* v. *Dalton*, [1940] 2 K. B. 264; 109 L. J. K. B. 656; 163 L. T. 359; 56 T. L. R. 784, it was held that a year was an unreasonable time for the filling up of a cheque.

(g) As against a person who became a party to such instrument prior to its completion, it is necessary that the actual authority should have been strictly observed in regard to the details of the completion. In *Watkin* v. *Lamb* (1901), 85 L. T. 483, the plaintiffs entered into an agreement with R by which they were to accept bills in blank and R was to insert drawers, and raise money on the bills for the accommodation of the plaintiffs. R, for his own purposes, discounted the bills with the defendant, who took them in good faith and inserted drawers' names. It was held that the defendant had no title to the bills as against the plaintiffs, since (the bills not being complete when they took them) they were bound by R's authority, which was only to complete and use the bills for the purposes of the plaintiffs, and not for his own purposes.

(h) But the signatory may be estopped from denying his apparent authority. In *Glenie* v. *Bruce Smith*, [1908] 1 K. B. 263; 77 L. J. K. B. 193; 98 L. T. 515, the defendant S agreed to become responsible for the price of pigs bought by the defendant T from G, and for that purpose to back T's bills for such amount. Accordingly, T wrote his acceptance across two blank stamped bill forms and S indorsed them. They were then handed to G, who filled up the body of the bills for the agreed amounts and signed them as drawer and also indorsed them. The pigs were duly delivered to T. In an action upon the bills by G's executors, it was held (*inter alia*) that, as the bills had been indorsed in pursuance of the agreement, and had been made out with the authority of the defendant S, he was estopped from setting up the defence that the bills were incomplete when he indorsed them (*m*). But this estoppel will not avail a holder

(*m*) Followed in *Re Gooch, ex p. Judd*, [1921] 2 K. B. 593; 90 L. J. K. B. 932; 125 L. T. 583, and approved in *Macdonald & Co.* v. *Nash*, [1924] A. C. 625; 93 L. J. K. B. 610; 131 L. T. 428; 40 T. L. R. 530, where it was held, on the facts, that there was implied authority from the indorser to the drawer to complete the bill by the insertion of the drawer's signature, which had previously been omitted. For the kind of quest'on put to a jury in such cases, see *Dunn* v. *Jefferson* (1925), 69 S. J. 725.

who has not given value. In *Painé* v. *Bevan* (1914), 110 L. T. 933; 30 T. L. R. 395, it was held that a person who signs a blank cheque and then hands it to a confidential clerk to fill in the name of the payee, is not estopped as against a holder of the cheque who has not given value for it from saying that it was wrongly filled up as regards the name of the payee. In such circumstances, if the holder has obtained payment of the cheque from the drawer's bank, the drawer can recover back from the holder the amount of the cheque. The order and place of signature does not matter so long as the intention is clear. In *National Sales Corporation* v. *Bernardi*, [1931] 2 K. B. 188; 100 L. J. K. B. 386; 145 L. T. 48; 47 T. L. R. 380, and again in *McCall Bros.* v. *Hargreaves*, [1932] 2 K. B. 423; 101 L. J. K. B. 733; 147 L T 257; 48 T L. R. 450, the drawer had completed the bill by signing on the back, instead of in the usual place on the face of the instrument. It was held that place or order of signature was immaterial, the signatory having intended to sign as drawer.

(i) When once the instrument is complete and is afterwards "negotiated" to a "holder in due course", as against him, no question can be raised as to the extent of the authority, or the exercise of it within a reasonable time. The word "negotiated" is of prime importance as it precludes the original payee of the bill to whom the bill was issued from taking advantage of the proviso in favour of a holder in due course. "An ordinary Bill or Note is not 'negotiated' between the immediate parties to the instrument; between them it is 'issued' (*n*) . . . : therefore, where a Note, sufficiently stamped, was signed in blank by A and delivered to B for the latter to procure a loan thereon for A for a stated sum, and B thereon obtained a larger sum from C, whose name B had previously inserted as the payee for the larger sum; held, that the Note was not 'negotiated' within the proviso to . . . section 20, and as it had not been filled up 'strictly in accordance with the authority given' . . ., A was not liable thereon (*Herdman* v. *Wheeler*, [1902] 1 K. B. 361; 71 L. J. K. B. 270; 86 L. T. 48)" (*o*). *Stroud's Judicial Dictionary, sub nom.*

(*n*) For definition of "Issue" see *post*, p 97.

(*o*) Since this decision, it has been decided that in no circumstances can the original payee of a bill be a holder in due course. See *post*, p. 181.

NEGOTIATE. The case is different where the bill is made payable to bearer. The bill is negotiated to a bearer merely by delivery to him (see section 31 (2), *post*, p. 118) and he may, therefore, take it as a holder in due course.

**Omission of Date.**—The above section may be supplemented by the earlier provision that

> "where a bill expressed to be payable at a fixed period after date is issued (*p*) undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date"

(section 12).

Observe that

(a) The right of a holder to fill in the date applies in the case of the date of the bill only to a bill payable at a fixed period after *date*, and in the case of the date of the acceptance only to a bill payable at a fixed period after *sight*.

(b) The holder may insert only the *true* date, not any date.

(c) But the insertion of the wrong date will not matter if the holder inserts it in good faith and by mistake

(d) Nor will the insertion of a wrong date matter as against a subsequent "holder in due course".

(e) When the wrong date is permissibly inserted as in (c) and (d), it shall be treated as the true date.

**Referee in case of Need.**—Apart from the completion of the bill the drawer or an indorser may make an addition to it in the shape of what is termed a "referee in case of need", or

(*p*) "'Issue' means the first delivery of a bill or note, complete in form to a person who takes it as a holder" (s. 2).

alternatively a "drawee in case of need", or simply a "case of need". The Act provides that

> "the drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit"

(section 15). It must be observed, however, that in the case of non-payment by the acceptor, before the holder can resort to the referee in case of need for payment, he must "protest" the bill (see section 67 (1), *post*, p. 208) or at any rate "note" it for protest (section 93, *post*, p. 175). A referee in case of need is not an acceptor, or a party to the bill at all. He is merely in the position of a drawee who has not accepted (*q*); the bill cannot be presented to him for acceptance, but only for payment.

(*q*) Such as a banker in the case of a cheque, see *post*, Chap. XXI.

## CHAPTER XI.

### THE LIABILITIES OF THE PARTIES TO A BILL.

As we have seen, the liability of a party upon a bill is that of drawer, acceptor, or indorser.

**Position of the Parties.**—The position of these parties has been stated in general terms thus:—

"The legal effect of drawing a bill payable to a third person is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill or making a note is an absolute contract on the part of the acceptor of the one, or maker of the other, to pay the payee, his order, or the bearer as the instrument may require. The effect of indorsing is a conditional contract, on the part of the indorser, to pay the immediate or any suceeding indorsee, or bearer, in case of the acceptor's or maker's default" (Byles). Again:—

"The drawer and indorsers of a bill are jointly and severally responsible to the holder for the due acceptance and payment thereof (*a*). If it be dishonoured the holder may enforce payment from the drawer, or an indorser, or the acceptor, or all or any of them at his option. The liability of the drawer of an accepted bill must in general be measured by that of the acceptor, their relations for most, not all, purposes resembling those of principal and surety" (Chalmers).

The foregoing statements may be illustrated thus: B draws upon A in favour of C. C indorses the bill to D. If A dishonours the bill by refusing to accept, D may sue B or C or both. If A accepts the bill and afterwards dishonours it by non-payment, D may sue A or B or C or any two or any one of them. If C pays he may sue A and B or either of them. If B pays he may sue A, but not C. If A pays, the object of the bill is attained, the primary obligation contained in the bill is discharged, and of course A has no right of recourse against any other party to the bill. In other words, the bill may *for most purposes* be regarded as a

(*a*) By the drawee

contract of guarantee in which A is the principal debtor, B is surety for A, and C is surety for B; or more fully (a) as between D, on the one hand, and A, B and C on the other, A is the principal debtor and B and C are co-sureties; (b) as between C, on the one hand, and A and B on the other, A is the principal debtor and B is the surety (*b*).

**Quasi-Suretyship.**—The result of this relationship of *quasi*-suretyship between the parties to a bill and the holder is that, upon the holder's right to sue upon the bill arising, he has certain duties to observe towards the parties against whom he has recourse, other than the acceptor. These are to be found, in the first place, in the law relating to suretyship generally, and may be exemplified (by the application of familiar rules) thus: if the holder enters into a binding agreement to give time to the acceptor, he will thereby lose his rights against the parties intermediate between him and the acceptor (*c*), although by merely giving the acceptor time to pay, *i.e.*, by delay in suing him, he will not; and again, a discharge of the acceptor will discharge the drawer and indorsers prior to the holder (*c*). In the second place, the Act lays certain specific duties upon the holder towards prior intermediate parties, the non-observance of which will or may have the effect of discharging the latter. These will appear in their places (Chapters XV and XVI), and may, for the moment, be instanced by the rule that a holder must upon dishonour of the bill give prompt notice thereof to such of the intermediate parties as he may desire to charge (see sections 48, *post*, p. 158, and 49 (12), *post*, p. 162).

We now come to the specific liabilities of acceptor, drawer, and indorser respectively as provided in the Act.

(*b*) The expression "for most purposes" has been used in this statement because—"The drawee or indorser is not exactly a surety for the acceptor, or co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to entitle him to the equities of a surety when the bill has been dishonoured, though not before" (Chalmers, citing Lord Blackburn in *Duncan, Fox & Co* v *N. & S. Wales Bank* (1880), 6 A C 1; 50 L. J. Ch. 355, 43 L T 706). It may be mentioned also that the parties may agree that as between each other they shall be co-, instead of successive, sureties: *Macdonald* v. *Whitfield* (1883), 8 A C 733; 52 L. J P. C 70; 49 L. T 466

(*c*) Unless, of course, the holder reserves his rights against the others in accordance with the rule of which the case of *Green* v *Wynn* (1869), L. R 4 Ch. 204, 38 L. J Ch. 220; 20 L. T. 131, is an illustration.

*The Acceptor*

**Position of Drawee before Acceptance.**—It is important to observe that until acceptance by him a bill is wholly inoperative as regards the drawee. Not only will he not be liable upon the bill itself, but the bill will have no effect as an assignment of any funds which the drawee may have in his hands belonging to the drawer. This is expressed in the Act by the provision that

> "a bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument"

(section 53 (1)) (*d*). The operation of this provision may be illustrated thus: A owes B £100. B draws upon A for £100 in favour of C and hands the bill to C who presents it to A for acceptance A refuses to accept C cannot sue A upon the bill as such, nor can he merely by virtue of the bill, sue as assignee of A's debt to B (*Schroeder* v. *Central Bank* (1876), 34 L. T. 735—a case of a cheque dishonoured by a banker although there were funds sufficient to meet it) In other words, a bill is not of itself an assignment by B to C of A's debt to B Of course C might have a right of action against A apart from the bill, although to the same amount, *e g*, where A gave B a "letter of credit" (*e*) for £10,000, upon which was the request that "*persons negotiating bills drawn by B upon this credit should indorse particulars upon the letter*" B drew a bill upon A for £500 in favour of C, who discounted the bill and indorsed

(*d*) The sub-section adds that

> "This sub-section shall not extend to Scotland"

And the Act further provides that

> "in Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee"

(s. 53 (2)).

(*e*) "A letter of credit is a letter of request whereby the person (usually a merchant or banker) requests some other person to advance moneys or give credit to a third person named therein for a certain amount, and promises that he will repay such sum to the person advancing the same or accept bills drawn upon himself for the like amount. It is called a general (or open) letter of credit when it is addressed to all merchants or other persons in general, and it is called a special letter of credit when it is addressed to a particular person by name, requesting him to make such advance to a third person" (Story on Bills) "A letter of credit is not a negotiable instrument" (Chalmers) particulars of it upon the letter. C then presented the bill to A for acceptance, which was refused, A having become insolvent. It was held that C could prove against A's estate for the £500 (*Re Agra Bank* (1867), 36 L. J. Ch. 222; L. R. 2 Ch. 391). Again, if B draws a bill upon A in favour of C, remitting A the money to meet the bill, and A refuses to accept the bill, but tells C that he has received the money, and promises to pay the bill, C can sue A for money had and received to C's use (*Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753).

**Liability of Acceptor.**—The Act provides that

> "the acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance"

(section 54 (1)). If, for example, the bill has been altered meanwhile so as to increase the amount, he will only have to pay the original amount, and he is under no obligation to see that the bill is in such a state as to preclude possible alterations in it: In *Scholfield* v. *Londesborough*, [1896] A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254, the defendant accepted a bill for £500. The bill was stamped to cover a much larger amount, and there were spaces left which might enable a person to insert further words and figures in respect of the amount The drawer, in fact, did make alterations which brought the amount of the bill up to £3,500, and then indorsed it to a holder in due course. It was held that the defendant was not liable for more than £500, as there was no duty upon an acceptor to take precautions to protect a possible holder (*f*).

**Acceptor's Estoppels.**—Furthermore, the acceptor

> "is precluded from denying to a holder in due course (a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the

(*f*) It should be observed in respect of the alteration in question in the case, that the position of acceptor of a bill differs from that of the drawer of a cheque in respect of unauthorised alterations: see *post*, p. 232.

> payee and his then capacity to indorse, but not the genuineness or validity of his indorsement "

(section 54 (2)). Shortly, the effect of the foregoing provision is this, that an acceptor is estopped from raising *as against a " holder in due course "* any defect that would have been present at the time of the acceptance *had the bill been presented for acceptance by the payee himself, and before any negotiation of it.* For example, a bill purports to be drawn upon A by B in favour of C. C indorses it to D, who is a holder in due course; and D presents it for acceptance to A, who accepts. A cannot question the existence of B or the genuineness of his signature, or his capacity or authority to draw the bill, nor can A question the existence of C or his *capacity* to indorse the bill to D. But A may question the *genuineness* or *validity* of C's indorsement to D, although C's purported indorsement to D was on the bill at the time A accepted.

### *The Drawer.*

**Liability of Drawer.**—The Act provides that

> " the drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken "

(section 55 (1) (a)).

" According to its tenor " would mean as regards acceptance according to the tenor of the bill as drawn If it be not accepted as drawn, the holder is entitled to treat the bill as though it had not been accepted at all, *i.e.*, he is not bound to take a qualified acceptance (see section 44 (1), *post*, p. 144). As regards payment, however, the expression " according to the tenor " would mean (a) according to the tenor of the bill *as drawn*, if the acceptance be " general ", but (b) according to the tenor of the bill *as qualified by the acceptance* if the acceptance be " qualified ", supposing, that is, that the presentor for acceptance has accepted a qualified acceptance.

As to the measure of compensation payable to the holder or indorser to whom the holder has had recourse, see section 57, *post*, pp. 106 *et seq*. As to the requisite proceedings on "dishonour", see *post*, Chapter XVI.

**Qualification of Liability.**—It must be observed that the engagement of the drawer given above may be qualified in accordance with the provision that

> "the drawer of a bill, and any indorser, may insert therein an express stipulation (1) negativing or limiting his own liability to the holder"

(section 16). For example, he may add the words "without recourse to me" or "*sans recours*", and in such case he could not be sued upon the bill in the event of dishonour by non-acceptance or non-peyment.

**Drawer's Estoppels.**—The drawer of a bill by drawing it

> "is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse"

(section 55 (1) (b)). Presumably he may, although it is not so expressed, deny the genuineness and validity of the indorsement, in the same manner as the acceptor (see section 54 (2) (c), *ante*, p. 102).

*The Indorser.*

**Liability of Indorser.**—It is provided that

> "the indorser of a bill by indorsing it engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken"

(section 55 (2) (a)).

The foregoing provision is the same as section 55 (1) (a) in relation to the drawer, except for the addition of the word "subsequent" before "indorser". For comment, therefore, see *ante*. p. 103.

**Qualification of Liability.**—An indorser has the same right to qualify his liability to a holder as is possessed by the drawer (see section 16, *ante*, p. 104).

**Indorser's Estoppels.**—The Act provides that the indorser of a bill by indorsing it

> "is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements"

(section 55 (2) (b)). And, further,

> "is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto"

(section 55 (2) (c)).

Apart from the difference in the nature of the foregoing estoppels it will be observed that the former is only in relation to a "holder in due course" who will, of course, have the benefit of the latter also.

**Quasi-Indorsement.**—The Act provides that

> "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course"

(section 56). The emphasis is on the words "to a holder in due course". Strictly, an indorser is the payee or any subsequent indorsee who has signed the bill for the purpose of negotiation, *i.e.*, he is one of those whose signatures are on the bill in the chain of title from the payee to the holder. *E.g.*, C (payee) indorses the bill and places in front of his signature "pay D or order"; D, on becoming holder, similarly makes the bill payable to E, and so forth down to X, the present holder. C, D, E, etc., are all indorsers *sensu strictu* In such case each indorser is in a position analogous to that of drawer towards the subsequent indorsees and holder. "The indorser of a bill is in the nature of a new drawer, that is to say, his relations with the holder resemble those of a drawer" (Chalmers). But a person who is not in this chain of title may sign the bill for the purpose of making himself liable upon it. This is what is meant by a *quasi*-indorsement. "An indorsement, properly so called, must be made by the holder; but when a person who is not the holder of a bill or note backs (g) it with his signature, he is not an indorser, but a *quasi*-indorser" (Chalmers) It would appear that *quasi*-indorsement of itself imposes no liability. "English law does not recognise anything at all akin to the Continental system of the '*aval*', whereby payment of a bill can be guaranteed by the signature of a third party appearing on the bill" (Byles). Nor will the bill so signed constitute a note or memorandum in writing, evidencing a contract of suretyship, on the part of the *quasi*-indorser, sufficient to satisfy the Statute of Frauds (*Jenkins* v. *Coomber*, [1898] 2 Q. B. 168; 67 L. J. Q. B. 780; 78 L. T. 752, followed in *Shaw* v. *Holland*, [1913] 2 K. B 15; 82 L. J. K B. 592; 108 L. T. 543). The law, however, draws no distinction between indorsers, strictly so called, and *quasi*-indorsers in their position *vis-à-vis* a holder in due course, as the above-cited section shows. As to what will constitute a holder in due course in relation to the section, see *post*, p. 182.

*Damages for Dishonour*

**Measure of Damages.**—We have seen that the acceptor of a bill engages that he will pay it and drawer and indorser engage that the acceptor will accept it and afterwards pay it. If, therefore, the drawee does not accept (*i.e.*, dishonours the bill by non-acceptance), the holder can look to the drawer and indorsers for compensation, while if the drawee accepts but afterwards does not meet the bill (*i.e.*, dishonours it by non-payment), the holder can look to acceptor as well as to the drawer and indorsers for compensation. What is the measure of such compensation or damages? The Act provides the answer in the following terms:

> "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay

(g) The technical sense of "backing" is the sporting one, and the signature need not be on the face of the bill See *ante*, p. 76.

the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) the amount of the bill (*h*); (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest" (section 57 (1)).

The following points are to be observed in connection with the foregoing provision:—

(i) The damages are to deemed liquidated. This enables the party suing to specially indorse his writ under Order III, r. 6, and afterwards, if necessary, to apply for summary judgment under Order XIV of the Rules of the Supreme Court. Such damages may also be a proper subject for a "default summons" in the County Court (*i*).

(ii) The measure of damages is the same whether the drawer is suing the acceptor, an indorser is suing the acceptor, drawer,

(*h*) In *Cohn* v *Boulken* (1920), 36 T L R 767, action was brought upon a dishonoured cheque, drawn in England upon an English bank, but in which the sum payable was expressed in a foreign currency (French francs), and the question arose as to what was the "amount of the bill" which the holder could recover Evidence was given that the settled practice of the banks was to debit the drawer and credit the payee with the equivalent in English money calculated at the rate of exchange ruling at the date and hour of presentation for payment. The Court, however, held that the plaintiff was entitled to have the calculation made at the rate of exchange ruling on the day of the trial The unsatisfactory nature of a rule which may give a plaintiff more or less, as the case may be, than he would have obtained if the contract upon which he is suing had been performed as agreed is obvious It was based upon *Scott* v *Bevan* (1831), 2 B. & Ad 78, 9 L J (o s) K B 152, in which the Court expressed doubt as to the propriety of its own conclusion, a doubt in which the Court in *Lebeaupin* v. *Crispin* (1920), 36 T L R 739, "respectfully concurred"

The ruling in *Cohn* v. *Boulken* arose out of a technical distinction (not applicable, it is submitted, in relation to the point under consideration), between an action for damages for breach of contract and an action for debt, a distinction which the Court, declining to follow *Cohn* v *Boulken*, refused to recognise in *Peyrae* v. *Wilkinson*, [1924] 2 K B 166, 93 L J K B 121, 130 L. T. 511. It is submitted that the amount recoverable in such cases is fixed at the date of dishonour of the bill, and that *Cohn* v *Boulken* was upon this point—it involved others (see *ante*, pp. 63, 64)—wrongly decided

(*i*) It has been held that the claim may include "interest until payment or judgment" (*London & Universal Bank* v *Clancarty*, [1892] 1 Q B 689, 61 L. J Q. B. 225, 66 L. T 798); "noting" (*Lawrence* v. *Wilcocks*, [1892] 1 Q. B 696; 61 L. J. Q B. 519, 66 L. T 511), "bank charges" (included in "noting") (*Dando* v. *Bodeu*, [1893] 1 Q B 318, 62 L. J. Q. B. 339; 68 L. T 90) or a prior indorser, or the holder is suing the acceptor, drawer, or an indorser.

(iii) The interest recoverable is as from the time the bill should be *paid*, even if the bill is dishonoured by non-acceptance. The interest normally allowed is five per cent. unless the bill itself provides for a different rate (*k*).

(iv) The expense of "noting" is recoverable if noting has taken place, even if it was unnecessary; but the expense of "protest" is only recoverable where it was both necessary and has actually taken place (*l*)

(v) The above provision is not exhaustive, *e.g*, the cost of re-exchange has been held recoverable where the drawer was foreign but the bill was payable in England and dishonoured there, although the Act only provides (see *infra*) for payment of re-exchange in the case of bills dishonoured abroad (*Re Gillespie. ex p. Robarts* (1886), 18 Q. B. D. 286; 56 L. J. Q. B. 74; 56 L. T. 599) (*m*).

**Bills dishonoured Abroad.**—The foregoing applies only to bills dishonoured at home The rule as to bills dishonoured abroad (*n*) is as follows:—

> "In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment"

(section 57 (2))

It will be observed that the foregoing omits reference to suing the *acceptor*. This is, presumably, because where a bill

(*k*) As to when interest begins to run when bill provides for payment of interest, see s. 9 (3), *ante*, p. 64, note (*r*).

(*l*) As to "noting" and "protest", see *post*, Chap. XVI. Apparently protest is only regarded as necessary in the case of "foreign" bills; see *post*, p 171

(*m*) When, however, anything beyond that provided for in s. 57 is claimed, it is not to be deemed liquidated damages for the purpose of a specially indorsed writ, etc.

(*n*) It must be borne in mind that the distinction here made between bills dishonoured at home and bills dishonoured abroad does not square with the distinction also drawn in the Act between inland and foreign bills, as to which, see s 4, *post*, pp 169 *et seq*.

is payable and dishonoured abroad, the amount claimable against the acceptor will be regulated by the law of the foreign country, even if he is sued here.

As to what will be recoverable under the term "re-exchange" as used in the above provision, the following may be quoted: "'Re-exchange', in its usual application means the loss resulting from the dishonour of a bill in a country different to that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the *then rate of exchange* on the place where drawer or indorser sought to be charged resides) must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses conseqent on dishonour are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn the price of the stamp" (Chalmers).

**Reduction of Interest.**—There may be cases where the interest allowed by the foregoing provision would be inequitable, *e.g.*, where tender of payment has been made after dishonour, it might be unfair to allow interest beyond the date of tender (*o*). Such cases are provided for by the Act:—

> "Where by this Act interest may be recovered as damages, such interest may, if justice require it be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper"

(section 57 (3)). The latter part of the sub-section means that if the bill itself provides for a certain rate of interest, the Court may from the time from which interest is allowed to be claimed under section 57 (1) (b) (*ante*, p. 107) allow it at a lower rate or, presumably, at a higher rate. Up to the time, however, at which the interest begins to be claimable under the Act, the interest payable would be that provided for in the bill, if any. Even this, however, may be reducible by the Court under the

(*o*) For other examples, see Chalmers, note to s 57 (3).

Moneylenders Act, 1900, s. 1, where that statute applies (see *post*, p. 115, note (*d*)); and also by the operation of the Bankruptcy Act, 1914, s. 66 (1), which enacts that where a bill provides for payment of interest exceeding five per cent., although the holder may *prove* for the full interest, yet, for the purpose of *dividend*, the interest will be restricted to five per cent., and the holder will not be entitled to interest beyond until all the debts proved have been paid in full.

*Liability of Transferor by Delivery.*

In effect, the only parties to a bill are the drawer, acceptor, and indorsers, who have signified their adhesion by the affixing of their signatures (see section 23, *ante*, p 79). Suppose however, a person holds a bill which is payable to bearer and which therefore does not require indorsement by him in order to transfer it, and he does so transfer it without indorsement. What is the extent of his liability? The Act provides the answer in the following terms:—

> "(1) Where the holder of a bill payable to bearer (*p*) negotiates (*q*) it by delivery without indorsing it, he is called a 'transferor by delivery'. (2) A transferor by delivery is not liable on the instrument. (3) A transferor by delivery who negotiates (*r*) a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless"

(section 58).

It will be observed that the liability above imposed is only towards the immediate transferee, and only if the latter is a holder for value (*s*). The three implied warranties were held to have been complied with in the following case. An agent discounted with a bank bills payable to bearer handed to him

(*p*) As to when a bill is payable to bearer, see s. 8 (3), *ante*, p. 72, and s. 7 (3), *ante*, p. 75.

(*q*) *I.e.*, "transfers", see *post*, p. 118.

(*r*) *I.e.*, "transfers", *ibid* The words "who negotiates a bill thereby" appear to be redundant, since the section has already defined a transferor by delivery as a person who negotiates it by delivery.

(*s*) Not necessarily a "holder in due course".

for that purpose by his principals, of which they were the drawers. He did not indorse the bills. It was assumed that he had paid over the money to his principals and was unable to recall it. It transpired that the acceptances on the bills had been forged by the principals, but the agent was ignorant of this. The principals became insolvent, and the bank therefore sought to recover from the agent, or, rather, to prove against the agent's estate, he having become bankrupt. It was held that the bank could not prove (*Ex p. Bird* (1851), 4 De G. & S. 273).

The transfer by delivery of a bill payable to bearer must, of course, be distinguished from the transfer by delivery of a bill requiring indorsement by the transferor. The latter is provided for by section 31 (4), *post*, p. 126.

## CHAPTER XII.

### THE CONSIDERATION FOR A BILL.

**Consideration Necessary.**—The liability of a party to a bill is contractual in its nature and, in accordance with general contract law, is partly conditioned by the presence or absence of consideration. A bill is a "simple" contract (*a*), and consideration is necessary to support a simple contract whether the contract be oral or written (*Rann* v. *Hughes* (1778), 7 T. R. 350). A person is not liable upon a *nudum pactum* or bare promise, and it must be shown that he received some consideration for his undertaking, or at least that he is estopped from setting up the absence of it. A party to a bill, whether acceptor, drawer, or indorser, is therefore, when sued by the holder, entitled to set up the absence of consideration for his adhesion to the bill in exoneration of his liability.

**Differences in case of Bills.**—The general doctrine of consideration, however, presents certain important variations in relation to bills, now to be described.

(1) **Consideration is presumed.**—In an action on a bill against a party thereto, the defendant is presumed to have received consideration unless the contrary is proved. The Act provides that

> "every party whose signature appears on a bill is primâ facie deemed to have become a party thereto for value"

(section 30 (1)). For example, B draws a bill upon A in favour of C and A accepts. C indorses the bill to D. A dishonours the bill by non-payment. In an action by D against A, B, or C, or in an action by C against A or B, or in an action by B against A, there will be a presumption that A, B, and C in the first case, B and C in the second case, and C in the third case, received consideration for their adhesion to the bill.

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(*a*) Except in the case of a corporation when it chooses to execute a bill under seal—see *ante*, p. 85. Presumably, in accordance with the general rule, the corporation is then liable even if it received no consideration.

(2) **The Consideration need not have been received by the Party sued.**—Even if the party sued rebuts the presumption that he received consideration for his signature, he is still liable if consideration was given by the person suing, or even if it had been given by a party through whom the person suing is claiming, the Act providing that

> " where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time "

(section 27 (2)). In other words, when the holder of a bill sues a party thereto, it is not necessary to his claim that the consideration should have moved from him to the defendant.

It is sufficient that consideration has been given by any party in the holder's chain of title provided that the defendant became a party before the giving of such consideration. The result is that the plaintiff will succeed although he gave nothing for the bill and the defendant received nothing for his adhesion to the bill, and although the plaintiff was all along aware of the latter fact. For example, B draws upon A, who accepts gratuitously. C gives B value for the bill, and indorses it to D by way of gift. D can sue A although D gave nothing for the bill and A received nothing for his signature, and this applies even though D knew that A accepted gratuitously. D can also sue B. But D cannot sue C, as C did not become a party prior to the giving of value The rule has been stated thus: " The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it " (Chalmers) A person who becomes a party to a bill gratuitously merely to oblige another party is called an " accommodation party "

**Accommodation Parties.**—The Act defines an accommodation party as

> " a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person "

(section 28 (1)). Suppose B draws on A in favour of C, A or B or both executing the bill gratuitously to enable C to raise money on the bill upon the strength of their names, they would be accommodation parties. The Act goes on to provide that

> "an accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not"

(section 28 (2)) Thus, in the above example, A and B, although they executed the bill without consideration, would be liable to D if D gave C consideration for the bill, even though D was aware at the time that A and B had signed without consideration (*b*). It may be observed here that a distinction should be made between a bill with an accommodation party and an "accommodation bill". "A bill which is signed by one or more accommodation parties is frequently spoken of as an accommodation bill, but this is incorrect An accommodation bill is a bill whereof the acceptor (*i e*, the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto. The distinction is material when questions arise as to what is a discharge of the bill An accommodation bill is discharged when it is discharged by the person who is in substance, though not in form, the principal debtor (see, *e.g*, section 59 (3), *post*, p 196), or if time be given to such person (*c*)" (Chalmers).

(*b*) Certain duties which a holder owes towards an indorser before his right to sue on the bill is complete are, or may be, excused where such drawer or indorser is an accommodation party see s 46 (2) (d) (presentment for payment), *post*, p 153, s 50 (2) (d) (notice for dishonour), *post*, p 167, s 51 (9) (protest), *post*, p 178

(*c*) *I e*, if a binding agreement to give time is entered into—see *ante*, p 66 The following questions suggest themselves A, being desirous of making a present to B, but not having the money handy, accepts by way of gift a bill for £100 drawn upon him by B in favour of C, and for which C pays B the £100 The bill matures (i) If A meets it, can he recover from B? (ii) If A dishonours the bill, and C claims upon B and B pays it, can B recover from A? (iii) If neither A nor B pays, and C sues them both in one action and they (*i e*, A and B) claim indemnity from each other, what order should the Court make? The answer to (i) would seem clearly in the negative, because A did not intend merely to accommodate B (*i e*, become surety for him), but intended a gift The case of (ii) is more difficult It is true that B gave nothing for A's signature, but cannot be argue that, as the bill was a gift to him, he was really a party for the accommodation of A? As to (iii) we offer it for discussion.

**What is Value.**—It is now necessary to consider what is meant by the expression "value" in the foregoing provisions. The Act says

> "'value' means valuable consideration"

(section 2). It provides further that

> "valuable consideration for a bill may be constituted by—(a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time"

(section 27 (1)). The question of what amounts to a "consideration sufficient to support a simple contract" within (a), so far as it appears to fall within the scope of the present treatise, has already been discussed in connection with negotiable instruments generally (see *ante*, pp. 27 *et seq.*), and what is there stated is applicable in the present connection (*d*). An instance of "antecedent debt or liability" within (b) is furnished by *McLean* v. *Clydesdale Bank* (1883), 9 A. C. 95; 50 L. T. 457, where a customer of a bank obtained a cheque from M. and paid it into his account, which was overdrawn The bank credited the account in reduction of the overdraft. It was held that the bank was a holder for value and could recover the amount of the cheque from M. Again, in *Elkington* v. *Cooke Hill* (1914), 30 T. L. R. 670, the plaintiff, in December, 1912, lent to the defendant £1,500 on the security of a promissory note payable three months after demand. In March, 1914, the plaintiff became uneasy about his money and saw the defendant, who promised to pay in April. When April came, the defendant gave the plaintiff a post-dated cheque for the amount, and the plaintiff agreed that until the presentation of the cheque he

(*d*) It may, however, be supplemented by the statement that the inadequacy of the consideration for a bill may, while leaving the bill valid, limit the amount which a holder may recover upon it This is, firstly, by virtue of the equitable rules relating to unconscionable or catching bargains, *i e*, unfair bargains made with persons whose position renders them particularly liable to improvident dealing, *e.g*, expectant heirs, and, secondly, by virtue of the Moneylenders Act, 1900, s. 1, in proceedings by moneylenders against borrowers or borrowers' estates for the enforcement of any security for money lent In the latter case the Court may, where the interest or the amount charged for expenses, etc., is excessive and the transaction is harsh and unconscionable, re-open the transaction, and relieve the borrower against the excess. This, however, will not affect a "holder in due course" (see *post*, p. 191) would not claim under the note. Upon presentation, the cheque was dishonoured. The plaintiff sued upon the cheque. It was held that the plaintiff's agreement was consideration for the cheque and that he was entitled to recover. And in *Ayres* v. *Moore*, [1940] 1 K. B 278; 109 L. J. K. B 91; 163 L. T. 337; 56 T. L. R. 145, where F, the secretary of a company, was indebted to the plaintiff, A, for personal loans, and persuaded the defendant, M, who was the chairman of the company, to accept certain bills payable to A upon the false pretence that the bills were in respect of advances made by A to F for the purposes of the company, and F handed the bills to M in payment of the personal loans, it was held that the loans were "an antecedent debt or liability" moving from A (*e*).

**Distinction between Illegal and Void Consideration.**—As regards the person who has taken the bill it is of no consequence whether the consideration which moves from him is illegal or merely void. In neither case has he given consideration in the eye of the law, and so cannot recover on the bill from the party from whom he has received it But upon transfer by such person the position is different in the two cases. Where B obtains a bill from A for an illegal consideration and transfers it to C, who gives value, C cannot recover from A if he knows of *the manner in which B obtained the instrument.* For example, in *Woolf* v *Hamilton*, [1898] 2 Q. B 337; 67 L. J. Q. B 917; 79 L. T. 49, the defendant gave a cheque to X in payment of bets lost on horse-races X indorsed the cheque to the plaintiff for value. The plaintiff knew the circumstances. It was held that the plaintiff could not recover on the cheque, as the consideration was by virtue of the Gaming Act, 1835, to be deemed illegal. And, again, in *Jones* v. *Merionethshire Building Society*, [1892] 1 Ch. 173; 61 L. J. Ch 138; 65 L. T. 685, the relatives of the defaulting secretary of a building society gave promissory notes for the amount of his defalcations on the implied agreement that he should not be prosecuted. It was held that the society could not sue on the instruments, as they were given for a consideration illegal on grounds of public policy. In order

(*e*) The plaintiff failed in the action upon other grounds.

to recover in such cases the holder must be a "holder in due course" (see *post*, Chapter XVII). But if B obtains a bill from A for a consideration not illegal but merely void, and transfers it to C for value, C, by giving value himself, cures the want of value between A and B and can recover from A even though he knew that the consideration given by B was void. In *Lilley* v *Rankin* (1886), 56 L J. Q. B 248; 55 L. T., 814, the defendant gave a cheque to X in payment of gambling Stock Exchange transactions. X indorsed the cheque to the plaintiff for value. The plaintiff knew of the circumstances. It was held that the plaintiff could recover on the cheque, as the consideration was merely void by virtue of the Gaming Act, 1845, and not illegal.

**Holder with Lien.**—The Act provides that

> "where the hoider of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien"

(section 27 (3)). The position created by the sub-section may be exemplified thus: B draws upon A for £150 in favour of C. A accepts for value C indorses and delivers the bill to D to secure a loan of £100 D can sue A or B, or both, for £150. If he recovers the £150, he must pay £50 of it to C. If D sues C he can of course only recover £100. Again, assume in the foregoing example that B has drawn and A accepted for C's accommodation In such case D can recover £100 only, whether he sues A, B, or C In the first example D is, as against A and B, the holder for value of the bill to its full amount, by virtue of section 27 (2) (see *ante*, p. 118); but in the second example D is only the holder for value to the amount of his lien, by virtue of section 27 (3), *supra*.

## CHAPTER XIII.

### THE NEGOTIATION OF A BILL.

In treating of negotiable instruments in general, it was seen that the two characteristics of such documents were (1) the transferability of the instrument together with the right of action upon it, by simple delivery of the instrument itself, and (2) the ability, under proper conditions, of such transferee to obtain a title free from any equities which might encumber the title of the transferor (see *ante*, Part I, Chapters I and II). The former of these characteristics, in their relation to bills, will form the subject of the present chapter (*a*).

**Meaning of Negotiation.**—To describe the transfer of a bill by delivery, or delivery with indorsement (as the case may be), the Act employs the term "negotiation" (*b*).

> "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder (*c*) of the bill"

(section 31 (1)). It should be borne in mind that this chapter treats only of bills which are, in fact, transferable. A bill may be so worded as not to be transferable at all and then, of course, it cannot be negotiable in whatever sense that term is used.

**How Bill is Negotiated.**—The Act provides that

> "a bill payable to bearer (*d*) is negotiated by delivery (*e*)"

(section 31 (2)), while

> "a bill payable to order (*f*) is negotiated by the indorsement of the holder completed by delivery"

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(*a*) The latter will be dealt with in Chapter XVII, *post*.

(*b*) See Note on the use of this term, *ante*, p 46.

(*c*) For meaning of "holder", see *post*, p. 130.

(*d*) As to when a bill is payable to bearer, see s. 7 (3) (*ante*, p. 72) and s. 8 (3) (*ibid.*).

(*e*) For meaning of "delivery", see *ante*, p. 91.

(*f*) As to when a bill is payable to order, see s. 8 (4), *ante*, p. 67.

(section 31, (3)). As we have seen, the condition of the transferability of a negotiable instrument by mere delivery is that it is in a "deliverable state" (g). In the case of a bill, if it is payable to *bearer* and is otherwise complete, it is in a deliverable state as it stands, while if it is payable to *order*, it needs, in order to put it into a deliverable state, indorsement, *i.e.*, a statement by the transferor authorising or commanding payment to some one other than the transferor himself (h). As will be seen, however, when it is intended to make the bill payable merely to bearer, the bare signature of the transferor implies such a statement

**What will constitute Indorsement.**—The Act provides that "an indorsement in order to operate as a negotiation must comply with the following conditions, namely—(1) it must be written (i) on the bill itself (k) and be signed (l) by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient (m). An indorsement written on an allonge (n), or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognised, is deemed to be written on the bill itself. (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount

(g) See *ante*, p 25

(h) This, it is apprehended, is strictly the meaning of indorsement, although, as has been seen (*ante*, pp 105, 106 *et seq*), the term is also used to include "backing" or the affixing of his signature to the bill by a person (other than an acceptor, drawer, or indorser in the strict sense), who desires to make himself responsible for payment of the bill to a holder in due course. See *Shaw* v *Holland*, [1913] 2 K B, at p 17, where Hamilton, J, says "But before the plaintiffs ever indorsed them [i.e., the bills in question], and before the plaintiffs, therefore, ever ordered payment to anybody . . ."

(i) Includes 'printed" (s 2, *ante*, p 60)

(k) It is almost invariably, but not necessarily, written on the back (*Ex p Yates* (1857), 27 L J Bk 9, 2 De G & J. 191)

(l) As to what constitutes signature, see s 91 (1), *ante*, p. 80, and observe the alternative of sealing in case of corporation, s 91 (2), *ante*, p 85

(m) When it is intended merely to make the bill payable to bearer, *i.e.*, to indorse it 'in blank", see s 34 (1), *post*, p 120

(n) "Since there is no legal limit to the number of indorsements, there may be no room to write them all on the bill itself the supernumerary indorsements may, therefore, as above provided, be written on a slip of paper annexed to the bill, called an 'allonge', or partly on both An allonge is thenceforth part of the bill, and requires no additional stamp" (Byles) payable (o), or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill. (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners (p) all must indorse, unless the one indorsing has authority to indorse for the others. (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature (q). (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill until the contrary is proved. (6) An indorsement may be made in blank, or special. It may also contain terms making it restrictive" (section 32). An indorsement must correspond with the mandate on the face of the bill, *e.g.*, in *Slingsby* v *District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T. 337; 48 T. L. R. 114, a cheque was made payable to "J. P. & Co. per C. & P. or order" and was indorsed merely "C. & P.". It was held that the indorsement was faulty, and should have been "J. P. & Co. per pro C. & P." As the indorsement was forged, the bank upon which the cheque was drawn was held liable for paying the cheque, notwithstanding the protection given to bankers for paying upon forged indorsements, a topic dealt with later (see *post*, Chapters XXI and XXII).

**Indorsement in Blank: Special Indorsement.**—The Act provides that

"(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. (2) A special

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(o) That is to say, *then* payable. *E.g.*, A holds a bill for £100, A indorses thus: "pay B £40". Such an indorsement will not amount to negotiation. But "pay B. £40, the balance having been received by me", would be valid. In the first instance, however, the payer *may* pay B the £40 as the indorsement authorises him to do so.

(p) In the case of partners each has implied authority to indorse for the firm.

(q) This, in fact, is the course almost invariably adopted. Note that a bill payable to "Mrs. Brown" or "Mrs. John Brown" should not be indorsed in similar terms, as this is not a case of wrong designation or misspelling. It should be indorsed with the proper name of the indorser thus: "Jane Brown", or "Jane Brown, wife of Mr. Brown", or "Jane Brown, wife of Mr. John Brown", as the case may be.

indorsement specifies the person to whom, or to whose order, the bill is to be payable. (3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement (4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person "

(section 34).

The foregoing section may be exemplified thus:—

(1) A bill is payable to A. A indorses the bill by simply affixing his signature. This is an indorsement in blank by A. Again, suppose A indorses the bill to B (*i.e.*, indorses it specially; see next example), and B merely affixes his signature. This is also an indorsement in blank by B. In either case the bill becomes payable to bearer (see section 8 (3), *ante*, p. 72).

(2) A bill is payable to A. A indorses it thus, "Pay B" or "Pay B or order", and affixes his signature. This is a special indorsement by A. Again, B indorses the bill "Pay C" or "Pay C or order", and affixes his signature. This is a special indorsement by B.

(3) A bill is payable to A. A indorses it in blank and negotiates it to B. B may write above A's signature the words "Pay B" or "Pay B or order". Or he may write the words "Pay C" or "Pay C or order". In either case the effect will be the same as if A had written those words himself, and the bill will have become specially indorsed as by A in favour of B or C, as the case may be. In the latter of the two examples B will not be liable as indorser.

**Restrictive Indorsement.**—It is provided by the Act that

"an indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D only', or 'Pay D for the account of X' or 'Pay D or order for collection'" (section 35 (1)). The foregoing sub-section provides for two cases:—

(i) Where the indorser desires to transfer the ownership in the bill to the indorsee himself, but to prevent the indorsee from *negotiating* it, *i.e.*, to prevent him transferring the bill so as to constitute his transferee the "holder" of the bill in accordance with section 31 (1), *ante*, p. 118. The example "Pay D only" belongs to this case. It should be observed that it is the word "only" in the example which makes the indorsement restrictive. The indorsement "Pay D" merely would not be restrictive (see section 8 (4), *ante*, p. 67).

(ii) Where the indorser does not desire to transfer the ownership of the bill at all, but merely to confer upon the transferee such rights of dealing with the bill as the indorsement indicates. The examples "Pay D for the account of X" and "Pay D or order for collection" apply to this case.

The position of the indorsee under a restrictive indorsement is provided for in the Act thus:—

> "A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so"

(section 35 (2)). Of the two examples given in (ii), *supra*, the earlier shows no authority, and the latter shows authority, to the indorsee to transfer his rights. So that, under "Pay D for the account of X", D could not indorse the bill to E so as to give E the right to obtain payment on X's account; but under "Pay D *or order* for collection", D could indorse to E, enabling E to collect the bill (*r*).

The rights of a further indorsee in pursuance of a restrictive indorsement authorising further transfer are dealt with by the Act in the provision that

(*r*) It should be observed that "It has never been attempted to make the payer responsible for the due application of the proceeds by the indorsee, and it is clear that he is not responsible" (Chalmers). In other words, the duty of the payer ends with payment to the immediate payee, *e.g.*, under "Pay D for the account of X", the payer would not be responsible for the misappropriation of the amount by D.

"where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement"

(section 35 (3)). This may be exemplified by the case of C indorsing a bill "Pay D or order for collection". D indorses to E. E may sue the persons liable on the bill. Having obtained payment, E may be sued by C, and, on the other hand, E may set up against C any defence which D had against C.

**Conditional Indorsement.**—The Act provides that

"where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not"

(section 33). For example, a bill runs "Pay X *on his marriage*". The payer may disregard the words italicised, and treat the bill as payable on demand. The section is permissive, however, and therefore the payer may, if he so desires, insist upon reasonable proof of the fulfilment of the condition before payment.

**Continuation of Negotiability.**—The Act provides that

"where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise"

(section 36 (1)). For example, such a bill may be transferred after the holder has commenced an action upon it (s), certainly if the transferee has no notice of the action, and probably if he has (*Deuters* v. *Townsend* (1864), 33 L. J. Q. B. 301). The only remedy, apparently, of the defendant on finding himself sued by the transferee would be to apply to the Court to stay one or other of the actions.

**Negotiation of Overdue Bill.**—The Act provides that

"where an overdue bill is negotiated it can only be negotiated subject to any defect of title (t) affecting it at its maturity, and thenceforward no person who takes it can

(s) Of course, before judgment, when there would be a merger in the judgment of the right of action on the bill.

(t) As to what constitutes a "defect in title", see s. 29 (2), *post*, p. 184, but it may be mentioned here that the term used before the Act was "equity attaching acquire or give a better title than that which the person from whom he took it had "

(section 36 (2)). The effect of this sub-section may be stated thus: *Of the two characteristics of a negotiable instrument, viz.*, transferability by delivery and transferability free from equities, an overdue bill retains the former and loses the latter. In other words, no one can take an overdue bill as a "holder in due course".

As to when a bill (other than a bill payable on demand) is overdue, see section 14, *post*. p 145. As to a bill payable on demand the Act provides that

> "a bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section (*u*), when it appears on the face of it to have been in circulation for an unreasonable length of time What is an unreasonable length of time for this purpose is a question of fact"

(section 36 (3))

The date of the indorsement is of course also a question of fact, but

> "except where an indorsement bears date after the maturity of the bill, every negotiation is primâ facie deemed to have been effected before the bill was overdue"

(section 36 (4))

**Negotiation of Dishonoured Bill.**—The Act provides that

> "where a bill which is not overdue has been dishonoured (*x*) any person who takes it with notice of the dishonour takes it subject to any defect of title attaching

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to the bill", as distinct from "collateral equity". "In the law of bills of exchange, *a distinction is drawn between* 'equities attaching to the bill *itself*' (such as an agreement between the original parties to the bill that in certain events the acceptor shall not be held liable) and 'collateral equities', such as set-off. As a rule a bill of exchange in the hand of a *bonâ fide* holder for value is not subject to the equities between prior parties, but in the case of a bill negotiated when overdue, the holder takes it subject to the 'equities attaching to the bill', although not to any collateral equities" (Sweet's Law Dictionary).

(*u*) As to when a bill payable on demand is due for the purpose of presentation for payment in order to render drawer and indorsers liable, see s. 45 (2), *post*, p 147.

(*x*) *I.e.*, by non-acceptance. *A bill* dishonoured by non-payment becomes overdue.

thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course"

(section 36 (5)). This places the transferee of a dishonoured bill in a position similar to that of the transferee of an overdue bill, with, however, this important difference, that, as has been stated (*supra*), no one can take an overdue bill as a "holder in due course", but there can be such a holder of a dishonoured bill, and he will not take subject to defects of title. In other words, in the case of an overdue bill, *notice* of that fact is immaterial to the question of a holder's rights; *contra* in the case of a dishonoured bill.

**Negotiation Back and Re-issue.**—Suppose a bill is transferred by delivery by the holder back to a prior party, what is such party's position? The point is dealt with by the Act thus:—

> "Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable"

(section 37). For example, B draws on A in favour of C. C indorses to D. D indorses to E. E indorses back to C. C will have no rights against D and E, although he will, of course, maintain his rights against A and B. The reason is that if C were able to sue D and E as his prior indorsers, D and E could sue C as *their* prior indorser, and so the law cancels both sets of rights in order to avoid circuity of action. Further, C may indorse the bill to, say, F in the ordinary way.

The expression "subject to the provisions of this Act" in the section refers, *inter alia*, to the provision that a bill ceases to be negotiable when it has been restrictively indorsed or has been discharged (see section 36 (1), *ante*, p. 123). Therefore, if, in the above example, D had indorsed the bill "Pay E only", E could, of course, not indorse back to C.

**Transfer without Indorsement.**—Suppose a bill payable to order and therefore requiring indorsement in order to negotiate it, is delivered without indorsement with the intention of transferring it to the deliveree, what is the position of the deliveree?

If he takes without giving value it is possible that he has no rights at all (*y*), but if he takes for value his position is thus defined by the Act:—

> "Where the holder of a bill payable to his order transfers it for value without indorsing it (*z*), the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor"

(section 31 (4)). This is merely an application of the rule that an equitable owner may call upon the legal owner for a transfer of the legal estate. Thus a bill payable to X is handed by X to Y for value without indorsement. Y can sue the parties prior to X, subject, however, to such defences on their part as they could have set up had they been sued by X. But he is not a "holder" within the meaning of the Act (see *post*, p. 130), and he cannot sue in his own name only. He is merely the equitable assignee (*Good* v. *Walker* (1892), 61 L. J. Q. B. 736), and must join X as a party to the proceedings (see *ante*, p. 5). In addition, he may sue X for specific performance of X's implied contract to indorse the bill (*a*), upon which he becomes the "holder" and can recover from X as indorser (*b*) It must be observed also that when he has obtained X's indorsement the negotiation will not date back to the time of the delivery, but be regarded as at the date of the subsequent indorsement. So that if, for example, there was a defect in X's title, and Y took the delivery in ignorance of it, but received notice before he obtained X's indorsement, Y will not be a "holder in due course" (*Whistler* v. *Forster*, *ante*, p. 25) (*c*).

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(*y*) Because the result is at best an equitable assignment, and the question of whether consideration is a necessary element in an equitable assignment cannot be regarded as settled, see *ante*, p 5

(*z*) The holder need not be the actual transferor, if the latter is his agent: *Walters* v. *Neary* (1904), 21 T L R 146, where the acceptor was held to be the payee's agent.

(*a*) By s 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court may, in the event of the transferor not complying with the order to indorse, order the indorsement to be made by someone nominated in that behalf, who may be the transferee himself See also Rules of the Supreme Court, O 42, r. 30

(*b*) The claims against the transferor for specific performance and the amount of the bill can be combined in one action *Walters* v *Neary*, *supra*, note (*z*)

(*c*) The case of the transfer by delivery of a bill requiring indorsement must not be confused with the transfer by delivery of a bill payable to bearer, *i.e.*, not requiring indorsement and not in fact indorsed by the transferor It is the

**Transfer by Assignment.**—It will have been observed that although the normal method of transferring a bill is by negotiation (*d*) (*i.e.*, transfer in such manner as to constitute the transferee a "holder" (see section 31 (1), *ante*, p. 118), with all the rights, powers, and duties attaching to such a position (*e*)), nevertheless there is nothing to prevent transfer by the methods available for non-negotiable instruments. "A bill is a chattel; therefore it may be sold as a chattel. A bill is a chose in action; therefore it may be assigned as a chose in action" (Chalmers). In the case of a bill payable to order, which is the only case where the point is likely to arise, the position may be put thus: The mere delivery of the instrument unindorsed will, if for value, operate as an *equitable* assignment with the results stated *ante*, p. 126. But the transferor might go further and assign his rights in accordance with section 136 of the Law of Property Act, 1925 (*ante*, p. 6), and in such case the assignment will be *legal* and the assignee would be able to sue on the bill in his own name, subject, of course, to equities (*ibid.*). Suppose, however, that the transferor assigns his rights in accordance with the statutory provision just referred to, but does not hand over the bill and afterwards negotiates it to a holder for value without notice of the assignment: whom will a person liable on the bill have to pay—the assignee, or the transferee under the law merchant? Clearly, the latter's title will prevail.

**Effect of Bill upon Liability for which it was given.**—A person who receives a bill on account of a debt (*f*) cannot sue for the debt, or assign it so as to bind the debtor, during the pendency of the bill. In *Bence* v. *Shearman*, [1898] 2 Ch. 582; 67

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transferor in the latter case only who is known as a "transferor by delivery", and his position is dealt with in s. 58, *ante*, p. 110. It will be observed that in neither case is the transferor liable on the instrument itself, and in both cases his liability is only to a holder for value, but in the former case the liability of the transferor is to execute an indorsement, whereupon he becomes liable on the bill as indorser, while in the latter case his liability consists in certain implied warranties as to genuineness, right of transfer, and ignorance of anything rendering the bill invalid.

(*d*) Transfer by negotiation, *i.e.*, by delivery in case of a bearer bill, or by indorsement plus delivery in the case of an order bill, is often referred to as transfer "under the law merchant".

(*e*) As to which, see *post*, Chaps. XIV—XVI.

(*f*) Whether the bill is given by the debtor or a stranger: *Allen* v. *Royal Bank of Canada* (1926), 95 L. J. P. C. 17; 134 L. T. 194; 41 T. L. R. 625.

L. J. Ch. 513; 78 L. T. 804, the defendant gave a cheque on account of a debt. Before the cheque was cashed the creditor assigned the debt to the plaintiff, and notice of the assignment was given to the defendant. The creditor retained the cheque. It was held that the defendant could disregard the notice of assignment. In other words, the bill given in payment of a debt operates as a conditional payment. If the bill is dishonoured, the creditor can sue either on the bill or for the debt. If he negotiates the bill, he cannot sue for the debt unless he gets back the bill before action. In *Davis* v. *Reilly*, [1898] 1 Q. B. 1; 66 L. J. Q. B. 844; 77 L. T. 399, A supplied goods to B, for which B gave A a bill. A indorsed the bill to C, and then sued B for the price of the goods. It was held that while the bill was outstanding A could not sue B for the goods, and that it was necessary for A to have got back the bill before action, and not merely before trial. On the other hand, the transferee of the bill can only sue on the bill and not for the debt, *i.e.*, the transfer of the bill does not operate as an assignment of the debt, but only of the obligation contained in the bill itself (*g*).

**Transfer by Operation of Law.**—When a bill is transferred or, more accurately, transmitted by operation of law, *e.g.*, on the bankruptcy or death of the holder, the transmittee, *i.e.*, the trustee in the case of bankruptcy, or personal representative in the case of death, may, in order to realise it, find himself under the necessity of indorsing it. In such event, he will wish to relieve himself from any liability as indorser and to confine such liability to the estate he represents. To meet such case the Act provides that

> "where a person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability"

(section 31 (5)). He must, however, consider what terms are necessary "to negative personal liability" and, in this connection, he should recall the cases upon section 26 (1) (*ante*,

(*g*) Of course, if it is proved that the bill was received by the creditor in absolute discharge of the debt, the debt is extinguished, and the creditor can only claim upon the bill. But the onus of proof is upon the debtor, as the presumption is in favour of the bill being intended as merely conditional payment: *Allen* v. *Royal Bank of Canada* (previous note).

p. 83), which decide that mere words of description are not sufficient. For example, indorsement in the form of "A, executor of B deceased", might render A personally liable, even since the Act (*Liverpool Bank* v. *Walker* (1859), 4 De G. & J. 24), and he should add some such words as "so far as assets only". If, further, he desires that neither he nor the estate he represents shall be liable, he may take advantage of section 16 (1), *ante*, p. 104, as well as of the above provision, and confine liability to parties prior to the bankrupt or deceased, as the case may be.

The following further points may be noted in the present connection:—

The legatee of a bill requiring indorsement cannot indorse it himself. The bill passes in the first instance to the personal representative of the deceased whose indorsement is necessary. The legatee is not the testator's agent for purpose of indorsing (*Bishop* v. *Curtis* (1852), 18 Q B. 878; 21 L. J. Q. B. 391).

Where there are several executors of an estate which includes a bill requiring indorsement in order to negotiate it, the indorsement of one is, it is believed, sufficient

When a sheriff takes bills in execution, can he dispose of them by negotiation? "It would seem . . . that he must keep all bills and endeavour to collect them himself" (Chalmers) (*h*).

(*h*) Whom see for reasons for the statement quoted. It appears clear that he cannot indorse a bill, as the Judgments Act, 1838, upon which his authority depends, gives him no such power.

# CHAPTER XIV.

## THE HOLDER OF A BILL: HIS RIGHTS AND POWERS.

THE largest part of the law relating to bills (*a*) is directed to the ascertainment of the position of the holder. The liability of the parties (*i.e.*, drawer, acceptor, indorser) is, in the first instance, towards the "holder" of the bill (see *ante*, Chapter XI); the negotiation of a bill means its transfer to a "holder" (see *ante*, Chapter XIII); the discharge of a bill means, ordinarily, payment to the "holder" by the party primarily liable upon it (see *post*, Chapter XVIII). The present and the two succeeding chapters will be devoted to a more precise consideration of what constitutes a holder and to a detailed statement of his rights, powers and duties.

### *Who is a Holder.*

**Definition of Holder.**—The Act defines "holder" as meaning

> "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof"

(section 2). Taking this in conjunction with the definition of "bearer" (*ante*, p. 75), the following may be laid down as the requisites of a holder:—

**Requisites of Holder.**—(i) He must be in possession of the bill.

(ii) If the bill is payable to bearer (*b*), nothing further is necessary, as the person in possession is such bearer.

(iii) If the bill is not payable to bearer, he must be the person to whom the bill is payable (*c*).

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(*a*) And to negotiable instruments generally, see Part I, *ante*.

(*b*) It will be borne in mind that a bill is payable to bearer not only where it was originally, or has been since, made so payable, but also where, being payable to order, it has been indorsed in blank (see s. 8 (3), *ante*, p. 72, and s. 34 (1), *ante*, p. 120), and it may also be treated as payable to bearer where the payee is a fictitious or non-existing person (see s. 7 (3), *ante*, p. 72).

(*c*) *I.e.*, the original payee or the person nominated as payee by special indorsement (see s. 34 (2), (3), *ante*, pp. 120, 121).

**Possessor not necessarily Holder.**—It is important to observe that except where the bill is payable to bearer, mere possession does not constitute the possessor a "holder". In other words, "possession" is not equivalent to "holding" except in the case of a bearer bill. For example, a transferee for value of a bill payable to order, and not indorsed by the transferor, has the right to demand the indorsement of the transferor; but until he obtains it he is not the "holder", and, *inter alia*, he cannot sue on the bill in his own name or negotiate it (see *ante*, pp. 125, 126).

**Holder not necessarily Owner.**—On the other hand the holder of a bill is not necessarily the "owner" of it. A, the owner and holder of a bill, indorses the bill to B for collection merely. B is a "holder", and may sue on the bill.

**Holder not necessarily Lawful Holder.**—Moreover, the term "holder" is not equivalent to "lawful holder". X steals a bearer bill. He can, *inter alia*, negotiate the bill as holder so as to give a good title to a "holder in due course". "In the cases the term 'holder' is used in different senses. It is generally used to denote the lawful holder or holder in due course. It then includes (a) the person to whom a bill is by its terms payable and whose title is good against all the world; (b) the person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though as between himself and his transferor he is a mere agent or bailee with a defeasible title, *e.g.*, an indorsee for collection. But 'holder' is also used to denote an unlawful holder, that is, the person to whom a bill is by its terms payable, whose possession is unlawful (*e.g.*, the finder of a bill indorsed in blank), but who nevertheless can give a valid discharge to a person who pays it in good faith, and also a good title to a person who takes it before maturity in good faith and for value. . . . The above definition (*d*) includes both classes of holder" (*e*) (Chalmers).

(*d*) That in s. 2, *ante*, p. 130

(*e*) But "An unlawful holder must be distinguished from a mere wrongful possessor, *e.g.*, a person holding under a forged indorsement, or a person who has stolen a bill payable to the order of another. Such a person has no rights and can give none" (*ibid.*).

*Rights and Powers of a Holder.*

**Statement of Rights and Powers.**—The rights and powers of the holder of a bill may be stated as follows:—(i) to **retain** possession of the bill, (ii) to present the bill for acceptance, (iii) to present the bill for payment, (iv) to note or protest the bill upon non-acceptance or non-payment, (v) to sue upon the bill, (vi) to negotiate the bill, (vii) to insert additional matter in the bill, (viii) to discharge the payer of the bill.

(i) **The Right to Retain Possession.**—The right of a holder to continue to hold or retain possession of the bill resembles generally that belonging to the possessor of any other chattel and depends upon the validity and nature of his title. Thus the finder of a bill may retain it as against all except the true owner in accordance with the well-known rule in *Armory* v. *Delamirie* (1722), 1 Str. 504 Again, a pledgee may hold the bill until redemption, and a donee or purchaser may hold it absolutely, provided that the pledgor, donor or vendor, as the case may be, has the corresponding right of disposition over the bill. But the case of a bill (in common with negotiable instruments in general) differs from that of other chattels in this important respect, that where the possessor, whether he obtained possession as absolute owner or as mere pledgee, did so as a "holder in due course", he will be unaffected by any defect in the right of disposition of the person from whom he obtained such possession.

(ii) **The Right to present for Acceptance.**—Under the head of the "Duties of the Holder" (see *post*, Chapter XV), the cases are given in which it is the *duty* of a holder to present the bill to the drawee for acceptance in order to secure his rights. In other cases, however, the holder has the *right* to present for acceptance if he so chooses (*f*).

(iii) **The Right to present for Payment.**—As a rule it is the *duty* of the holder of a bill to present it to the acceptor for pay-

(*f*) As to the object of exercising this option to present for acceptance, see *post*, pp. 137, 138.

ment in order to complete his right to recover on the bill (see *post*, Chapter XV). In certain cases, however, as will be seen, presentment for payment is excused. Nevertheless, the holder has the *right* to present for payment in such cases if he so desires (*g*).

(iv) **The Right to Note or Protest.**—In connection with "Duties of the Holder", *post*, Chapter XVI, it will be observed when it is the *duty* of the holder to "note" or "protest" the bill for non-acceptance or non-payment, and when not. In the latter event, the holder has the *right* to note or protest, if such a course appears to him desirable (*h*).

(v) **The Right to Sue.**—The Act provides expressly that the holder of a bill

"may sue on the bill in his own name"

(section 38 (1)) This, of course, is but an application of the general principle of transferability by delivery (or by indorsement with delivery), attaching to negotiable instruments in general (see *ante*, Part I, Chapters I and II) It must be observed, however, that the right to *sue* upon a bill is not the same thing as the right to *recover* upon it. Whether a holder will succeed in his suit depends upon his title, whether, for instance, he is a holder for value, or a holder in due course. All that the above provision means is that where he has the right to recover on the bill, he may bring his action "in his own name", *i.e.*, without joining any party through whom he derives title For example, B purchases from A a bill payable to A. A has not indorsed the bill. B cannot sue on the bill without joining A. But if A has indorsed the bill in blank or specially to B, B can sue alone in his own name. On the other hand, if A obtained the bill by fraud and B is not a "holder in due course" B cannot recover on the bill from the parties prior to A (*i*).

(*g*) As to when a holder should present for payment when such presentment is excused, see *post*, p 152

(*h*) As to this see *post*, p. 173.

(*i*) A person who carries on business in other than his true name cannot sue (although he may be sued) on a business bill while he is in default under the Registration of Business Names Act, 1916, s 8 (1), which provides that the rights of a defaulter under the Act "under or arising out of any contract made or

(vi) **The Right to Negotiate.**—Three observations may be made upon this topic:—

(a) The *right* to negotiate must be distinguished from the *power* to negotiate. "The right to negotiate is an incident of ownership; the power to negotiate is an incident of apparent ownership" (Chalmers). For example, A indorses a bill to B, his agent, to enable B to collect it on A's behalf. B indorses it to C for value and C is ignorant that B is merely an agent for collection, *i.e.*, C is a "holder in due course". The negotiation to C is good. B had no right to negotiate, as he was neither the owner nor invested with authority to negotiate. But he had the power to negotiate as he was apparently the owner. In other words, "right" includes "power", but "power" does not necessarily include "right". The position is stated in the Act thus,

> "Where his (*k*) title is defective, if he negotiates the bill to a holder in due course that holder obtains a good and complete title to the bill"

(section 38 (3) (a)).

(b) The power to *negotiate* must be distinguished from the power to *sue* on the bill. A bill is payable to "A only" (see section 35 (1), *ante*, p. 122). A can sue on such bill (assuming, of course, that there is no defect in his title or that he is a "holder in due course"), but he cannot negotiate it.

(c) *Negotiation* must be distinguished from *transfer by assignment*. A bill payable to A is delivered by him to B without indorsement. B has certain rights in respect of the bill (see section 31 (4), *ante*, p. 126). B can *transfer* these rights to C in the proper manner, but he cannot negotiate the bill to C, *i.e.*, he cannot make C the "holder". In other words, negotiation is transfer and something more, namely, transfer under such circumstances as to constitute the transferee the "holder" (section 31 (1), *ante*, p. 118), *i.e.*, possessor with the rights and powers dealt with in the present chapter.

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entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in *default shall not be enforceable by action or other* legal proceeding either in the business name or otherwise". For relief in proper cases, see proviso to section.

(*k*) *I.e.*, the holder's.

(vii) **The Right to insert Additional Matter** (*l*).—The Act gives the following powers to a holder in the present connection:—

(a) To insert the true date of issue of a bill issued undated when payable a fixed period after date (section 12, *ante*, p. 97).

(b) To insert the true date of acceptance of a bill payable a fixed period after sight where he finds the acceptance undated (*ibid.*).

(c) To convert an indorsement in blank into a special indorsement (section 34 (4), *ante*, p. 121).

(viii) **The Right to Discharge.**—For the various ways in which the holder may discharge a bill, see *post*, Chapter XVIII. In this connection also the *right* to give a discharge must be distinguished from the *power* to give a discharge. The holder of a bill having a defective title thereto obtains payment from the drawee or acceptor who is ignorant of the holder's want of title. The payer will obtain a discharge. In other words, the holder had no right to discharge the payer, but he had the power to do so. The provision of the Act on this point is as follows:

> "Where his (*m*) title is defective, if he obtains payment of the bill the person who pays him in due course (*n*) gets a valid discharge for the bill"

(section 38 (3) (b)).

*Duties of a Holder.*

These will form the subject of the ensuing two chapters.

(*l*) The right of the holder of a bill to insert additional matter in it must be distinguished from the right of a person to whom an inchoate instrument has been delivered to fill it up as a complete bill in accordance with s 20, *ante*, pp. 93, 94. In the latter case the person entitled to the right cannot properly be called a "holder" as the instrument while inchoate is not yet a "bill" or "note" as required by the definition of "holder", *ante*, p. 130.

(*m*) *I.e.*, the holder's.

(*n*) As to "payment in due course", see s 59 (1), *post*, p. 193.

## CHAPTER XV.

### THE HOLDER OF A BILL: HIS DUTIES (I)—PRESENTMENT FOR ACCEPTANCE AND PRESENTMENT FOR PAYMENT.

**Statement of Duties.**—The duties imposed upon the holder of a bill are: (1) to present the bill for acceptance, (2) to present the bill for payment, (3) to give notice of the dishonour of the bill by non-acceptance or non-payment, (4) to note or protest the bill upon such dishonour.

The following general observations may be made upon the foregoing:—

(a) The duties are not imposed in all cases, nor are the whole of them necessarily imposed in any particular case. Whether a duty is imposed depends upon the nature of the bill and upon the party from whom the holder seeks to recover on the bill.

(b) The performance of a duty may, under specified circumstances, be excused entirely. Again, where performance is not excused, delay in performance may be excused. In other words, the consequences of the non-performance of a duty only arise when the holder has been guilty of *laches*, or omission to perform the duty without lawful excuse (*a*).

(c) Apart from excuse for non-performance of a duty, any party to whom such duty is owed may waive its performance. This waiver may be made by the party in the act of becoming such in accordance with the provision of the Act that

> "the drawer of a bill, and any indorser, may insert therein an express stipulation . . . (2) waiving as regards himself some or all of the holder's duties"

(section 16), or it may be made subsequently, as will be indicated below in the specific treatment of the various duties.

(d) In accordance with the general rule that laches cannot be imputed to the Crown, the non-performance of a duty cannot be set up against a claim by the Crown on a bill.

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(*a*) "The duties in question are not absolute duties; but, throughout the Act, the holder is required to use reasonable diligence in order to fulfil them" (Chalmers).

(e) When a party to a bill is discharged by the laches of the holder, the holder cannot sue such party upon the consideration for the bill; *e.g.*, A owes B £100 and indorses to B, as collateral security, a bill accepted by C. On maturity, C dishonours the bill and turns out insolvent. B does not give notice to A of dishonour as required by the Act. Not only cannot B sue A on the bill, but he cannot sue A for the debt for which the bill was given as security A is discharged of both, and evidence is not admissible to show that A was not in fact prejudiced by B's neglect, *e.g.*, that C had been insolvent all along (*Peacock* v. *Purssell* (1863), 14 C B. (N.S.) 728, 32 L. J. C. P. 266; 8 L. T. 636) (*b*).

(1) *The Duty to present for Acceptance.*

**As a Rule Unnecessary.**—As a rule, the holder of a bill is under no obligation to present it for acceptance For example, B draws upon A at six months after date, in favour of C. C owes no duty to B to present the bill to A for acceptance. He may wait until the six months have expired and present the bill to A for payment, and if this is refused, he may claim against B.

**But Desirable.**—It must be observed, however, that C has the *right* to present for acceptance and would be foolish not to exercise it in such case, for two reasons. firstly, because unless A accepts the bill C will have no claim against him either on the bill or on any fund which A may happen to have in his hands provided by B to meet the bill (see *Re Agra Bank* and *Griffin* v. *Weatherby*, *ante*, p. 102), and can look only to B; and, secondly, because if A refuses to accept the bill, C's

(*b*) In one case, the rule as stated would appear to work an injustice, *viz.*, where a bill is dishonoured by non-acceptance. A owes B £100 and gives E in payment a bill for that amount drawn by A upon C, A having goods in the hands of C. B presents the bill for acceptance to C, but the latter refuses or neglects to accept B does not give notice of dishonour by non-acceptance as required by the Act. According to the rigour of the rule, B cannot recover from A either on the bill or the original debt. Neither, of course, can he sue C on the bill. So that A might be £100 to the good, as he still remains the creditor of C. There would appear to be room here for an extension of the doctrine of *subrogation* (already recognised in the Act, s. 68 (5), *post*, p 210, and s 74 (3), *post*, p. 227), so that B might be remitted to A's rights against C, for what they are worth. The moral is, of course, that B should not take the bill in payment except conditionally upon C accepting it.

right against B will arise immediately instead of six months hence. Of course, where a bill is payable on demand (as to which see section 10, *ante*, pp. 65, 66), there is nothing to be gained by presentment for acceptance (*c*), so far as the holder is concerned, as the drawee who did not intend to pay the bill would be very unlikely to accept it, since it would be presented for payment the moment afterwards. Such a bill, however, must be presented for acceptance if it comes within section 39 (2), *infra*.

**When Necessary.**—The Act provides that

> "(1) where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument. (2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. (3) In no other case is presentment for acceptance necessary (*d*) in order to render liable any party (*e*) to the bill"

(section 39). There are, therefore, three cases where presentment for acceptance is necessary:—

(i) Where the bill itself as drawn provides that it shall be presented for acceptance. In such case the right to present for payment would be conditional upon previous presentment for acceptance.

(ii) Where the bill as drawn itself provides for the place where it shall be payable and such place is not the drawee's residence or place of business. In the absence of any provision to the contrary, a bill is payable at the place of business or residence of the drawee (or acceptor) (section 45 (4) (c), *post*, p. 148). Consequently, if a different place is specified in the drawing, the bill must be presented for acceptance in order that the drawee may know of and assent to the departure from the ordinary rule.

(*c*) "In the case of a bill which is due or payable on demand, presentment for acceptance is merged in presentment for payment" (Chalmers).

(*d*) But it may be desirable, see *supra*.

(*e*) "Party", *of course, does not refer to the drawee as, not having accepted, he has not yet become a party.*

(iii) Where the bill is payable *after* sight. In this case, until the date of the "sight" has been determined, it is impossible to arrive at the date of maturity. The expression "sight" in such a case has been held to mean "acceptance" if the bill be accepted, or noting or protest for non-acceptance if the bill be dishonoured on presentment for acceptance (*Campbell* v. *French* (1795), 6 Term Rep 200; 2 H. Bl. 163) (*f*).

Although the Act provides as above that a bill payable after sight must be presented for acceptance before it can be presented for payment, there is nothing in such provision to force the holder to present it for acceptance within any reasonable time. Consequently, a holder, instead of presenting promptly for acceptance, might postpone that event indefinitely until the drawee at the time he accepts has become impecunious, and then claim against the drawer or other prior party whose right of recourse against the acceptor would then be worthless. This mischief is intended to be met by the provision that

> "(1) Subject to the provisions of this Act (*g*), when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time. (2) If he do not do so, the drawer and all indorsers prior to that holder are discharged. (3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case"

(section 40). It must be observed that the remedy thus provided is only partial, because apparently the bill may remain indefinitely outstanding without presentment for acceptance by passing from holder to holder, so long as no one holder holds it for an unreasonable time.

**What is Due Presentment.**—The Act provides that

> "a bill is duly presented for acceptance which is presented in accordance with the following rules: (a) The

(*f*) The Act itself seems to bear out this interpretation by the provision that the time for payment in the case of a bill payable after sight is to be computed from the date of acceptance, or noting or protest for non-acceptance (see s. 14 (3), *post*, p. 146).

(*g*) That is to say, the provisions excusing presentment for acceptance, see s. 41 (2), *post*, pp. 141, 142 presentment, must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue; (b) where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only; (c) where the drawee is dead, presentment may be made to his personal representative; (d) where the drawee is brankrupt (*h*), presentment may be made to him or to his trustee; (e) where authorised by agreement or usage, a presentment through the post office is sufficient"

(section 41 (1)). The following observations may be made upon the foregoing provisions:—

(i) Although provision is made in relation to the one who is to present, to whom presentation is to be made, and to the time of presentment, nothing is provided as to the place where presentment is to be made (*i*). The bill usually gives the address of the drawee, but if it does not and the holder does not know the address, it is assumed that he has merely to use "reasonable diligence" to discover the drawee, and if he fails presentment will be excused, in accordance with section 41 (2) (b), *post*, p. 141.

(ii) In the case of the drawee being dead, the provision is that presentment *may* be made to the personal representative; while, if he be bankrupt, it may be made either to him or to his trustee in bankruptcy. But presentment is excused altogether in such case if the holder so desires (see section 41 (2) (a), *ibid.*).

(iii) Presentment to one of several drawees (not partners) is only permissive, and if the holder has any doubt as to the authority of such a drawee to accept for his co-drawees, he should present to all.

(iv) The "reasonable hour" for presentment will depend on

(*h*) "'Bankrupt' includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy" (s. 2).

(*i*) In the case of presentment for *payment*, there is such provision (see s. 45 (4), *post*, p. 148).

circumstances. In the case of a bank it would be banking hours, in the case of a trader at his place of business at ordinary business hours according to the nature of the business, season, or neighbourhood.

(v) "Business day" means any day except

"(a) Sunday, Good Friday, Christmas Day; (b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it; (c) A day appointed by Royal Proclamation as a public fast or thanksgiving day"

(section 92). The foregoing are "non-business days" (*ibid.*)

(vi) Due presentment means presentment "before the bill is overdue". An acceptance afterwards will, however, be good as against the acceptor (see section 18 (2), *ante*, p 87), but as against him only, and will not serve as against the drawer or prior indorsers where presentment for acceptance is necessary to their liability.

**When Presentment Excused.**—The Act provides that

"presentment in accordance with these rules is excused (*k*), and a bill may be treated as dishonoured by non-acceptance. (a) where the drawee is dead (*l*) or bankrupt (*l*), or is a fictitious person (*m*) or a person not having capacity to contract by bill (*n*). (b) Where, after the exercise of reasonable diligence (*o*), such presentment can-

(*k*) Where, that is to say, excuse is necessary, *viz.*, where presentment for acceptance is obligatory

(*l*) Presentment may, however, be made in these cases to the personal representative or trustee respectively (see s 41 (1) (c) and (d), *ante*, p. 140).

(*m*) As to the meaning of this term, see *ante*, pp 72 *et seq*

(*n*) As to capacity to incur liability as a party to a bill, see s 22, *ante*, pp 77 *et seq*.

(*o*) The requirement of "reasonable diligence" appears in six places in the Act, *viz.*, in s 41 (2), *supra* (in connection with presentment for acceptance); in s. 45 (5), *post*, p. 148, and s 46 (2), *post*, p 151 (in connection with presentment for payment), in s. 50 (1), *post*, p 165, and sub-s 2, *post*, p 163 (in connection with notice of dishonour), and in s 51 (9), *post*, p. 178 (in connection with protest of foreign bills). In each case "reasonable diligence is a question of fact" (Chalmers, citing *Bateman* v. *Joseph* (1810), 2 Camp., at p. 462) In no case is it provided that reasonable diligence, where required, is dispensed with when no amount of diligence would produce the desired effect. It would seem, however, that where the circumstances are clearly and notoriously such that the result intended to be effected by the diligence is impossible or illegal and, therefore, the exercise of diligence, reasonable or otherwise, would prove futile and, indeed, absurd, such exercise is excused—*Cornelius* v. *Banque Franco-Serbe*, [1942] 1 K. B. 29; 110 L. J. K. B. 573, 165 L. T. 374; 57 T. L. R. 610, where presentment for payment was dispensed with without proof of exercise of reasonable diligence because the place of presentation had become territory in enemy occupation.

> not be effected. (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground " (*p*)

(section 41 (2))

The fact that diligence to effect presentment would apparently be wasted, will not remove the liability to exercise it, the Act providing that

> " the fact that the holder has reason (*q*) to believe that the bill, on presentment, will be dishonoured does not excuse presentment "

(section 41 (3)). It may be stated, however, that if, in fact, presentment would have been futile, it will be excused, but the fact that it appeared futile to the holder will not excuse him if the futility is not certain (*r*).

**Dishonour by Non-Acceptance.**—The non-acceptance of a bill by the drawee is entitled " dishonour by non-acceptance ". The Act provides that

> " a bill is dishonoured by non-acceptance (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or (b) when presentment for acceptance is excused and the bill is not accepted "

(section 43 (1)). Furthermore,

> " when a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must (*s*) treat it as dishonoured by non-acceptance "

(section 42).

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(*p*) This provision finds its analogy in a similar rule in connection with " tender " Refusal to accept the offer merely on the ground of deficiency in the amount, will operate as a waiver of any other ground of objection to the tender (see *Cadman* v *Lubbock* (1824), 5 D & R 289, and other cases)

(*q*) For some observations on this word, see *post*, pp 152, 153

(*r*) " If the drawee has absconded the bill may be treated at once as dishonoured, but not merely if his house be closed, and the holder make no further attempt to find him " (Byles, citing *Anon* (1695), 1 Ld Raym 743, and *Collins* v. *Butler* (1738), 2 Stra 1087)

(*s*) The sanction (provided by the section now being quoted) being that

" if he do not, the holder shall lose his right of recourse against the drawer and indorsers "

As to the right of recourse, see *post*, p 143

Dishonour by non-acceptance may therefore mean:—

(i) Where due presentment (*t*) has been made, either a refusal to accept, or mere non-acceptance within the customary time (*u*), or acceptance not in accordance with the Act (*x*).

(ii) Where presentment is excused (*y*), mere non-acceptance.

It must be observed that a "qualified" acceptance is not acceptance within the foregoing provisions except under certain conditions (see *infra*).

**Consequences of Dishonour by Non-Acceptance.**—The Act provides that

> "subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary"

(section 43 (2)). It must be observed upon this provision that—

(i) The right of immediate recourse to prior parties applies in all cases of dishonour by non-acceptance, whether presentment for acceptance was necessary (*z*) or not. Hence the second of the advantages of presentment for acceptance, given *ante*, p. 137

(ii) The right given against prior parties is not a right to sue but of *recourse* and is subject to the provisions of the Act. This means that where any duty is imposed upon the holder as a condition precedent to a right of action against prior parties, such duty must be performed before his right to sue is complete. Such duties may be those of "notice of dishonour" (see *post*,

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(*t*) *I e*, presentment in accordance with s 41 (1), *ante*, pp 139, 140

(*u*) In case of ordinary trade bills, twenty-four hours *Bank of Van Diemen's Land* v *Victoria Bank* (1871), L R 3 P C 526 The customary law on the subect may be stated as follows —The holder must leave it with the drawee (if the latter so requires) for that period At the expiration thereof, the holder must call for the bill, and is entitled to receive it either accepted as prescribed by the Act, or not accepted If the drawee refuses to give it up, he is not deemed to have accepted it but becomes liable to be sued by the holder for its detention. The twenty-four hours is exclusive of "non-business" days, as to which see s. 92, *ante*, p. 141

(*x*) For the acceptance prescribed by the Act, see s 17, *ante*, p 86

(*y*) As to which, see s 41 (2), *ante*, pp 141, 142

(*z*) *Viz.*, in the cases provided for by s 39, *ante*, p 138

Chapter XVI), "protest" (*ibid.*), or presentment to an "acceptor for honour", and protest for non-payment by him (see *post*, Chapter XIX).

**Qualified Acceptance** (*a*).—The Act provides that

> "(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance. (2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill. The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance. (3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto"

(section 44). The foregoing provisions may be re-stated as follows:—

(i) The holder of a bill is entitled to a "general" acceptance and *may* treat a qualified one as a dishonour by non-acceptance.

(ii) Moreover, he *must* treat any qualified acceptance (other than a "partial" one) as a dishonour. If he does not he will discharge the prior parties, except such prior parties as consent to his accepting a qualified acceptance.

(iii) The consent of a prior party to the acceptance of a qualified acceptance may be given beforehand or subsequently, and expressly or impliedly. Such subsequent implied consent is constituted by the receipt of notice of the qualified acceptance and the non-expression of dissent therefrom within a reasonable time.

(iv) In the case of a "partial" qualified acceptance, although, as stated *supra*, the holder may treat it as a dishonour,

(*a*) As to what is meant by a "qualified" acceptance, see s. 19, *ante*, pp. 88, he is not bound to do so even if the prior parties do not consent, provided he has given due notice thereof to such prior parties. In the case of a foreign bill (*b*) accepted partially, the rule as to the necessity for protest on dishonour (*post*, p. 173) will apply as to the balance for which the bill has not been accepted.

### (2) *The Duty to present for Payment.*

**As a Rule Necessary.**—The Act provides that

> "subject to the provisions of this Act (*c*) a bill must be duly presented for payment"

(section 45).

**What is Due Presentment.**—Due presentment for payment may be stated shortly as presentment (i) on the proper day, (ii) at the proper hour, (iii) by the proper person, (iv) at the proper place, (v) to the proper person, (vi) in the proper manner.

(i) *The Proper Day for presentment*—It is necessary to consider the day on which it is necessary to present (a) where the bill is not payable on demand, (b) where the bill is payable on demand

(a) The Act provides that

> "where the bill is not payable on demand, presentment must be made on the day it falls due"

(section 45 (1)). The following provisions are made for the determination of the date of such day (*d*).—

> "(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide (*e*), added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—
> (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the

(*b*) As to what is a foreign bill, see s 4, *post*, p 169

(*c*) *I.e*, the provisions excusing presentment, *post*, pp 151 *et seq*

(*d*) No action on the bill may be brought until the day after it falls due See *Kennedy* v. *Thomas*, [1894] 2 Q B. 759; 63 L J Q B 761; 71 L. T. 144, where it was held that although a bill is, by s. 14 (1) of the Act (*infra*), due and payable on the last day of grace, and, if the bill be dishonoured, notice of dishonour may be given on that day to the drawer and prior indorsers, no action may be brought against such parties or the acceptor until the following day.

(*e*) A provision in a bill that it shall be paid "punctually" will not, of itself, negative the right to the days of grace· *Schaverien* v *Morris* (1921), 37 T L. R. 366.

case hereinafter provided for, due and payable on the preceding business day (*f*); (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (*f*). (2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest (*g*) if the bill be noted or protested for non-acceptance, or for non-delivery (*h*). (4) The term 'month' in a bill means calendar month"

(section 14).

The following examples will serve to illustrate the foregoing provisions:—

A bill is dated January 1 payable three months after date. It will fall due on April 4.

A bill is dated January 1 payable three months after date, but provides no "grace". It will fall due April 1.

A bill is dated November 22 payable one month after date. It will fall due on December 24.

A bill is dated November 23 payable one month after date It will fall due December 27.

A bill is payable ten days after death of A. A dies March 15. It will fall due March 28.

A bill is payable three days after sight. It is accepted on March 10. It will fall due on March 16. The foregoing bill is dishonoured on presentation for acceptance. The time will be reckoned from the day of such dishonour if it need not be noted or protested. But if it has to be noted or protested, or is in fact noted or protested, although noting or protest be

(*f*) As to what is meant by a "business day", see s 92, *ante*, p 141

(*g*) As to "noting" and "protest", see *post*, Chap. XVI

(*h*) As to noting or protest for "non-delivery", see s 51 (8), *post*, p. 178

unnecessary, the time will be reckoned from the day of such *noting or protest*.

A bill is date January 31, payable one month after date, and providing for "no grace". It will fall due February 28 (in leap year, February 29) If not providing for "no grace", it will fall due March 3

(b) Where the bill is payable on demand (*i*), the Act provides that

> "subject to the provisions of this Act (*k*), presentment must be made within a reasonable time after its issue (*l*) in order to render the drawer liable, and within a reasonable time after its indorsement (*m*) in order to render the indorser liable In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case (*n*)"

(section 45 (2)). Presentment must be made on a "business day" (see section 45 (3), *infra*).

(ii) *The Proper Hour for presentment.*—The Act provides that presentment must be made

> "at a reasonable hour on a business day"

(section 45 (3)). The question of what is meant by presentment at "a reasonable hour" has been discussed in connection with a similar provision relating to presentment for acceptance (see *ante*, p. 141). The provision that presentment must be made on "a business day" is only necessary in the case of a bill payable on demand In the case of other bills, the provisions for arriving at the due date of maturity (*ante*, pp 145 *et seq.*) insure that such date shall not coincide with a *dies non*

(*i*) As to when a bill is payable, or deemed payable, on demand, see s 10, *ante*, pp 65, 66

(*k*) *I e*, subject to the excuses allowed for delay in presentment, or for non presentment, contained in s 46, *post*, pp 150—154

(*l*) As to meaning of "issue", see s 2, *ante*, p 97

(*m*) As to meaning of "indorsement", see s 2, *ante* p 97

(*n*) "The question of what is a reasonable time under s 45 (2), s 74 (2) and s 86 (2), is a question of fact" (Byles, citing *Wheeler* v *Young* (1897) 13 T L. R. 468) For difference between note on demand and bill on demand or cheque, see Byles under s 86 (1), (2) As to cheque, see also Byles, quoted *post*, p 228 See further *post*, p 162, as to meaning of expression in question in connection with s 49 (12)

(iii) *The Proper Person to present.*—The Act provides that presentation must be made

> "by the holder or by some person authorised to receive payment on his behalf"

(section 45 (3)). When a bill is presented, not by the holder himself, but by some person purporting to act on his behalf, the question suggests itself as to what evidence the payer is entitled to demand of such person's authority. The point, however, appears to give rise to no difficulty in practice, nor to have ever come before the Courts, so that it is scarcely necessary to discuss it here.

(iv) *The Proper Place of presentment.*—The Act provides that presentment must be made

> "at the proper place as hereinafter defined"

(section 45 (3)). The definition of "proper place" is as follows:—

> "A bill is presented at the proper place—(a) Where a place of payment is specified in the bill and the bill is there presented. (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented. (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known. (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence"

(section 45 (4)). It must be observed that provision (d) is only applicable as a last resource, *e.g.*, a bill specifies no place of payment as in (a), and it contains no address as in (b), but the holder knows the acceptor's residence; the holder meeting the acceptor in the street cannot present under (d), but must do so at the residence as provided by (c). Upon presentment at the proper place the duty of the presenter is discharged, and he is not responsible if no one presents himself there to pay, the Act providing that

> "where a bill is presented at the proper place, and after the exercise of reasonable diligence (o) no person authorised

(o) See *ante*, p. 141, note (o).

to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required"

(section 45 (5).) This is not a case of presentment being excused (as to which see *post*, pp. 151 *et seq.*), the law deems presentment to have actually taken place. It may be assumed that the presenter is not bound to go further than make inquiry for the payer and if he is informed by the person answering the door that the payer is not there, the presentation is sufficient, the duty being upon the payer to anticipate the presentation at such place and to take proper steps to meet the presenter.

(v) *The Proper Person to whom to present.* The Act provides that presentment must be made

"either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found" (p)

(section 45 (3).)

The case of two or more payers is provided for as follows:—

"Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all"

(section 45 (6).) In other words, where the payers are partners presentment to one is presentment [illegible]. Where they are not partners presentment at the specified place of presentment is presentment to all. The exception in the case of partners is made because the partner is deemed to have authority to pay or refuse payment on behalf of all; and even if the payees are not partners, if, in fact, he has authority to act on behalf of the others, presentment to him will suffice.

In the case of the payer being dead the Act provides that

"where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found"

(section 45 (7).) It should be observed on this provision, first that if a place of payment is specified, it does not matter whether

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(p) *I.e.*, at the proper place of presentment, as to which see *ante*, p. 148. If such person cannot there be found, he need not be further sought (see s. 45 (5), *ibid.*).

the payee is alive or dead; and secondly, that the expression "personal representative" means a person who has actually obtained letters of administration or probate, and not one merely entitled to apply for a grant.

(vi) *The Proper Manner of presentment.*—Two provisions contained in the Act are to be noted in this connection, *viz.*,

> "Where authorised by agreement or usage a presentment through the post office is sufficient"

(section 45 (8)), and

> "Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it"

(section 52 (4)). It will be observed in the last-mentioned provision that the presenter for payment is not bound to do more than exhibit the bill, and need not deliver it up until he has actually received payment. It will be remembered that, in the case of presentment for acceptance, presentment involves actually handing over the bill to the drawee (see *ante*, p. 143, note (*u*)).

**Delay in Presentment.**—Delay in presenting may be excused (without presentment being excused altogether), the Act providing that

> "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence"

(section 46 (1)). Examples of excusable delay are furnished by death of the holder and consequent disarrangement of his affairs, delay in the post where presentment in that manner is authorised, and state of siege of place of presentment (*Patience* v. *Townley* (1805), 2 Smith 223).

One specific cause of delay is expressly provided for in the Act. It will be remembered that one of the cases in which presentment for *acceptance* is necessary is where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In such case it must be presented for acceptance before it can be presented for payment (see section 39 (2), *ante*, p. 138). Now a *holder may not receive the bill until* so close upon the date for presentment for payment that he is unable to present it for acceptance, and afterwards present it for payment punctually upon the date when it falls due. In such a case he may not omit the presentment for acceptance, but the consequent delay in presentment for payment is excused, the Act providing that

> "Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers"

(section 39 (4)). For example, a bill is drawn abroad at short date upon a drawee in Manchester, and is made payable in London. The holder, who is in London, does not receive it until the day before it matures. He has no time to send it to Manchester for acceptance and get it back again in time to present it for payment in London on the day of maturity. He must remit it to Manchester, and, upon acceptance or dishonour, present it for payment with all due diligence, but such delay as was inevitable will be excused.

**When Presentment is Excused.**—The Act provides that presentment for payment is dispensed with—

(i) As regards *all* prior parties,

> "(a) Where, after the exercise of reasonable diligence (q) presentment, as required by this Act, cannot be effected.
>
> (b) Where the drawee is a fictitious (r) person"

(section 46 (2) (a) and (b)).

(ii) As regards the *drawer*,

> "where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the

(q) See *ante*, p. 141, note (o)

(r) As to what is meant by a "fictitious person", see *ante*, pp. 72 *et seq.*

> drawer has no reason to believe that the bill would be paid if presented"

(section 46 (2) (c)). For example, A accepts a bill for the accommodation of B, the drawer, who discounts it with C. As between himself and B, therefore, A is not bound to pay the bill. If B has no reason to think that the bill would be paid if presented, C need not present it for payment to A in order to charge B. Suppose, however, that B has supplied A with funds to meet the bill, then C must present to A in order to be able to charge B in the event of A not meeting the bill. It must be observed that the question is not whether the *holder*, but whether the *drawer*, has reason to believe that the bill will be paid. Consequently a holder would be very unwise to refrain from presenting a bill for payment merely because he happens to know that it was accepted for the drawer's accommodation. Suppose the holder learns that, in a case where the acceptor was bound originally to pay the bill, the drawer has countermanded payment, *i.e.*, ordered the acceptor not to pay, will this by itself excuse the holder from presentment for payment. The answer is no, because although the acceptor will then have lost his liability to pay the bill as between himself and the drawer, the latter may still have reason to believe that the bill will be paid by the acceptor in order to discharge his liability to the holder (*Hill* v. *Heap* (1823) D. & R., N. P. C. 57 (s)). It should be observed also that the fact that the drawer believed that the bill would be paid is not material if he had no reason for such belief, and by "reason" is meant, apparently, "sufficient reason". In *Re Boyse* (1886), 33 Ch. D. 612, 56 L. J. Ch. 135, 55 L. T. 391, it appeared that in 1872 B drew a bill on sight payable to her own order on the Bank of England, and indorsed it the following year to G. B had no account with the Bank, but she had Government securities, on which large dividends became due from time to time, and which were paid her through the Bank on behalf of the Government. G kept the bill, without presenting it, until 1876, when he indorsed it to C. C, in turn, kept it, without presenting it, until 1880, when he presented it and was refused payment by the Bank. In the meantime B had died. It was

(s) Notice of dishonour will, however, in such case be excused, see s. 50 (2) (c) (5) (*post*, p. 167).

held that the delay in presentment did not release her estate, as presentment was excused altogether on the ground that she had no reason to believe that the bill would be paid if presented. It seems clear, on the facts, that B might have believed that the bill would be paid by the Bank out of the dividends from the Government securities, that she did believe it; and that she had some reason, *which seemed good to herself*, for so believing. But the Court held that "her idea that these dividends upon the Government funds would be assets in the bank available for payment of a bill drawn on the bank was, of course, untenable", and that such idea, *although there* was something which not unreasonably accounted for it, was not reason for believing that the bill would be paid if presented within the meaning of the section in question.

(iii) As regards an *indorser*:

"where the bill was accepted or made for the accommodation of that indorser and he has no reason to expect that the bill would be paid if presented"

(section 46 (2) (d)). The example and other comment used in connection with the previous sub-section relating to the *drawer* will apply to the present sub-section by substituting indorser for drawer.

(iv) As regards *any* prior party:

"by waiver of presentment, express or implied"

(section 46 (2) (e)). As to *provision* for waiver contained in the bill itself, see section 16, *ante*, p. 130. Subsequent waiver is exemplified in *Hopley* v. *Dufresne* (1812), 15 East 275, where a prior party wrote to the holder after the bill had matured asking for further time in which to pay. Waiver before maturity, if not contained in the bill itself, or express, must be clear in its implication (*Britannia Electric Lamp Works* v. *Mandler*, [1939] 2 K. B. 129; 108 L. J. K. B. 823, 160 L. T. 587, 55 T. L. R. 655).

As in the case of presentment for acceptance (see section 41 (3), *ante*, p. 142), the fact that presentment for payment will apparently be futile will not of itself excuse such presentment, the Act providing that

"the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment "

(section 46 (2) (a)). For example, the acceptor declares before the bill matures that he will not pay when due, or that he cannot do so. Nevertheless the holder must present (*Ex p. Bignold* (1836), 1 Deac. 712; *Baker* v. *Birch* (1811), 3 Camp. 107; *Britannia Electric Lamp Works* v. *Mandler*, *ante*, p 153).

**Presentment for Acceptance and Payment compared.**—The comparison between presentment for acceptance and payment respectively has been stated thus: "Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where money is Any one can then hand over the money A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place were it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present the bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment" (Chalmers).

**Consequences of Non-Presentment.**—The Act provides with reference to presentment for payment that

> "if it be not so presented the drawer and indorsers shall be discharged"

(section 45).

This relates only to the drawer and indorsers. As regards the acceptor (*t*), the Act provides that

> "When a bill is accepted generally, presentment for

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(*t*) Of course, a mere drawee who has not accepted cannot be liable on the bill.

payment is not necessary in order to render the acceptor liable"

(section 52 (1)). But that

"When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures"

(section 52 (2)). These provisions may be restated thus:—

(i) In the case of a general acceptance (*u*), the acceptor becomes forthwith liable to the holder without presentment for payment, in accordance with the ordinary rule that the debtor must seek his creditor and that demand for payment is not necessary to complete the creditor's right of action (*x*).

(ii) Where the acceptance is qualified (*y*) so as to make presentment for payment to the acceptor a condition precedent to the holder's right to payment from the acceptor, presentment for payment is necessary before the holder can sue the acceptor, but it need not be on the day the bill is due, unless the acceptance is so qualified as to bring the case within (iii), *infra*. It must be observed that the sub-section does not say that presentment is necessary where the acceptance is qualified, but that it is necessary where it is qualified by requiring presentment. Therefore, for example, a "partial" (*z*) acceptance would not render presentment necessary. But a local (*a*) acceptance would (*b*).

(iii) If the acceptance expressly stipulates for presentment on maturity, the acceptor will be discharged if presentment is not made on the day when the bill is due.

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(*u*) For meaning, see s. 19 (2), *ante*, p. 88.

(*x*) Nevertheless the Court might regard a holder who sued an acceptor without presentment or other demand for payment as having acted so harshly as to entitle the Court to exercise its discretion as to costs so as to deprive the plaintiff of them.

(*y*) For meaning, see s. 19 (2), *ante*, p. 88.

(*z*) For meaning, see s. 19 (2) (b), *ante*, p. 89.

(*a*) For meaning, see s. 19 (2) (c), *ibid.*

(*b*) Query, however, whether the presentment in such a case would have to be punctual. A local acceptance would not appear to constitute an "express stipulation" for punctual presentment within (iii), *supra*, but, nevertheless, the acceptor might perhaps be discharged in such case on the ground of the holder's negligence if the latter did not present at due date (see Byles and Chalmers under s. 52, and authorities cited by them).

**Dishonour by Non-Payment.**—The non payment of a bill by the drawee or acceptor, like non acceptance is entitled "dishonour" *i.e.* dishonour by non payment. A bill is dishonoured by non payment

> (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid

(section 47 (1)). In other words dishonour by non payment means

(i) Non payment upon due presentment when presentment is necessary or is made voluntarily.

(ii) Non-payment without presentment when presentment is unnecessary and is in fact not made, provided that the bill is overdue.

**Consequences of Dishonour by Non-Payment.** It is provided by the Act that

> "Subject to the provisions of this Act, when a bill is dishonoured by non payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."

(section 47 (2)). If reference is made to section 43 (2) *ante*, p. 143 where the consequences of dishonour by non acceptance are stated it will be observed that they are precisely the same as in the case of dishonour by non payment. In the latter case as in the former the right conferred is a right of 'recourse' merely, which does not become a right to sue until the holder has carried out any duties such as "notice of dishonour" or of "protest" which may be imposed upon him as a condition precedent to the completion of his right of action against prior parties (*ibid.*). The difference between the consequences of dishonour by non acceptance and dishonour by non payment lies, of course, in this, that the former can give no rights against the drawee, since he has not become a party to the bill, while in the latter case the drawee may have accepted the bill and in such event will have made himself a party to the bill and liable upon it. The right of a holder against the acceptor upon dishonour by non payment is, however, not a mere right of recourse but a complete right of action, as the duties referred to are in no case owed to him.

# CHAPTER XVI.

## THE HOLDER OF A BILL: HIS DUTIES (II)—NOTICE OF DISHONOUR, NOTING AND PROTEST.

*(3) The Duty to give notice of Dishonour*

**As a Rule Necessary.**—The Act provides that

> "Subject to the provisions of this Act (*a*), when a bill has been dishonoured by non acceptance or by non payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged"

(section 48). The following points should be observed —

(i) Notice of dishonour is only required in order to charge the drawer or indorsers, the Act providing that

> "In order to render the acceptor of a bill liable it is not necessary . . that notice of dishonour should be given to him"

(section 52 (3) )

(ii) The requirement of notice of dishonour is not confined to cases where presentment of the bill was compulsory With certain exceptions (see section 39, *ante*, p 138), it is unnecessary to present a bill for acceptance in order to charge the drawer or indorsers. Again, in certain cases (see section 46 (2), *ante*, pp. 151 *et seq.*) it is unnecessary to present a bill for payment in order to charge such parties. Nevertheless, in either case, if the holder exercises his option in favour of presentment, he must give notice of dishonour, unless notice is dispensed with in accordance with the provisions to be dealt with presently.

(iii) Where a bill has been presented for acceptance and dishonoured, if the holder so presenting negotiates the bill, the transferee may or may not be aware of the dishonour. He will, however, be bound by the transferor's omission to give notice of

(*a*) *I.e*, the provisions excusing notice of dishonour, see s. 50 (2), *post*, pp. 166 *et seq*.

dishonour except in one case, as to which the Act provides that

> "Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course (*b*) subsequent to the omission, shall not be prejudiced by the omission"

(section 48 (1)).

(iv) Again,

> "Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted"

(section 48 (2)). For example, a three months' bill is presented by the holder for acceptance and dishonoured. The holder gives notice of dishonour to the drawer and indorsers, but does not exercise his immediate right of recourse to them as conferred by section 43 (2), *ante*, p. 143. Upon the bill maturing he presents it to the drawee for payment, when it is again dishonoured. He need not give notice of dishonour by non-payment, but his previous right of recourse remains good. Suppose, however, that he re-presents the bill for acceptance and it is accepted, and it is afterwards dishonoured by non-payment, he must give notice of dishonour by non-payment.

**Requirements as to Notice of Dishonour.**—The rules laid down by the Act to constitute a valid and effectual notice of dishonour relate to (i) the person to give notice, (ii) the persons for whose benefit the notice enures, (iii) the manner of giving notice, (iv) to whom notice must be given, (v) the time for giving notice.

(i) *The Person to give Notice.*—The Act provides that

> "the notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill"

(section 49 (1)); and further that

(*b*) For meaning, see *post*, Chap. XVII. The Act makes no express provision for the protection of a holder in due course, who takes a bill dishonoured by *non-payment* where it is not apparent that the bill is overdue (*e.g.*, bill payable on demand) But it is surmised that, on general principles, he will be protected See argument, *post*, p 179, in analogous case

> "notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not"

(section 49 (2)).

It must be observed on the foregoing that:—

(a) The notice must be by or on behalf of the holder or of an indorser and not by or on behalf of a stranger to the bill. For example, A indorses a bill to B. The bill is dishonoured. B omits to give notice to A, but happens to have been informed of the dishonour by C, who is a stranger to the bill and is not acting on B's behalf A is deemed not to have received notice. But if C in informing A purports to act on B's behalf, this will be good notice to A, provided that B afterwards ratifies C's act (c)

(b) When the notice is given by or on behalf of an indorser, it must be an indorser who is liable on the bill at the time of the notice, *e.g.*, it cannot be given by or on behalf of an indorser *sans recours*. Again, suppose that A indorses to B, who indorses to C. If C gives notice too late to B only, the latter is discharged, and thereupon loses his power to give notice to A for C's benefit (*Turner* v. *Leach* (1821), 4 B. & Ald. 451).

(c) When the agent of the holder or of an indorser gives notice he may do so either on behalf of his principal or on behalf of any other person liable on the bill. For example, A indorses to B who indorses to C. C's agent may give notice to A either on C's behalf or on B's behalf.

(ii) *The Persons for whose Benefit Notice enures.*—The Act provides that

> "Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given"

(section 49 (3)). Again,

> "Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided, it enures

(c) It is necessary to the ratification of an unauthorised act that the person doing it should have professed to act on behalf of the person ratifying (*Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240, 70 L. J. K. B 662; 84 L. T. 777).

> for the benefit of the holder and all indorsers subsequent to the party to whom notice is given "

(section 49 (4)).

The foregoing provisions may be illustrated by the following examples:—

(a) A indorses to B who indorses to C The bill being dishonoured, C gives notice to A and afterwards indorses to D. C's notice will enure for the benefit of B (unless he indorsed *sans recours*), and of D.

(b) Again, A indorses to B who indorses to C, who indorses to D who indorses to E who is the holder. C gives notice of dishonour to A C's notice of dishonour will enure for the benefit of B, D, and E.

(iii) *The Manner of giving Notice* —The Act provides that

> " the notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment "

(section 49 (5)). Again,

> " the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour "

(section 49 (6)). Again,

> " A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby "

(section 49 (7)). Finally,

> " Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office "

(section 49 (15)).

In other words—

(a) The notice may be oral, or in writing, or partly one and partly the other, or merely by returning the bill.

(b) If or so far as the notice consists of writing or the return of the bill, it may be remitted in any manner as long as it reaches in time the party to whom it is remitted; but if the post is used delay or loss in the post will not affect the sender. Any writing used may be unsigned.

(c) The notice must identify the bill (although a misdescription of it will not matter unless the recipient of the notice is misled thereby) and must intimate the fact of dishonour.

Bankers usually adopt towards their customers the method of returning the bill, at any rate in the case of cheques. Other persons usually send a formal written notice such as the following:—

EXAMPLE 23. NOTICE OF DISHONOUR (*d*).

I beg to notify you that a bill for £ dated the drawn by upon payable months after date [and indorsed by you] has been presented for acceptance [*or* payment] and dishonoured

(*Signed*)

(*Date*)

"Notices of dishonour are now construed very liberally" (Chalmers) "Since 1841 it does not appear that any written notice of dishonour has been held bad on the ground of insufficiency in form" (*ibid.*)

(iv) *To whom Notice must be given*.—The Act provides that

> "Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf"

(section 49 (8)). Again,

> "Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative (*e*) if such there be, and with the exercise of reasonable diligence he can be found"

(section 49 (9)). Again,

> "Where the drawer or indorser is bankrupt (*f*), notice may be given either to the party himself or to the trustee"

(section 49 (10)). Finally,

(*d*) For alternative forms, see Byles and Chalmers.

(*e*) Actual and not merely potential, see *ante*, p 149, note (*p*).

(*f*) For meaning, see s. 2, *ante*, p. 140

"Where there are two or more drawers or indorsers who are not partners (*g*), notice must be given to each of them, unless one of them has authority to receive such notice for the others"

(section 49 (11)).

(v) *The Time for giving Notice.*—The Act provides that

"the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter"

(section 49 (12)).

The Act assists to some extent in the ascertainment of what is meant by "reasonable time" by the provision that

"In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill; (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter"

(section 49 (12)).

The following will exemplify the foregoing provisions:—

(a) A has to give notice of dishonour to B. A and B both reside in London. The bill is dishonoured on Monday. A must give notice so as to reach B not later than Tuesday.

(b) But if, in the above example, A resides in London and B in Birmingham, A, if he uses the *post*, must *post* the notice not later than Tuesday.

(c) If, however, in the above example, A resides at a place where there is no post on the Tuesday, he must post by the next earliest post.

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(*g*) In which case any partner would be deemed to have authority to receive notice on behalf of all. In the case of dissolution of the partnership, it is sufficient for the holder of the bill to give notice to the continuing partner in the business, even though the holder has had notice of the dissolution (*Goldfarb* v. *Bartlett*, [1920] 1 K. B. 639; 89 L. J. K. B. 258; 122 L. T 588).

"Non-business days" (*h*) are not to be counted, the Act providing that

> "where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded"

(section 92). For instance, in example (a) above, if the bill had been dishonoured on a Saturday, A need only have timed his notice to reach B on the Monday.

It must be borne in mind that where the post is used, the sender is not concerned as to the actual delivery within time or at all (see section 49 (15), *ante*, p. 160).

The section is construed liberally in favour of the validity of the notice where there has been no actual prejudice to the recipient. In *Fielding* v. *Corry*, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7; 77 L. T. 453, a branch bank received a bill for collection and sent it to a London bank to collect. The bill was dishonoured, and the London bank wrote stating this fact, but by mistake sent it to the wrong branch. They discovered the mistake, and the next day wired notice of dishonour to the right branch. The wire was received within the same time as the letter would have been received had it been addressed properly. It was held that the letter and wire having been sent to branches of the same bank could be treated as one, and that therefore the notice was within time.

The foregoing precise requirements, it will have been observed, only apply in the absence of "special circumstances". An example of special circumstances is furnished by *Lindo* v. *Unsworth* (1811), 2 Camp. 602. There, the sender of the notice was a Jew, and to have sent within the required time would have involved the desecration of a sacred holiday. He delayed sending accordingly, and was held to have shown special circumstances.

The question of what constitutes "reasonable time", in connection with section 49 (12), is, according to Chalmers, one of mixed law and fact (*i*), in which the jury find the facts

(*h*) For what are "non-business days", see s 92, *ante*, p 141.

(*i*) For a discussion of the distinction between question of law and question of fact, see Wrottesley and Jacobs' Law and Practice of Criminal Appeals, Appendix D.

and the Judge* decides whether they constitute "reasonable time", while, according to Byles, the question is one of law only (*k*).

The Act further provides that

> "Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder"

(section 49 (13)). In other words, the agent is treated as though he were a further indorsee from the holder: *e.g.*, A indorses a bill to B. B has handed the bill to an agent for collection. A resides in London and B in Birmingham. The agent is in London. The bill is dishonoured on Monday. The agent may himself post notice to A in time to arrive on Tuesday, in accordance with section 49 (12) (a), *ante*, p. 162; or he may post the notice to B on the Tuesday, and B must post the notice to A on the day following his receipt of it from the agent, thus following section 49 (12) (b), (*ibid.*).

Finally, the Act provides that

> "Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour"

(section 49 (14)): *e.g.* A indorses to B who indorses to C (the holder). C gives due notice of dishonour to B. B has the same time in which to give notice to A as he would have had if he had been the holder and the bill had been dishonoured in his hands. In other words, each party to whom notice of dishonour is duly given so that he becomes liable to succeeding parties, becomes as it were the holder of the bill for the purpose of the time within which he must give notice to prior parties in order

(*k*) In the case of other sections, Byles states that the question of "reasonable time" is one of fact only (see *ante*, p. 147, note (*n*)). Why there should be this distinction is not apparent.

to secure his rights against them. The result of the present provision combined with the provisions in section 49 (3) and (4), *ante*, pp. 159, 160, may be illustrated as follows:—A indorses to B who indorses to C who indorses to D (the holder). A is in London, B in Birmingham, C in Liverpool, and D in Manchester, where the acceptor also is. The bill is dishonoured on Monday. If D wishes to make sure of his rights against A, B, and C, he should post off notice of dishonour to A, B, and C not later than Tuesday. But D's rights against A, B, and C will also be secured if he posts off notice to C on Tuesday, and if C posts off notice to A and B on the day following his (C's) receipt of notice; or if C posts such notice to B only, but B posts notice to A on the day following the receipt of the notice by him (B). In other words, if D is wise he will himself give due notice to all antecedent parties, but such rights will be equally secure if he gives notice only to the party immediately antecedent to him, provided that such party gives due notice to the party antecedent to *him*, and so forth. It must be observed, however, that a party cannot take advantage in this respect of his notice of the time which an antecedent party would have. Thus, in the above example, if D gives due notice to C, and C to B, and B to A, D's rights against A will be secured although A will not have received notice until, perhaps, a week after the dishonour. But if D wishes to make certain that his rights against A are secure even if A received no notice from B or C, D must post notice to A not later than the Tuesday and not within such later time as C or B would have had

**Delay in giving Notice.**—The Act provides that

> "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence (*l*)"

(section 50 (1)) (*m*).

(*l*) See *ante*, p. 141, note (*o*)
(*m*) Cf. s. 46 (1), *ante*, p. 150 (delay in presentment for payment)

The most ordinary cause of delay is ignorance of the address of the party to whom the notice has to be given. This is a good excuse, but reasonable diligence must be used to discover the address and there must be no neglect of the ordinary means for acquiring the information. The person to give notice "must not allow himself to remain in a state of passive and contented ignorance" (*per* Lord Ellenborough in *Bateman* v. *Joseph* (1810), 2 Camp. 461; 12 East 433). The "reasonable diligence" required after the cause of delay has ceased to operate means apparently giving notice within the "reasonable time" required for giving notice by section 49 (12), *ante*, p. 162, such time, however, dating not from the date of dishonour but from the date of cesser of the cause of delay (*Firth* v. *Thrush* (1828), 8 B. & C. 387; *Dixon* v. *Johnson* (1855), 1 Jur. (N.S.) 70).

It should be observed that what will constitute "special circumstances" which will excuse giving notice within the narrow limit of time prescribed by section 49 (12), *ante*, p. 162, will not necessarily constitute "circumstances beyond the control of the party" within section 50 (1) so as to excuse delay. For example, in *Turner* v. *Leach* (1818), Chitty (11th ed.), p. 226, a party delayed a considerable time giving notice through leaving business on account of the dangerous illness of his wife, and it was held that the delay was not excused. No doubt, however, it would have been "special circumstances" excusing notice within the precise time fixed by section 49 (12); cf. *Lindo* v. *Unsworth*, *ante*, p. 163.

**When Notice Excused.**—It is provided by the Act that notice of dishonour is dispensed with altogether in the following cases:—

> (i) "When, after the exercise of reasonable diligence (*n*), notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged"

(section 50 (2) (a)) (*o*). It will be observed that what will excuse *delay* in giving notice (within section 50 (1), *ante*, p. 165) will not necessarily excuse *omission* to give notice under the present

(*n*) See *ante*, p. 161, note (*o*).

(*o*) "Comparing this sub-section with the corresponding provisions of s. 46 (2), it will be seen that notice of dishonour is dispensed with in several cases when presentment for payment is not" (Chalmers). For s. 46 (2), see *ante*, pp. 150 *et seq.*

sub-section. If, for example, the party to whom notice is to be given cannot be found at the address given on the bill but, before the holder brings his action against such party, an address at which the party is to be found comes to his knowledge, he must give notice of dishonour before bringing the action (*Studdy* v. *Beesty* (1889), 60 L. T. 647).

> (ii) "By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice"

(section 50 (2) (b) ). A promise to pay the bill may be waiver (*p*) of notice of dishonour as well as of presentment for payment (see section 46 (2) (e), *ante*, p. 000), but not necessarily so; *e.g.*, the drawer of a bill, after its maturity, wrote a letter to the holder in the following terms:—"I accept notice of non-payment of my draft, and admit my liability to you therein in every manner as though the same had been given in a regular way". The bill in question had not been presented for payment, but the drawer was ignorant of this fact when he wrote the letter. It was held that the letter amounted only to a waiver of notice of dishonour and not of non-presentment for payment (*Keith* v. *Burke* (1885), 1 Cab. & E. 551) (*q*).

> (iii) "As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person (*r*) or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment"

(section 50 (2) (c) ). In these cases the ground of dispensation is obvious.

> (iv) "As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person (*r*) or a person not having capacity to contract and the indorser was

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(*p*) It may also operate as an admission that the party has in fact received notice. The distinction between waiver and evidence of receipt of notice is important because the former may have been made under a mistake of *fact*, and be therefore inoperative (see Byles, and Chalmers, under section in question).

(*q*) See also *Re Fenwick, Stobart & Co.*, *post*, p. 168.

(*r*) See *ante*, pp. 72 *et seq.*

> aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation "

(section 50 (2) (d)). Here also the reason for dispensation is plain.

It must be observed that, although some of the cases provided for in (iii) and (iv) above are based on the view that the drawer or indorser, as the case may be, will have known beforehand that the bill would in all likelihood, or most certainly, be dishonoured, there is no general rule that the fact that he has reason to believe that the bill will be dishonoured will dispense with the necessity for giving him notice of dishonour; *e g*, in *Esdaile* v *Sowerby* (1809), 11 East 114, it was held that, where the drawer and acceptor were both bankrupt and an indorser knew of this, the holder was nevertheless bound to give such indorser due notice of dishonour In *Re Fenwick, Stobart & Co* [1902] 1 Ch 507, 71 L. J Ch 321; 86 L T 193, a bill was drawn by a company in favour of itself and indorsed to another company Upon dishonour the indorsee company did not give notice to the drawer company, and the latter refused to pay on that account The two companies had the same secretary, who knew of the dishonour It was held that this fact was not notice to the drawer company, as it was not shown that there was a duty on the secretary to communicate to the drawer company knowledge received by him as secretary of the indorsee company It was held further that the fact that all parties knew that the bill would be dishonoured was not waiver of notice within section 50 (2) (b) (*ante*, p. 167) Finally it was held that although the party to whom notice has to be given knows of the actual fact of dishonour, this does not prevent him from relying upon non-notice, as the Act specifies the persons from whom the notice must come and the person entitled to notice need not trouble about information received from any other source, in other words, " notice does not mean knowledge but actual notification " (Byles; and see further, *ante*, pp. 158 *et seq* ).

**Consequences of not giving Notice of Dishonour.**—When notice of dishonour is not excused, the effect of not giving notice is expressed in the provision already cited (section 48, *ante*, p. 158), *viz.*, to discharge any drawer or indorser to whom notice shall not have been given.

### (4) *The Duty to Protest upon Dishonour.*

For a proper comprehension of the provisions of the Act relating to the present topic it is necessary to have in mind the distinction between "inland" and "foreign" bills and the meaning and object of "protest".

**Distinction between Inland and Foreign Bills.**—The Act defines an inland bill as one

> "which is or on the face of it purports to be (a) both drawn and payable within the British Islands (s), or (b) drawn within the British Islands (s), upon some person resident therein"

(section 4 (1)). To constitute an inland bill, therefore, it must be—

(i) drawn within the British Islands, and

(ii) *either* payable within the British Islands *or* drawn upon some person resident within the British Islands

> "Any other bill is a foreign bill"

(section 4 (1)) A bill is foreign. therefore, if—

(i) either it is not drawn within the British Islands, or

(ii) although drawn within the British Islands, is neither payable therein nor drawn upon somebody resident therein (*t*)

(*s*) "For the purposes of this Act, 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty" (*ibid.*) Presumably, since the legislation of 1920–22, the definition should be read with the word "Northern" in front of the word "Ireland". "A bill drawn in or on the Irish Free State (Eire), it seems, is now a foreign bill, and must be dealt with accordingly" (Chalmers). The contrary is arguable, but the practice is in accord with Chalmers' view.

(*t*) The stamp duty on a foreign bill actually drawn and expressed to be payable out of the United Kingdom, is up to £50 the same as on inland bills (see *ante*, p. 57, note (*g*)), exceeding £50 but under £100, sixpence, and from £100 upwards, sixpence for every £100 or fraction of £100 more than that amount—Finance Act, 1899, s. 10. A foreign bill must be stamped before being negotiated here

The following are examples of foreign bills:—

### EXAMPLE 24.

Accepted, Speyer & Co.

£200. Winnipeg, May 4th, 1929.

90 days after sight of this First of Exchange (second and third being unpaid) (u) pay to Messrs. Williams & Co., or order, the sum of two hundred pounds, value received.

LAURIER, BORDEN & CO.

To Messrs. Speyer & Co., London.

The above is a foreign bill because it is not drawn within the British Islands.

### EXAMPLE 25.

Accepted, payable at the Bank of India, Bombay Branch. Brown Brothers.

Rs.1000 London, 5th March, 1929.

Six months after date pay this First of Exchange (second and third of the same tenor and date unpaid) (u) to the order of Messrs. Jabberjee & Co., one thousand rupees for value received.

WILLIAM SMITH & CO.

To Messrs. Brown Brothers Limited, Bombay.

The above is a foreign bill because, although it is drawn within the British Islands, it is neither payable therein nor is the drawee resident therein.

But the following is an inland bill:—

### EXAMPLE 26.

Accepted payable at Parr's Bank, Limited, London, Brown Brothers

Rs.1000 London, 5th March, 1929.

Six months after date pay to the order of Messrs. Jabberjee & Co., one thousand rupees for value received.

WILLIAM SMITH & CO.

To Messrs. Brown Brothers, Bombay.

(u) These expressions mean that the bills are "drawn in a set", as to which see *post*, Chap. XX.

because it is both drawn and payable within the British Islands. And the following is an inland bill also:—

EXAMPLE 27.

£100. London, June 1st, 1929.

Nine months after date pay Messrs. Edwards & Co., or order, the sum of one hundred pounds value received.

WILLIAM SMITH & CO.

To Mr. Charles Robinson, London.

Accepted payable at the West India Bank, Jamaica, Charles Robinson.

because it is drawn in the British Islands upon a person resident therein, although payable abroad.

Sometimes it is *uncertain on the face of a bill* whether it is inland or foreign. To meet such a case the Act provides that

> "unless the contrary appear on the face of the bill the holder may treat it as an inland bill"

(section 4 (2)).

**Meaning of "Protest".**—A "protest" is "a formal declaration in writing made by a notary public (*x*) that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof" (Stephen's Commentaries). The object of protest is to provide authentic proof of due presentment and dishonour which will be accepted as sufficient by any tribunal at home or abroad (*y*). Moreover, it affords to a drawer or indorser such unimpeachable evidence of these facts as he is in fairness entitled to demand before being called upon to pay in consequence of them. It is obvious that the desirability of protest relates mainly to the case of foreign bills, in which case parties to whom recourse is made here, or the Courts in which they are sued, have to be

(*x*) "Notary, or Notary Public (Lat. *Registrarius*, *Actuarius*, *Notarius*), is one that attests deeds or writings to make them authentic in another country. He is generally a solicitor. It is the office of a notary, among other things, at the request of the holder of a bill of exchange of which acceptance or payment is refused, to *note* and *protest* the same" (Mozley and Whiteley's Law Dictionary). See further, Byles, under s. 51 (2).

(*y*) "A notary public by the law of nations has credit everywhere" (*Hutchem* v. *Mannington* (1802), 6 Ves. 823, *per* Ld. Eldon).

satisfied as to due presentation and dishonour abroad. It is therefore only in the case of foreign bills that protest is necessary (see *post*, p. 178). The procedure leading up to protest is as follows: The holder presents the bill, and, it being dishonoured, he places it in the hands of a notary public. The notary, or his clerk, presents it again, and upon its re-dishonour he makes upon the bill a memorandum consisting of (i) his initials, (ii) the date, (iii) his charges for noting, and (iv) a reference to his register where a copy of the bill and of the foregoing matters are entered. He also affixes a label or ticket, on which is written the answer, if any, given by or on behalf of the drawee or acceptor upon this presentment, *e g*., in case of a cheque the answer given by the bank may be that it had not sufficient funds of the drawer in hand to meet the cheque, expressed thus shortly "no effects", or "r/d.", *i e.* "refer to drawer", or "effects not cleared". Or, again, there may be some such reply as "orders not to pay", or "payment countermanded". The foregoing is called *noting* (z) the bill, and it forms the preliminary stage to the "protest", which consists of a certificate under the hand and seal of the notary setting out the facts of presentation and dishonour and protesting against all parties liable on account of the non-acceptance or non-payment, according to the occasion of the dishonour (*a*). As will be seen (section 93, *post*, p. 175) the only urgent matter in the above process is that of "noting": actual protest may take place afterwards, if it should become necessary.

**Where Protest unnecessary.**—The Act provides that

> "where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser".

(z) "By 'noting' is meant the minute made by a notary public on a dishonoured bill at the time of its dishonour. The formal notarial certificate, or protest, attesting the dishonour of the bill is based upon the noting" (Chalmers).

(*a*) For form of protest, see *post*, pp. 177 *et seq*. The continuation of the process from noting to the certificate of protest is described as "*extending*" the protest.

(section 51 (1)). The effect of the foregoing provision may be stated as follows:—

(i) In the case of an inland bill (including a foreign bill if it does not appear to be such—see section 4 (2), *ante*, p. 171, and section 51 (2) (*infra*) it is not necessary for the holder to go so far even as to note the bill in order to secure his right of recourse.

(ii) He may, however, note the bill if he so desires, and if he does he will be able to charge the expenses thereof against the parties liable on the bill (see section 57 (1) (c), *ante*, p. 107). A holder very often desires in the case of an inland bill to go so far as to get it noted, because he is then sure of its proper presentment and of being able to produce a practically unimpeachable witness thereto.

(iii) Further, he may even go as far as actually to protest the bill if he so desires; but if he does he will not be able to recover the expenses thereof, as section 57 (1) (c) (*ibid.*) only enables such expenses to be recovered where the protest was necessary.

**Where Protest necessary** (*b*).—The Act provides that

> "where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary"

(section 51 (2)). It will be observed that to render protest necessary three things must combine:—

(i) The bill must be a foreign bill in fact.

(ii) It must be a foreign bill on the face of it.

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(*b*) Apart from what follows, protest is also necessary before presentment for payment to an acceptor for honour or referee in case of need (sec. 67 (1), *post*, p. 208).

(iii) It must have been dishonoured by non-acceptance (c) or non-payment.

But it is only necessary to protest the bill once. If it has been dishonoured by non-acceptance, it must be protested then, but if subsequently presented for payment and dishonoured it need not be protested again. But it *may* be re-protested in such circumstances, the Act providing that

> "a bill which has been protested for non-acceptance may be subsequently protested for non-payment"

(section 51 (3)). The reason of this permission to protest a second time is that some of the parties to whom the holder desires to have recourse may be abroad where he may desire to sue them, and most foreign systems do not recognise protest for non-acceptance as excusing protest for subsequent non-payment.

Where protest is necessary, it is only necessary in order to charge drawer or indorsers. As regards the acceptor, the Act provides that

> "in order to render the acceptor of a bill liable it is not necessary to protest it"

(section 52 (3)).

**Requirements of Protest.**—The requirements of the Act as to noting or protest relate to (i) time for protest, (ii) place of protest, (iii) form of protest.

(i) *Time for Protest.*—It is provided that,

> "subject to the provisions of this Act (*d*), when a bill is noted or protested, it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting"

(section 51 (4), as amended by the Bills of Exchange (Time of Noting) Act, 1917). In other words, noting, in order to be

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(c) By s. 44 (2), "Where a foreign bill has been accepted as to part, it must be protested as to the balance".

(*d*) *I.e.*, to the provisions excusing delay, for which see s. 51 (9), *post*, p. 178, and s. 51 (6) (a), *post*, p. 175.

effective, must take place on the day of the dishonour of the bill or the next succeeding business day (*e*), but the process of protesting may, where necessary or desired, be completed subsequently and ante-dated as of the date of noting, the Act providing generally that,

> "for the purposes of this Act (*f*), where a bill or note is required to be protested within a specified time, or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting"

(section 93). As to the meaning of the expression "at any time thereafter", the following observation may be quoted: "The protest may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and ante-dated accordingly" (Byles (*g*)).

(ii) *Place of Protest.*—The Act provides that

> "A bill must be protested at the place where it is dishonoured"

(section 51 (6)).

To this rule two exceptions are provided:—

> (a) "When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day"

(section 51 (6) (a)). This provision may be exemplified thus: The holder in London posts the bill to Manchester for acceptance, where it is dishonoured and posted back to him. He receives it back on the following day. He may protest it after its receipt back, although that is the day after its dishonour, and he may

(*e*) For meaning of "business day" see *ante*, p. 141.

(*f*) *I.e.*, in addition to the purposes of the section now being dealt with (s. 51), the purposes of ss. 65—68 (acceptance and payment supra protest for honour), *post*, Chap. XIX.

(*g*) For whom see authority for statement. "The noting is in fact an incipient protest, and is 'unknown in law as distinguished from the protest. The notary having made his minute, draws up the protest at his leisure'" (Chalmers, citing Selwyn, N. P. (11th ed.), 381).

protest it in London, although it was dishonoured in Manchester. But he must do so on the day of its receipt back if that is a business day, and he receives it during business hours. If he does not receive it on a business day or during business hours, he may protest it on the next business day.

> (b) "When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary"

(section 51 (6) (b)). Thus, a bill is drawn on A, payable in Manchester, which is neither the residence nor place of business of A. It is dishonoured by *non-acceptance*. It must be protested for *non-payment* at Manchester, and no presentment to, or demand upon, A for payment need be made.

(iii) *Form of Protest.*—The Act provides that

> "A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—(a) The person at whose request the bill is protested, (b) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found"

(section 51 (7)). The ordinary contents of a protest have been summarised thus:—"(1) An exact copy of the bill. (2) A statement of the parties for whom and against whom the bill is protested. (3) The date of protesting and the place where protest is made. (4) A statement that acceptance or payment was demanded by the notary; the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found. (5) A reservation of rights against the parties liable. (6) The subscription and seal (*h*) of the notary making the protest" (Chalmers). Further, it is provided by the Stamp Act, 1891, s. 90, that the protest must be stamped (*i*). The following is an example of a protest (for non-acceptance):—

(*h*) Sealing, however, is not essential.

(*i*) Where the duty on the instrument is less than 1s. the stamp on the protest must be of the same amount. If the duty on the instrument is 1s. or over, the protest must be stamped 1s.

### EXAMPLE 28. PROTEST.

On the seventh day of March, one thousand nine hundred and twenty-nine, I, John Jones, Public Notary, by lawful authority and sworn, dwelling in Norwich, in the county of Norfolk, England, at the request of the holder did exhibit the original bill of exchange, whereof a true copy is on the other side written, unto Samuel Brown, at his counting-house, the person upon whom the same is drawn, and demanded acceptance thereof, and he answered that he would not accept.

Stamp

Wherefore I, the said Notary, at the request aforesaid, did and do by these presents protest against the drawer of the said bill, and all other parties thereto, and all others concerned, for all costs of exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of acceptance of the said bill. Thus protested in the presence of Henry Roberts and William Smith, witnesses.

Which I attest
(Signed) JOHN JONES,
Notary Public of Norwich aforesaid.

Seal

(Signed) HENRY ROBERTS }
WILLIAM SMITH } Witnesses.

It happens sometimes that the services of a notary are not available where or when wanted. For such cases the Act makes provision thus:—

> "Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill. The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient"

(section 94). The following is the form referred to:—

### EXAMPLE 29. PROTEST.

Know all men that I, A. B. [householder], of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 19 , at demand payment [*or* acceptance] of the bill of exchange hereunder written, from E. F., to which demand he made answer [state answer, if any,] wherefore I now in the presence of G. H. and J. K., do protest the said bill of exchange.

(Signed) A. B.

G. H. } Witnesses.
J. K. }

N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

The loss, destruction, or wrongful detention of a bill will not obviate the necessity for protest where otherwise necessary, the Act providing that

> " where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof."

(section 51 (8) ).

**Delay in Protest.**—The Act provides that

> " Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence (*k*) "

(section 51 (9) ). This provision is in precisely the same form as in the case of delay in presentment for payment (section 46 (1), *ante*, p. 150), and in giving notice of dishonour (section 50 (1), *ante*, p. 165), and the comment upon those provisions is applicable here.

**When Protest Excused.**—The Act provides that

> " Protest is dispensed with by any circumstance which would dispense with notice of dishonour "

(section 51 (9) ). As to these, see section 50 (2) (*ante*, pp. 166 *et seq.*).

**Consequences of Not Protesting.**—When protest is necessary and is not excused, the result, as already stated, is to discharge

(*k*) See *ante*, p. 141, note (*o*).

the drawer and indorsers (see section 51 (2), *ante*, p. 173). It will be remembered that when a bill dishonoured by non-acceptance subsequently comes into the hands of a "holder in due course", the rights of such a holder are not prejudiced by the fact that no notice of dishonour had been given by the holder at the time of the dishonour (see section 48 (1), *ante*, p. 158). Is a holder in due course in a similar position if he acquires a bill which has been dishonoured by non-acceptance and the holder at the time of the dishonour gave notice of dishonour but did not protest, supposing protest to have been necessary? The provision given above (section 51 (9), *ante*, p. 178), dispensing with notice of dishonour, does not appear to cover this case, but it cannot be doubted that the holder in due course is secure. The fact that the Act is silent on the point is by no means conclusive against this contention, as the Act is not intended to be exhaustive (see section 97 (2), *ante*, p. 52), and the general principles governing the position of the holder in due course, in the case of all negotiable instruments, would appear to have a paramount claim to be applied unless clearly excluded.

**Protest for Better Security.**—In certain cases, where a bill has been accepted, it may be protested before it falls due. Such a protest is said to be "for better security". The provision of the Act on the point is that

> "where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers"

(section 51 (5)). "In this case the holder may cause a notary to demand better security, and, on its being refused, the bill may be protested, and notice of the protest may be sent to an antecedent party" (Byles). It must be observed that such a protest gives the holder no right to sue the drawer or indorsers until the bill falls due and is then dishonoured, and upon such event the ordinary protest for non-payment is necessary. The advantage of the protest for better security is that it complies with the necessary condition precedent to enable a person to accept "supra protest for honour", as to which see *post*, Chapter XIX.

# CHAPTER XVII.

## THE HOLDER IN DUE COURSE.

It will be remembered that the essential marks or characteristics of a negotiable instrument were stated to be (1) facility of transfer by mere delivery; and (2) the possibility of transfer so as to give a transferee a good title in spite of defect in the title of the transferor (see *ante*, Part I, Chapters I and II). In the consideration of these characteristics in relation to bills those concerned with (1) formed the subject of Chapter XIII *ante*; those concerned with (2) will be dealt with in the present chapter.

The conditions to be complied with to enable the transferee of a negotiable instrument to hold "free from equities" (*a*) are, in the case of a bill implied in the rule, that the transferee in such case must be a "holder in due course".

**Definition of Holder in Due Course.**—The Act defines a "holder in due course" as

> "a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely (a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it"

(section 29 (1)). From the foregoing definition it will be seen that the conditions that entitle a person to be regarded as a holder in due course are eight:—

(i) *He must be a "holder"*. This means that he must have taken the bill under such circumstances as to constitute him a holder within the definition contained in section 2 of the Act (*ante*, p. 130), *e.g.*, he must not be merely the transferee by delivery without indorsement of a bill requiring indorsement (*b*).

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(*a*) For which conditions see Pt I, Chap IV

(*b*) See *ante*, pp. 125, 126.

But there is one class of holder within the meaning of the Act who comes within section 2 but who is outside section 29 (1). It has now been settled, after some conflict of judicial opinion, that the *original payee* of a bill cannot be a holder in due course. It is true that section 2 (which is a definition section) defines "holder" as meaning, *inter alia*, "the payee", but that section is introduced by the words "unless the context otherwise requires", and it was held by the House of Lords in *R. E. Jones & Co* v. *Waring & Gillow*, [1926] A. C. 670; 95 L. J. K. B. 913; 135 L. T. 548; 42 T. L. R. 644, that the context to the word "holder" in section 29 (1) did so require, it being regarded as evident that paragraph (b) assumes a holder in due course to have acquired by negotiation, which, in the case of a bill payable to order, means transfer from one person to another by indorsement completed by delivery (see section 31 (1), (3), *ante*, p. 118) (*c*). Section 21 (2), *ante*, p. 92, which includes a holder in due course among the "remote" (as distinguished from the "immediate") parties to a bill, was held to point to the same conclusion.

The position may be exemplified thus: A draws on B a bill payable to C, or to C or order, or to the order of C, which B accepts, and the bill is delivered to C, who gives value. B was induced to accept by the fraud of A, to which C was not party C becomes the holder of the bill, but it was "issued", not "negotiated" to him, as section 31 (3) (*ante*, p. 118) provides that a bill payable to order is negotiated by indorsement completed by delivery, *i.e.*, indorsement is necessary to the negotiation of a bill payable to order. C, therefore, cannot be a holder in due course and cannot recover from B. On the other hand, the facts being otherwise as above, if the bill was payable to "bearer" and was delivered to C, C could be a holder in due course and recover from B, since section 31 (2) (*ibid.*) provides that a bill payable to bearer is negotiated merely by delivery, and the bill was in fact delivered to C.

(ii) *The Bill must be complete on the face of it.* We have seen that the Act confers certain powers in the direction of filling

(*c*) *R. E. Jones & Co* v. *Waring & Gillow* appears to be the only case so far in which the Court has decided that the context requires deviation from any of the meanings given to the words in s. 2.

up an inchoate instrument (see section 20, *ante*, pp. 93, 94) (*d*), but the person exercising such powers cannot himself be a holder in due course. A bill not payable to bearer is not complete within the meaning of the definition until it has been indorsed by the payee. In *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168; 67 L. J Q B 780, 78 L. T. 752, the plaintiffs agreed to supply goods to B, on condition that the defendant, who was B's father, "backed" the bill for his son The plaintiffs drew the bill on B to their own order, B accepted it, and the defendant indorsed it on the back He acted gratuitously in so doing. The bill was returned to the plaintiffs, who indorsed it underneath the signature of the defendant Upon the bill maturing and being dishonoured, the plaintiffs sued the defendant under section 56 (*ante*, p. 105). It was held, *inter alia*. that as they had not indorsed the bill before it came into their hands, it was not complete when they took it They were, therefore, not holders in due course, and could not recover. This case was followed in *Shaw* v. *Holland*, [1913] 2 K B 15; 82 L. J K. B. 592; 108 L T. 543, where the facts were similar (*e*) A bill is complete though not accepted (*National Park Bank* v *Berggren* (1914), 110 L T. 907; 30 T. L R 387).

(iii) *The bill must be regular on the face of it* Suppose the bill to have been torn in pieces and pasted together again. If its appearance suggests that destruction might have been intended, a person taking the bill could scarcely claim to be a holder in due course (*f*) The fact that a cheque is post-dated

(*d*) See also paragraph (i) of the comment upon s 20, *ante*, p 96

(*e*) Distinguished in *Macdonald & Co* v *Nash & Co* (*ante*, p 95) *Jenkins* v *Coomber* and *Shaw* v *Holland* should be distinguished from *Glenie* v *Bruce Smith* and *Re Gooch, ex p Judd* (*ibid*), which were cases of estoppel

(*f*) But *contra* if its appearance was consistent with accidental tearing In *Ingham* v *Primrose* (1859), 7 C B (N S) 82, the acceptor of a bill, with the intention of cancelling it, tore it into two pieces and threw them into the street They were picked up by the indorser and joined together, and the bill was put into circulation The acceptor was held liable to a *bona fide* holder for value because, said the Court, although the acceptor intended to cancel it, yet he did not cancel it This decision has been commented upon adversely. In *Baxendale* v *Bennett* (1878), 3 Q B D 525, 47 L J Q B 624, Bramwell, L J, said "It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it" And in *Smith* v *Prosser*, [1907] 2 K B 735, 77 L J K B 71, 97 L T 155, Vaughan Williams, L J, coupled it with *Young* v *Grote* (1827), 4 Bing 253, 5 L J (O S) C P 165, as a pair of cases no longer possessing authority It is submitted, however, that there is something and is known to be so when taken by a holder will not make the cheque irregular on the face of it so as to prevent the holder being a holder in due course (*Hitchcock* v *Edwards* (1889), 60 L. T. 636) (*g*).

(iv) *He must have taken the bill before it was overdue.* When a bill is overdue, it can be "negotiated" in the sense in which the Act uses that term, *i e*, it remains transferable by mere delivery, but it cannot be transferred so as to confer a title free from equities In other words, the bill retains one of the two attributes of negotiability (*h*) but loses the other (see section 36 (2), *ante*, p 123) The moment at which a bill becomes overdue is provided for in the case of bills not payable on demand by section 14, *ante*, pp 145, 146 and in the case of bills payable on demand by section 36 (3), *ante*, p 124.

(v) *He must have taken the bill without notice that it had been previously dishonoured if it has, in fact, been previously dishonoured.* The following examples will serve to illustrate this rule:—A takes a bill which has been dishonoured by non-acceptance, knowing of that fact He cannot be a holder in due course A bill payable on demand is taken by A before "it has been in circulation for an unreasonable length of time" within the meaning of section 36 (3) (*ante*, p 124), but it has in fact been presented for payment and dishonoured, and A knows this A cannot be a holder in due course

to be said for the decision It was accepted in evidence that it was a common practice at that time to provide against the loss of a bill in post by dividing it and sending the pieces by successive posts, the recipient joining them again on receipt of both Having regard to that circumstance, the Court might reasonably have held that there was nothing irregular on the face of the instrument in question It is, perhaps, an omen that *Young* v *Grote* has recovered its reputation (see *post*, p 233, note (*g*)), and it may be that its fellow outcast will, some day, do the same

(*g*) The question of whether the holder for value of a cheque fraudulent in origin was put upon inquiry by reason of its being post dated, so as to negative his claim to be a holder in due course, came up for decision again in *Guildford Trust* v *Goss* (1927), 136 L T 725 43 T L R 167, when the Court (Branson, J), held in favour of the holder, but stressed the fact that in the circumstances in which the cheque was given, post dated cheques were quite ordinary It is difficult to see however, why so common a practice as the giving of a post-dated cheque should be ground for suspicion, and it is submitted that the answer to the question is a simple negative, unless, of course, the precise opposite to what appeared in the above case is proved, *viz*, that the instrument was given in circumstances which made the giving of a post-dated cheque an abnormal incident calling for explanation.

(*h*) See *ante*, Pt. I, Chaps I and II.

(vi) *He must have taken the bill for value.* For the meaning of value, see section 27 (1), *ante*, p. 115, and Part I, *ante*, pp. 27 *et seq.* It must be observed that a holder in due course must himself have given value and cannot take the benefit of the fact that he takes through a holder for value. *E g.* A gives value for a bill with notice of a defect A indorses the bill to B, who takes it gratuitously but without knowledge of the defect. B cannot be a holder in due course In other words, the conditions for holding in due course cannot be split up among successive holders, and value and the good faith must proceed from the same person to constitute a holder in due course

(vii) *He must have taken the bill in good faith*, and

(viii) *He must have taken the bill without notice of any defect in the title of the transferor*

The Act separates these two requirements, but it is not easy to distinguish between them, and in dealing with negotiable instruments in general they are treated together under the head of "*bona fide*"—see *ante*, Part I, pp. 29 *et seq.* It may be that bad faith is knowledge or suspicion of a general "fishiness" in the previous history of the instrument, and that notice is knowledge or suspicion of some actual defect In any event, negligence does not necessarily imply bad faith, the Act providing that

> "a thing is deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly, whether it is done negligently or not"

(section 90). The meaning of "notice" has been stated thus: "'notice' means actual, though not formal notice, that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge" (Chalmers, citing *Raphael* v. *Bank of England*, *ante*, p. 30.

As to what is meant by a defect in title of the transferor, the Act provides that

> "In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force

and fear (*i*), or other unlawful means, or for an illegal consideration (*k*), or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud"

(section 29 (2)). It should be observed that the above statement of "defects" is not intended to be exhaustive, but mere absence of consideration is not such a defect, *e.g.*, a person may be a holder in due course although at the time he acquired the bill he knew the defendant to have been an accommodation party (see section 28 (2), *ante*, p. 114), or that it was obtained upon a consideration which was void as distinct from illegal (*Lilley* v. *Rankin*, *ante*, p. 117). Negotiation "in breach of faith, etc", may be illustrated thus: A indorses a bill and hands it to B as security for a loan. While the bill is still maturing and before the loan is repayable, B negotiates it to C. B's title is defective for the purpose of such negotiation as he had no right to negotiate the bill in such circumstances. B could have assigned the debt and handed over the bill to C as an ordinary transfer of mortgage, but he was not entitled to negotiate the bill alone. Again, E is entrusted by D with a bill for safe custody. E negotiates it. This would be negotiation in fraud of D.

**Presumption as to Holding in Due Course.**—The Act provides that

"Every holder (*l*) of a bill is *prima facie* deemed to be a holder in due course; but if in an action (*m*) on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (*n*)"

(*i*) The Scots equivalent for "duress".

(*k*) For instances, see *Jones* v. *Merionethshire Building Society* (*ante*, p. 116) and *Woolf* v. *Hamilton* (*ibid.*).

(*l*) But, in view of *R. E. Jones & Co* v. *Waring & Gillow* (*ante*, p. 181), not the original payee.

(*m*) "'Action' includes counterclaim and set-off" (s. 2).

(*n*) It will have been observed that in s. 29 (2) the defects in title listed number six But when we come to section 30 (2), in dealing with the onus of proof upon the plaintiff, only five are specified, while in connection with the onus upon the defendant to prove value in good faith the number is reduced to two, *viz.*, fraud and illegality. The writer is, frankly, puzzled by this, but as he considers that (section 30 (2)). The effect of the foregoing provision may be stated thus:—

(a) In the first instance the onus of proof of defect in title rests on the party resisting payment. In other words, if there is no evidence one way or the other as to the circumstances under which the holder of a bill became such, he will be entitled to recover.

(b) But if the party resisting payment discharges his onus by proving the existence of a defect in title (or such defect is admitted), the onus of proof is shifted to the holder, who must prove that he became such in good faith and for value subsequent to the arising of such defect.

(c) The holder having proved good faith and for value, the onus of proof is again shifted to the party resisting payment, and in order to show that the holder is not a holder in due course, he must prove the absence of one or more of the remaining six (out of the eight) conditions previously set out necessary to enable a person to claim as a holder in due course.

**Rights and Powers of Holder in Due Course.**—A holder in due course has, of course, all the rights and powers of a holder as set out in Chapter XIV. *ante*. In addition the Act provides that where a holder is a holder in due course.

> "he holds the bill free from any personal defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill"

(section 38 (2)). The expression "personal defences" refers to such defences as set-off and counterclaim, and probably also covers all such defences as omission of the duties of presentation, notice of dishonour, and protest or noting. The operation of the sub-section may be illustrated thus: A, the holder of a bill, indorses it to B, who is a person who cannot be made liable on a bill (say, an infant or an ambassador who does not waive his diplomatic privilege). The bill is stolen from B by C, who forges B's indorsement and disposes of the bill to D who is a holder

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the expression "fraud or illegality" is probably intended to cover, and probably does cover, defects of all kinds the has assumed this to be the case in setting out the effect of the last-mentioned sub-section.

in due course. D can sue A and all parties prior to A, such as the drawer, the acceptor, and all prior indorsers. (He can, of course, also sue C, if C is worth suing.) But he cannot sue B. That is to say, D holds the bill free from the defect in title caused by C's theft and forgery (as well as from any "personal defences" available by any prior party against any other prior party), but he can only enforce payment against the parties liable on the bill, among whom B is not included. Again, a person who has indorsed a bill *sans recours* is not a party liable, although the title to the bill may be traced through him.

**Duties of Holder in Due Course.**—A holder in due course must carry out the duties of a holder as set out in Chapters XV and XVI, *ante*, although the omission of any such duty by a prior holder may not affect him.

**Transmission of Rights of Holder in Due Course.**—The Act provides that

> "A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder"

(section 29 (3)). The following will exemplify this provision:—

(a) B obtains A's acceptance to a bill by fraud. B indorses to C, who takes as holder in due course. C indorses the bill to D, who knows of the fraud. D can recover from A.

(b) B and D conspire to obtain and do obtain A's acceptance of a bill by fraud. The bill is drawn in favour of B. B indorses to C, who takes as holder in due course. C indorses to D. D cannot recover from A even if he gives value, since he was a party to the fraud against A (*o*).

**Provisions of Act Collected.**—It may now be useful to collect the various provisions made specifically by the Act for the protection of the holder in due course. These are as follows:—

(i) A holder in due course is defined by section 29 (1), *ante*, p. 180.

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(*o*) And see *May* v. *Chapman*, *ante*, p. 33.

(ii) Every holder is *prima facie* deemed to be a holder in due course (see section 30 (2), *ante*, p. 185).

(iii) A holder whose title is defective may give a good title to a holder in due course (see section 38 (3) (a), *ante*, p. 134).

(iv) A holder in due course holds the bill (a) free from defects in the title of prior parties; (b) free from personal defences available to prior parties among themselves, and (c) may enforce payment *against all parties liable on the bill* (see section 38 (2), *ante*, p. 186).

(v) Unauthorised or conditional delivery or delivery for a special purpose will not affect a remote party who is a holder in due course (see section 21 (2), *ante*, p 92).

(vi) A holder in due course may transmit all his rights to a holder (whether for value or not) who is not himself a party to any fraud or illegality affecting it (see section 29 (3), *ante*, p. 187).

(vii) Where a wrong date is inserted in a bill, if the bill comes subsequently into the hands of a holder in due course, the bill will not be avoided, but will operate as though the date inserted were correct (see section 12, *ante*, p. 97).

(viii) An inchoate instrument converted into a bill, but not within a reasonable time or in accordance with the authority given, will nevertheless be valid and effectual for all purposes if it comes subsequently into the hands of a holder in due course (see section 20 (2), *ante*, p. 94).

(ix) The rule that, where a bill not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour does not affect the rights of a holder in due course (see section 36 (5), *ante*, p. 124).

(x) Omission of notice of dishonour by *non-acceptance* does not prejudice a subsequent holder in due course (see section 48 (1), *ante*, p. 158). N.B.—There is no similar provision in the case of omission of notice of dishonour by *non-payment* in the case where it is not apparent that the bill is overdue (but see note (*b*), *ibid.*), nor in the case of omission of *protest* (but see *ante*, p. 179).

(xi) The acceptor is subject to a series of estoppels towards a holder in due course (see section 54 (2), *ante*, p. 102).

(xii) So is the drawer (see section 55 (1) (b), *ante*, p. 104).

(xiii) So is the indorser (see section 55 (2) (b), *ante*, p. 105).

(xiv) Where a person signs a bill otherwise than as drawer or acceptor, he incurs towards a holder in due course the liabilities of an indorser, whether he be an indorser in the ordinary sense, or whether he be merely a "backer" of the bill (see section 56, *ante*, p. 105).

(xv) Renunciation of the rights of a holder against a party will not affect a subsequent holder in due course without notice of the renunciation (see section 62 (2), *post*, p. 198).

(xvi) A material alteration in a bill will, if not apparent, not affect a holder in due course, who may enforce the bill according to its original tenor (see section 64 (1), proviso, *post*, p. 200).

(xvii) When the parts of a bill drawn in a set are negotiated to different holders in due course, the title of the one whose title first accrues prevails (see section 71 (3), *post*, p. 215).

(xviii) Where a person accepts more than one part of a bill drawn in a set, he is liable to each person into whose hands a part so accepted gets as holder in due course (see section 71 (4), *post*, p. 215).

(xix) Where an acceptor of a bill drawn in a set pays one part and does not obtain its delivery to him, he must pay it again if it gets subsequently into the hands of a holder in due course (see section 71 (5), *post*, p. 216).

(xx) The maker of a *promissory note* is subject to certain estoppels towards a holder in due course (see section 88 (2), *post*, p. 271).

**Holder without Value, Holder for Value, Holder in Due Course.**—In conclusion, it may be useful to give the following differentiation between the respective positions of these classes of holder:—

(a) A holder who has not given value for the bill cannot claim against any person who became party to the bill without consideration. This is, of course, in accordance with the ordinary rule that a bill, being a simple contract, consideration is necessary to support it (see Chapter XII, *ante*). But it must be borne in mind, first, that every party is presumed to have received consideration (see section 30 (1), *ante*, p. 112); and secondly, that a holder who has not given value himself will have the benefit of the fact that a previous holder has given value. In such cases he himself will be deemed to be a holder for value as regards parties prior to the one who gave value (see section 27 (2), *ante*, p. 113).

(b) A holder for value (including one deemed to be such, as regards parties prior to the latter: see *supra*), although he may not be a holder in due course, has, nevertheless, complete rights in and on the bill, unless there is a defect in his title. In such case he obtains no benefit from the mere fact that he has himself given value or that he takes through one who has given value.

(c) In a holder in due course is concentrated the highest efficacy of the bill due to the fact of its being a negotiable instrument. No defect in the title of any previous holder, and no omission on the part of any previous holder to carry out the duties necessary to secure the rights of such holder, will affect him. Nevertheless, it cannot be said that his position is impregnable:—

(i) *Unauthorised or forged Signatures.* It goes without saying that even a holder in due course cannot claim *against* an apparent party whose signature was unauthorised or forged. Nor can he claim *through* such apparent party against parties prior to the apparent party (see section 24, *ante*, p. 80, and Part I, Chapter V).

(ii) *Non est factum.* Nor can a holder in due course claim either *against* or *through* a person whose actual signature is on the bill if such signature is a mere nullity, *i.e.*, void as distinct from merely voidable, see *ante*, Part I, Chapter V.

(iii) *Contractual Disability.* Nor can a holder in due course claim *against* a party not possessing the necessary contractual capacity, *e.g.*, infants, or corporations acting *ultra vires*, although, as in the case of any other holder, he may claim *through* them against prior parties (see section 22 (2), *ante*, pp. 77 *et seq.*, and Part I, Chapter V).

(iv) *Other Statutory Provisions* (*r*). When the Legislature provides for the avoidance of a bill in certain circumstances, it also usually makes provision for the protection of the one who takes such a bill as a holder in due course. For example, the Gaming Act of 1710, enlarging the Gaming Act, 1664, rendered *void* securities given for money lost at games or by betting on the players or lent knowingly for such purposes. The result was that even a *bona fide* holder for value, ignorant of the origin of the instrument, could not recover upon it. The Act of 1710 was therefore modified by the Gaming Act, 1835, which provided that, instead of such securities being void, they should be deemed to have been given for an illegal consideration. The effect is to protect a holder in due course (*s*). Again, the Moneylenders Act, 1900, s. 1, provides that upon any action to enforce a money-lending security by a moneylender within the meaning of the Act, the Court may re-open the transaction and relieve the party sued from an unconscionable bargain (see *ante*, p. 115, note (*d*)); but the section expressly provides also that nothing in the section shall affect the rights of a party suing on such a security who is a *bona fide* holder for value without notice. On the other hand, the effect of the other provisions of the Act (those relating to registration, etc., of moneylenders) was held to make void all securities given by the borrower where a breach of such provisions had been committed. The result was to render such securities invalid, even where they had been acquired by a *bona fide* holder for value without notice of the defect. This injustice was, however, remedied by the Moneylenders Act, 1911, which makes the instrument valid in the hands of a holder in due course (*t*), *except, however, where such holder is himself a moneylender*. On the other hand, the Betting and Loans (Infants) Act, 1892, s. 5, makes void "absolutely as against all persons whomsoever" any instrument negotiable or other given by a person of full age in respect of a loan contracted during infancy, except so far as it may represent a new advance made

(*r*) The provisions mentioned do not complete the list, *e.g.*, there is the Tippling Act, 1756, and there may be others.

(*s*) S. 2 of this Act, providing that the loser might recover back from the winner the amount of a bill or note given in payment of losses, was repealed by the Gaming Act, 1922.

(*t*) But giving the borrower a right of indemnity against the moneylender.

since the infancy, *and no exception is made in favour of a bona fide holder for value without notice, of such an instrument.*

(v) Finally, reference may be made again to section 29 (3) *ante*, p. 187, which provides that, although a holder who derives through a holder in due course has, as a rule, the rights of a holder in due course, this is not the case if he was a party to any fraud or illegality affecting the bill before it came into the hands of the holder in due course through whom he derived title.

# CHAPTER XVIII.

## THE DISCHARGE OF A BILL.

THE Act gives five ways in which a bill may be discharged, *viz.*, (a) payment in due course, (b) acceptor becoming holder, (c) renunciation, (d) cancellation, (e) alteration.

(a) **Payment in Due Course.**—The Act provides that

> "A bill is discharged by payment in due course by or on behalf of the drawee or acceptor"

(section 59 (1)); and further that

> "'Payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective"

(*ibid.*). These provisions may be re-stated thus —

(i) *There must be payment.* This does not necessarily involve payment in cash "Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill" (Chalmers, citing cases of agreement to set off another debt, negotiable bill for less amount, bill of third party, etc) (*a*).

(ii) *The payment must be made at or after maturity.* For example, A, the holder of a bill, obtains payment from the acceptor before maturity, and hands the bill to the acceptor, who negotiates it to B. B is ignorant of the premature payment. B can recover on the bill against all prior parties

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(*a*) If the holder of a bill holds other security for the same debt and transfers the other security to a third party, he does not thereby necessarily discharge the bill In *Glasscock* v *Balls* (1889), 24 Q B D 13 59 L J Q B 51, 62 L T. 163, the defendant owed X a sum of money and gave X a promissory note for the amount payable on demand, and also a mortgage of certain property as further security X transferred the mortgage to Y for a sum equal to that due to him from the defendant, and he indorsed the note to the plaintiff the latter taking *bona fide* and for value, and without notice of the foregoing facts Upon the plaintiff suing the defendant on the note, the defence was set up that the note had been discharged It was held, that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and the plaintiff as a *bona fide* indorsee for value was entitled to recover upon it.

whose names remain on the bill (*Burbidge* v. *Manners* (1812), 3 Camp. 193, *per* Lord Ellenborough, at p. 194).

(iii) *The payment must be made to the holder, i.e.*, to the person who is the "holder" as defined by section 2, *ante*, p. 130. A bill payable to the order of A is stolen. The thief forges A's name on the bill and disposes of the bill to B. B presents the bill for payment to the drawee (or acceptor) on maturity. The drawee (or acceptor) pays The bill will not be discharged, as the payment was not made to the "holder" (*b*). An exception to this rule is provided in the case of cheques by section 60 of the Act (*c*). Thus, in the above example, had the bill been a cheque, payment by the banker on presentation would have relieved him from further liability.

(iv) *The payment must have been made in good faith.* For definition of "good faith", see section 90, *ante*, p. 184.

(v) *The payment must have been made without notice of the holder's defect in title* (*d*) (*if any*). For meaning of notice, see *ante*, p. 184. The acceptor pays a bearer bill which he knows has been obtained from A by fraud. He will not discharge the bill thereby, and will remain liable (*e*).

(*b*) It should be observed that had B's title been merely defective and not dependent upon a forgery, he could have given a valid discharge to the payer in pursuance of s 38 (3) (b) (*ante*, p. 134).

(*c*) *Post*, Chap XXI, and see Chap XXII for further provisions for the protection of bankers

(*d*) "Defect in title" is defined by s. 29 (2), *ante*, pp. 184, 185, the definition there given being applicable to the Act generally, and not merely to the section in which it appears

(*e*) When a holder under a defective title receives payment in due course, he will not necessarily have to refund the money to the true owner of the bill. In *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B 7, 65 L. J Q B. 80, 73 L. T 473, the defendants became the holders of a bill through a forged indorsement When the bill became due they presented it for payment to the acceptor, and received payment They acted in good faith throughout Afterwards the forgery was discovered, and they were sued by the acceptor for the money thus received. It was held that the acceptor could not recover. His *prima facie* right to sue for money paid under a mistake of fact had gone, as the position of the defendants had been altered to their detriment before they received notice of the mistake, they having, *inter alia*, lost their opportunity of giving notice of dishonour to prior parties. On the other hand, in *Imperial Bank of Canada* v *Bank of Hamilton*, [1903] A. C 49; 72 L. J P. C 1, 87 L. T. 457, a "marked" or "accepted" cheque for $5 was fraudulently altered by the drawer to $500. It came into the hands of a *bona fide* holder for value By mistake the bank paid the cheque, and the next day, discovering the mistake, claimed the return of $495 from the holder. It was held that the bank was at liberty to prove as between itself and an innocent holder for value that the cheque had been fraudulently altered after it had been certified, and that the principle of *London and River Plate*

(vi) *The payment must be made by or on behalf of the drawee or acceptor.* The drawee being the party ultimately liable on a bill, payment by no other party will serve to discharge it as a whole and relieve all other parties from liability. The effect of payment by other than the drawee or acceptor is provided for in the Act thus:—

> "Subject to the provisions herein-after contained (*f*), when a bill is paid by the drawer or an indorser it is not discharged; but (a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill. (b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill"

(section 59 (2)). The foregoing provisions may be illustrated thus:—

B draws on A (who accepts) a bill payable to the order of C. C presents the bill to A for payment, and it is dishonoured. C thereupon has recourse to B, who pays it. B then becomes the holder, and may enforce payment against A, but he cannot instead re-issue the bill to D. In other words, the bill is dead, except for the purpose of B's claim against A. This illustrates (a) above.

B indorses a bill to C, who indorses to D. D presents the bill to the drawee for acceptance, and it is dishonoured. D then has recourse to C, who pays it and becomes the holder.

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*Bank* v *Bank of Liverpool* (*supra*) did not apply, as the position of the holder could not have been altered meanwhile And see *R. E Jones & Co* v *Waring and Gillow* (cited *ante*, p 181), where a third party fraudulently obtained from the plaintiffs a cheque in favour of the defendants, and handed it to the defendants on account of money owed by him to them The defendants received the cheque in good faith, but were held liable to repay the amount to the plaintiffs as money paid under a mistake of fact It was submitted on behalf of the defendants that their position had altered to their detriment as they had given fresh credit to the third party (who had absconded) on the strength of receipt of the cheque, but the majority of the Court held such alteration to be too remote The rule may be that the alteration in position must be *vis-à-vis* the bill and involve some loss of right upon it The matter is discussed in the Law Quarterly Review for April, 1930.

(*f*) *I e.*, in the case of accommodation bills, see *post*, p 196

C may, of course, have recourse to B or any other prior party, but, in the alternative, he may strike out the indorsement of himself and D, and negotiate the bill to E. This illustrates (b) above. It must be observed that B must either be an indorser merely or else the drawer, the bill in the latter case being payable to his own order.

There is one case in which payment by a party other than the drawee or acceptor will discharge a bill, *viz.*, an "accommodation" bill (*g*), the Act providing that

> "Where an accommodation bill is paid in due course by the party accommodated the bill is discharged"

(section 59 (3)): *e.g.*, B draws on A in favour of C, for C's accommodation, and A accepts for the same reason. C indorses to D. D presents the bill to A for payment, and it is dishonoured. D then has recourse to C, who pays. The bill is thereby discharged, and C will have no right of recourse against A or B, nor any right to strike out his own and D's indorsements and re-negotiate the bill

(b) **Acceptor becoming Holder.**—The Act provides that

> "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged"

(section 61). A and B accept a bill jointly. Before maturity the then holder negotiates the bill to A. A keeps the bill until maturity. All parties are discharged, including B. Although A will have his right of contribution against B it will not be a right of action on the bill itself (*Harmer* v. *Steele* (1849), 4 Exch. 1). Again, A the acceptor of a bill becomes, on the maturity of the bill, the executor of the then holder. The bill will not be discharged, as A has not acquired the bill in his own right. If the acceptor becomes the holder through a person with a defective title, he will not have acquired "in his own right" within the meaning of the section. In *Nash* v. *De Freville*, [1900] 2 Q. B. 12; 69 L. J. Q. B. 484; 82 L. T. 642, A gave notes payable on demand to B on the understanding that they were not to be negotiated. B negotiated

(*g*) For meaning of accommodation bill, see *ante*, p. 114.

them to C, who took as holder in due course. Subsequently A paid the amount of notes, but did not ask for or receive them. Later on B obtained the notes from C by fraud and handed them to A. It was held that A had not become the holder of the notes " in his own right ", and that he was liable to C on them.

(c) **Renunciation.**—The Act provides that

> " When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged "

(section 62 (1)). It will be observed that the renunciation must be " at or after maturity ", and that renunciation before maturity will not be effective to discharge a bill (*h*). Further, the renunciation must be " absolute and unconditional ". For example, the holder renounces his rights upon a bill conditionally upon the happening of an uncertain event. The event happens. Nevertheless the renunciation is inoperative to discharge the bill. Finally, the renunciation must be of the holder's rights against the " acceptor ". Renunciation of rights against another party may discharge that party and his succeeding indorsees (see *infra*), but will not discharge *all* parties. It should also be observed that what is required is a renunciation and not a record of a mere intention to renounce. In *Re George* (1890), 44 Ch. D. 627; 59 L. J. Ch. 709; 63 L. T. 49, the holder of a note when dying and desiring to forgive the maker his debt, directed that the note should be brought to him so that he might destroy it. It could not be found, and he then had a memorandum drawn up to the effect that when found the note was to be destroyed. It was held that this was not a renunciation within the meaning of the Act, as it was not a record of renunciation, but of an intention or desire to renounce.

As regards form, the Act provides that

> " the renunciation must be in writing, unless the bill is delivered up to the acceptor "

(section 62 (1)). In *Rimault* v. *Cartwright* (1924), 93

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(*h*) Renunciation before maturity may, however, discharge a particular party, see s 62 (2), *post*, p 198

L. J. K. B. 823; 40 T. L. R. 803, the defendant (acceptor of a dishonoured bill) set up the defence that the plaintiff (the holder) had orally agreed, in common with the other creditors of the defendant, to accept a composition. It was held that the defence failed, as it was, in effect, a plea of renunciation not in writing. A renunciation of rights on a bill may be made to a third party, at any rate if so made at the request of the party in whose favour the renunciation is made (*Re Dickinson* (1909), 101 L. T. 27). And it is submitted that a written renunciation may be addressed to the world in general after the form of a deed poll, that is to all whom it may concern, although, of course, not necessarily under seal; but in an oral renunciation accompanied by delivery, the delivery must be to the acceptor. *E.g.*, the acceptor of a bill leaves the whole of his estate to X. The holder of the bill delivers it to X with an oral statement that he renounces his rights upon it. This will be ineffective as X is not the acceptor (*i*).

We have seen that to discharge the bill as a whole, the renunciation must be of the rights against the acceptor. But as regards the individual liability of any party (including the acceptor) the Act provides that

> "The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation"

(section 62 (2)). This provision may be exemplified thus: The payee of a bill indorses to A who indorses to B who indorses to C. C renounces his rights against A. This will discharge A and incidentally B, since B will have been deprived of his rights against A. But the drawer and acceptor will not be discharged. The following points must be noted: (i) that this form of renunciation must be "in like manner" to renunciation

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(*i*) Based on *Edwards* v. *Walters*, [1896] 2 Ch. 517; 65 L. J. Ch. 557, 74 L. T. 396. In that case, with a view of renouncing his rights under a promissory note, the holder handed it to the devisee under the will of the maker. It was held that this was not a delivery up to the maker within s. 62 (1) (*ante*, p. 197) [combined with s. 89 (2) (*post*, p. 272)]. If the delivery had been to the personal representatives, the result might be different, as "acceptor" might, perhaps, include his personal representatives: *per* Lopes, L.J.

of rights against the acceptor, *i.e.*, it must be absolute, unconditional, and in writing; and (ii) that it may be *before* as well as "at or after" maturity. Finally, the sub-section preserves (for the whole section and not merely for the sub-section) the rights of a holder in due course, *e.g.*, the holder of a bill renounces his rights against a prior indorser before maturity, and then negotiates the bill to a holder in due course, who is ignorant of the renunciation. The renunciation will not affect the latter.

(d) **Cancellation.**—The Act provides that

> "Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is *discharged*"

(section 63 (1)). The Act does not define what amounts to "cancellation", but as the cancellation must be "apparent" in order to be operative, it is obvious that some unmistakable method should be employed (*k*). The drawing of the pen through the signatures, and, or additionally, the writing of the word "cancelled" across the face of the bill would appear to be the most effective method, apart from the complete destruction of the instrument by fire.

Apart from cancellation of the bill as a whole, any party may be discharged by the cancellation of his signature, the Act providing that

> "In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent"

(section 63 (2)). The effect of the cancellation of an individual signature upon subsequent parties is provided for thus:—

> "In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged"

(*ibid.*).

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(*k*) Therefore the merely tearing the bill into pieces is inadvisable, as it might not be clear that the tearing was not a pure accident, and in such case a holder in due course might possibly not be affected (*Ingham* v. *Primrose* (1859), 7 C. B. (N.S.) 82). But see, as to the authority of this case, *ante*, p. 182, note (*f*).

As we have seen, the cancellation must be intentional. The Act expressly provides that

> "A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative"

(section 63 (3)). But apparent cancellation shifts the onus of proof as regards intention from the person claiming to the party resisting payment, the Act providing that

> "Where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority"

(*ibid.*).

(e) **Alteration.**—The Act provides that

> "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers"

(section 64 (1)) Thus A, while holder of a bill, alters the amount and then indorses to B who indorses to C B and C are aware of the alteration. C cannot claim against any party antecedent to A, but he can claim against A and B (*l*)

A holder in due course is, however, protected, the Act providing that

> "Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour"

(section 64 (1), proviso). In the above example, if the alteration were not apparent, and C were a holder in due course, he could claim against A and B for the amount of the bill as altered and against parties antecedent to A for the original amount of it.

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(*l*) Alteration by pure accident is, however, not within the above provision, *Hong Kong and Shanghai Banking Corporation* v *Lo Lee Shi*, [1928] A C. 181, 97 L J. P C 35, 138 L T 529, 44 T L R 233, where a lady placed a bank note in the pocket of a garment and, in forgetfulness of that fact, washed, dried, and starched the garment On proceeding to iron the garment, she discovered the note and managed to piece it together sufficiently to establish its contents. She was held entitled to recover the amount of the note from the bank

As to the effect of an alteration in an indorsement, see *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 22 T. L. R. 722. In that case, a promissory note was made payable to "The Gooderich Organ Co." The company was afterwards converted into a limited one, and the secretary thereupon inserted the word "limited" after the word company. It was then indorsed by the company and negotiated to a holder in due course. It was held, *inter alia*, that the alteration was not apparent within section 64 (1) of the Act (*supra*), but that, as payment could only be enforced according to the original tenor, *i.e.*, as if the word "limited" had not been inserted, the indorsement (which contained the word "limited") was wrong, and the company could not be sued on the bill.

It will be observed that to have any effect, the alteration must be "material". The Act does not define in general terms a material alteration, but provides that the expression shall include

> "any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent"

(section 64 (2)) (*m*). The test of materiality is whether the alteration affects the rights or liabilities of any of the parties to the bill, whether it affects them prejudicially or not, or even beneficially, and the onus of proving non-materiality of the alteration, when apparent, is upon the person claiming under the bill (*Koch* v. *Dicks*, [1933] 1 K. B. 307; 102 L. J. K. B 97; 148 L. T. 208; 49 T. L. R. 24).

Non-materiality may be exemplified generally by alteration in the place where the bill purports to be drawn, *e.g.*, from "London" to "Southampton", as no party's rights are, as a rule, affected, but where such a change *may* affect rights, *e.g.*, where the alteration is from a place in England to a place abroad (thus converting the document from an inland to a foreign bill), the alteration is material (*n*).

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(*m*) The alteration on a cheque of a crossing authorised by the Act is also material (see s 78, *post*, pp 236, 237)

(*n*) This was in fact the alteration held material in *Koch* v *Dicks*, *supra*.

It will also be observed that to protect the holder the alteration must have been "not apparent". It has been held that the alteration was not apparent if careful scrutiny on the part of the holder would not have disclosed it (*Woollatt* v. *Stanley* (1928), 138 L. T. 630). "Careful", no doubt, means "reasonably careful".

The correction, however, of an accidental error is not a material alteration. W signed his acceptance of two bills, but his name as drawee was omitted. The holder of the bills (being authorised to do so by virtue of section 20 of the Act (*ante*, pp. 93, 94)) proceeded to fill in the name of W as drawee, but by a slip filled in the name of M. On discovering the error, he crossed off the name of M and substituted that of W. It was held that he could sue W on the bill (*Haseldine* v. *Winstanley*, [1936] 2 K. B. 101; 105 L. J. K. B. 391; 154 L. T. 406).

**Discharge of Bill and Discharge of Parties.**—It will be observed that apart from the methods of discharge dealt with in this chapter, there are other ways in which the liability of a party to a bill may be discharged which have been already dealt with: *e.g.*, the non-observance towards him of any of the various duties imposed upon the holder which form the subject of Chapters XV and XVI, *ante*. It is necessary always to distinguish between the extinction of all rights of action on a bill and the extinction of the liability of an individual party to it. "The discharge of a bill must be distinguished from the discharge of one or more of the parties thereto, *e.g.*, the acceptor may be discharged by a discharge in bankruptcy, while the drawer and indorsers are only liberated to the extent of the dividends or composition received by the holder; or a particular indorser may be discharged by want of notice of dishonour, while the drawer and other indorsers remain liable; or, again, an indorser may be discharged as regards a particular party, but not as regards subsequent parties" (Chalmers).

**Statute of Limitations.**—Bills fall within the operation of the Limitation Act, 1939, s. 2 (1) (a), re-enacting in effect the corresponding provision in the Statute of Limitations (1623), 21 Jac. 1, c. 16, and therefore action upon a bill is barred after the lapse of six years from the accrual of the cause of action of person suing (or the person through whom he claims) against the party sued (or the party who is represented by the person sued). The date of the accrual of the cause of action will depend upon the date of the performance of the duties imposed upon the holder (*o*) in order to complete his right of action; *e.g.*, where a bill is dishonoured, the holder's right of action against a prior indorser is not complete until he has given notice of dishonour, and the statute will commence to run from the date of his so doing accordingly. In cases where circumstances make it impossible for the defendant to prove the accrual of the right of action so as to set the statute running, *e.g.*, where the cause of action is not complete until demand and the person upon whom demand had to be made is dead, and there is no evidence forthcoming as to the date of the demand, if any were made, there appears to be a common law presumption of payment of the instrument after the lapse of twenty years from its date, which may serve the defendant in lieu of the Statute of Limitations (see *Re Rutherford* (1880), 14 Ch. D. 687, where it was held by the Court of Appeal that a claim upon a promissory note given in 1857, payable six months after demand, should have been rejected by the Court below as a stale demand, quite independently of proof of demand and consequent operation of the Statute of Limitations) (*p*).

(*o*) As to which, see *ante*, Chaps. XV and XVI.

(*p*) Neither space, nor, perhaps, the scope of this treatise, permits a larger treatment of the present topic, but the reader is referred to Byles, Chap. XXII; and also Chalmers, where the effect of the Statute of Limitations in relation to actions upon bills is set out clearly in a series of rules.

# CHAPTER XIX.

## INTERVENTION FOR HONOUR.

### (I) *Acceptance for Honour.*

UNDER certain circumstances, where a bill has been dishonoured by non-acceptance, a stranger is allowed to intervene for the purpose of accepting in the place of the drawee, so as to prevent the operation of the immediate right of recourse which the holder of the bill will then have to those who have already become parties to the bill. Again, where a bill has been duly accepted but the condition of the acceptor has so changed as to render it extremely improbable that he will meet the bill upon presentation for payment, a similar intervention is permitted to a stranger to enable him to add his additional acceptance, so as to ensure the existence of a solvent acceptor to whom to present for payment when the bill matures. An acceptance of this nature is made in order to save the credit or honour of some party to the bill, or of the person for whose account the bill is drawn. Further, it is one of the conditions of such an acceptance that it can only follow upon protest. It is called, therefore, "acceptance supra protest for honour".

The statutory provisions on the subject deal with the following points. (i) The cases in which a bill may be accepted for honour supra protest, (ii) the time for such acceptance, (iii) the persons who may accept, (iv) whose consent must precede acceptance, (v) for whose honour the acceptance may be executed, (vi) the amount for which a bill may be so accepted, (vii) the form of acceptance, (viii) the liability of the acceptor, (ix) towards whom the liability is incurred, (x) the conditions necessary to complete the right to sue the acceptor.

(i) **When a Bill may be so Accepted.**—The Act provides opportunities for acceptance supra protest for honour, *viz.*,

"Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security" (section 65 (1)). As to protest for dishonour by non-acceptance, it will be remembered that it is necessary to protest a foreign bill upon dishonour in order to preserve the holder's right of recourse against the drawer and indorsers, but that protest is unnecessary for such purpose in the case of an inland bill (see section 51 (1), *ante*, p. 172). It is, however, optional, and the holder will have to exercise his option in the case of dishonour by non-acceptance if there is to be acceptance for honour. As regards protest for better security, see section 51 (5), *ante*, p. 179.

(ii) **Time for Acceptance.**—The Act provides that acceptance for honour can only take place provided that the bill

"is not overdue"

(section 65 (1)). As to when a bill is due in the case of a bill not payable on demand, see section 14, *ante*, pp. 145, 146.

(iii) **Who may Accept.**—The Act provides for acceptance for honour by

"any person, not being a party already liable thereon"

(section 65 (1)). A drawee may therefore accept for honour although he has previously dishonoured the bill by non-acceptance, and there is no inconsistency in this, since, as will be seen (*post*, p. 207), his liability as acceptor for honour is not necessarily to all the parties to the bill, as in the case of an ordinary acceptance.

(iv) **Whose Consent necessary.**—The Act provides that acceptance for honour can only take place

"with the consent of the holder"

(section 65 (1)). It is obvious that the rights of a holder should not be kept in suspense by the intervention of a stranger without his consent. It will be observed that the consent of the person for whose honour the acceptance is made is unnecessary. Nevertheless such person will be liable to the acceptor for honour, as will also parties prior to such person. The case is similar with "payment for honour" (see comment under section 68 (3), *post*, p. 210). Both cases form exceptions to the rule that a payment made by one person on behalf of another without the latter's request cannot be recovered by the former (see *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234; 56 L. J. Ch. 707; 56 L. T. 220).

(v) **For whose Honour.**—The Act provides that intervention supra protest can be made

> "for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn"

(section 65 (1)) The latter person is known as the "third account". For the effect of accepting for the honour of a particular person, see section 66 (2), *post*, p. 207.

(vi) **The Amount for which a Bill may be Accepted.**—The Act provides that

> "A bill may be accepted for honour for part only of the sum for which it is drawn"

(section 65 (2)). It will be remembered that if the holder accepts a partial acceptance he must give notice to the drawer *and indorsers, otherwise he discharges them (see section 44 (2), ante*, p. 144). Such notice is, however, not necessary in the case of a partial acceptance for honour.

(vii) **The Form of Acceptance.**—The Act provides that

> "an acceptance for honour supra protest in order to be valid must—(a) be written on the bill, and indicate that it is an acceptance for honour; (b) be signed by the acceptor for honour"

(section 65 (3)). The acceptance should also state for whose honour it is made, unless it is intended for the honour of the drawer, the Act providing that

> "Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer"

(section 65 (4)). The following indicates the method of acceptance—

EXAMPLE 30.

£100. Drawn March 1, 1929.

Six months after date pay our order the sum of one hundred pounds value received.

To Mr. William Smith,
4 Change Court,
London, E.C.

BROWN, JOHNSON & CO.

Accepted S.P. for
the honour of the in-
dorser, John Jones,
Charles Edwards.
March 3rd, 1929.

It is the practice to have the acceptance for honour attested by a " notarial act of honour " (*a*). The method is described as follows, *viz.*, " the acceptor supra protest must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honour of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time. This declaration is known as the ' act of honour ', and must be written at the foot of the protest " (Byles).

(viii) **The Liability of the Acceptor.**—The Act provides that

> " The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenour of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts "

(section 66 (1) ). With reference to the condition of the acceptor for honour's liability that the bill must have been " duly presented for payment " to the drawee, the question arises as to the date of maturity when the bill is payable " after sight ". Is the period to be calculated with reference to the " sight " of the drawee or that of the acceptor for honour? The Act provides on this point that

> " Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honour "

(section 65 (5) ).

(ix) **Towards whom the Liability is Incurred.**—The Act provides that

> " The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted "

(section 66 (2) ). *E.g.*, A bill is indorsed to A, who indorses

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(*a*) The practice is made compulsory in the case of *payment* for honour to enable the acceptor to recover against the person for whose honour he has accepted and against prior parties (see s. 68 (3), *post*, p. 210), but is not prescribed by the Act in the case of *acceptance* for honour, although it is invariably adopted, and assumed by those who handle bills to be necessary.

to B, who indorses to C, who indorses to D (holder). X accepts for the honour of A. He will be liable to D and to B and C, but not to A, or the parties antecedent to A.

(x) **Conditions necessary to Complete the Right to Sue the Acceptor.**—The Act provides that

> "Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need (b), it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need" (b)

(section 67 (1)). Taken in conjunction with section 66 (1), *ante*, p. 207, the conditions necessary to complete the right to sue the acceptor for honour are (a) due presentment for payment to the drawee, (b) protest for non-payment, (c) notice of the foregoing to the acceptor for honour, and (d) presentment for payment to the acceptor for honour. It will be remembered that presentment for payment is not necessary in order to charge the acceptor unless the acceptance is "qualified" by an express stipulation to that effect (see section 52 (1) and (2), *ante*, pp. 154, 155); nor is protest or notice of dishonour necessary in order to charge him (see section 52 (3), *ante*, p. 157).

As to the time when the bill must be presented to the acceptor for honour the Act provides that

> "Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him"

(section 67 (2)). It is further provided that

> "Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment"

(section 67 (3)). As to these circumstances, see section 46, *ante*, pp. 150—154.

(b) As to reference in case of need, see s. 15, *ante*, p. 97

**Protest for Dishonour by Acceptor for Honour.**—The Act provides that

> "When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him"

(section 67 (4)). It will be remembered that it is only in the case of foreign bills that protest is necessary for non-payment by an ordinary acceptor in order to charge the other parties to the bill (see section 51 (1) and (2), *ante*, pp. 172, 173).

(II) *Payment for Honour.*

Similar in object to intervention before a bill is due by means of acceptance for honour, is intervention after the bill has matured by means of "payment supra protest for honour". But examination of the following provisions of the statute will show that there are substantial differences between the conditions which govern the two forms of intervention.

**When Payment for Honour may be made, who may Pay and for whose Honour Payment may be made.**—The Act provides that

> "Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn"

(section 68 (1)). Comparing "payment for honour" with "acceptance for honour" it will be observed that in both cases the intervention must be preceded by protest, and may be for the honour of any party liable on the bill or for the "third account". In the case of "payment for honour", however, the intervention need not be before the bill is overdue, nor by a person not already liable on the bill, nor with the consent of the holder.

**Where several Offers of Intervention.**—The holder not having the option of refusing payment for honour, the question arises as to whose payment he must accept if more than one intervene. Upon this the Act provides that

> "Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference"

(section 68 (2)). As will be seen (section 68 (5), *infra*), payment for honour discharges the parties subsequent to the one for whose honour the payment is made. Consequently the earlier the party for whose honour the payment is made, the more the parties who will be discharged by the payment, and the holder must accept the intervention of the one who intervenes for the earlier party.

**Notarial Act necessary.**—The Act provides that

> "Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it"

(section 68 (3)). Neither acceptance nor payment for honour requires the consent of the person for whose honour the intervention is made. Nevertheless in both cases the intervener can recover against the person for whose honour the intervention is made and against parties liable to such person, thus forming exceptions to the rule that a person is not liable to another for a service rendered to the latter not at his express or implied request. In the case of payment for honour, however, it is necessary in order to complete the right to recover in respect of this voluntary service that it should be attested by a "notarial act". In the case of acceptance for honour, the "notarial act" is apparently unnecessary, although the invariable practice (see *ante*, p. 207, note (*a*)).

**Basis of Notarial Act.**—The Act provides that

> "The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays"

(section 68 (4)). The method of effecting the notarial act in the case of payment for honour is similar to that in the case of acceptance for honour, as to which see *ante*, p. 207.

**Effect of Payment for Honour.**—The Act provides that

> "Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are

discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party "

(section 68 (5)). B draws on A in favour of C. C indorses to D who indorses to E who indorses to F, the holder. X pays for the honour of C. D and E are discharged, but C is liable to X, and X stands in the shoes of C, both as regards C's right of recourse against A and B and as regards C's duties in order to complete such right of recourse. The position is similar in respect of acceptance for honour if the acceptor for honour subsequently pays the bill, *i.e.*, he will discharge the parties subsequent to the person for whose honour he accepted, can recover against him, and will be subrogated to his rights and duties as regards antecedent parties, if any.

**Duty of Holder.**—The Act provides that

" The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages "

(section 68 (6)). An ordinary payer is also entitled to delivery up of the bill (see section 52 (4), *ante*, p. 150).

**Consequences of Refusal to Accept Payment for Honour.**—The Act provides that

" Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment "

(section 68 (7)). As already indicated (*ante*, p. 209), a holder cannot refuse to receive payment for honour, although he may refuse acceptance for honour. The effect of refusing payment for honour may be exemplified thus: B draws on A in favour of C who indorses to D who indorses to E, the holder. X offers to pay for the honour of C. If E refuses, he will lose his right of recourse against C and D, but not against A and B.

# CHAPTER XX.

## LOST INSTRUMENTS—BILL IN A SET—CONFLICT OF LAWS.

*Lost Instruments.*

Two remedies are provided for the holder who loses the bill, one applicable before the bill is overdue, the other applicable upon action brought to enforce it.

**Before Bill Overdue.**—The Act provides that

"Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenour, giving security (*a*) to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled (*b*) to do so"

(section 69). It will be observed that the remedy afforded by this provision is very imperfect, as it does no more than give the holder a right to obtain execution of the duplicate by the drawer, and he cannot claim execution of it by the other parties (*c*). So far, however, as the right to sue all parties upon the lost bill is concerned, a more complete remedy is afforded by the provision next set out.

**Upon Action on the Bill.**—The Act provides that

"In any action (*d*) or proceeding upon a bill, the Court or a Judge may order that the loss of the instrument shall

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(*a*) The Act gives no indication as to what is to constitute such security, *e g*, a charge on property of the holder, or sureties. If the parties cannot agree, it would be for the Court to decide in its discretion as to the proper form of security, and as to its sufficiency, in an action by the holder for the delivery of a duplicate.

(*b*) By virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 47, if in an action for a duplicate the Court orders the drawer to execute a duplicate, and he refuses or neglects to do so, the Court may order the duplicate to be executed by a person nominated by the Court on behalf of such drawer. See also, Rules of the Supreme Court, O. 42, r. 30.

(*c*) Apparently, also, the provision in question will not apply to enable a duplicate to be demanded from the maker of a promissory note, as it is the first indorser, and not the maker, who is deemed to correspond with the drawer of a bill. See s. 89 (2), *post*, p. 272.

(*d*) "'Action' includes counterclaim and set-off" (s. 2).

> not be set up, provided an indemnity be given to the satisfaction of the Court or Judge against the claims of any other person upon the instrument in question "

(section 70). The proper course is for the plaintiff to tender the indemnity before action brought, and thus leave the defendant no excuse for defending the action. If this is not done the plaintiff will not get his costs of the action (*King* v. *Zimmerman* (1871), L. R. 6 C. P. 466).

It must be observed that the foregoing provisions only apply to a lost and not a destroyed instrument. An action on the bill may, however, be brought in the latter case, the plaintiff giving proof of its destruction and of its contents (*Wright* v. *Maidstone* (1855), 24 L. J. Ch. 623). Apparently an indemnity is unnecessary in such a case.

Presentment for payment (*e*) and notice of dishonour are not omissible because the bill had been lost or destroyed (*Thackray* v. *Blackett* (1811), 3 Camp. 164).

## *Bill in a Set.*

A "set" of bills means a bill executed in duplicate or triplicate with the intention that any of the set shall represent the others and that payment of one shall discharge the whole set. Each of the bills in a set is called a "part" The idea of drawing a bill in a set is that, when the bill has to be sent in such manner that there is a danger of loss, *e.g.*, across seas, each part can be sent separately and by different mails so as to ensure as far as possible that at least one part shall reach its destination. Bills in a set are usually associated with foreign bills because inland bills are rarely drawn in a set while foreign ones frequently are so, but the law on the subject is equally applicable to both classes of bills when so drawn.

**Bill in Set to Constitute one Bill.**—The Act provides that

> "where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill "

(section 71 (1)). The following will exemplify a bill in a set

(*e*) " If the bill be lost, a copy should be presented and an indemnity tendered; but qu. as to the sufficiency of this " (Chalmers).

complying with the two conditions contained in the foregoing provisions :—

EXAMPLE 31. BILL IN A SET.

No. 021. Exchange for £200. Delhi, March 1, 1929.

Three months after sight of this first of exchange (*second and third being unpaid*) pay to Messrs. Wilkinson & Co. or order the sum of two hundred pounds value received and debit same to the account of Messrs. Brown & Co. against your letter of credit No. 49.

To Messrs. Shipley, Janson & Co. JABBERJI & CO.
London.

No. 021. Exchange for £200. Delhi, March 1, 1929.

Three months after sight of this second of exchange (*first and third being unpaid*) pay to Messrs. Wilkinson & Co. or order the sum of two hundred pounds value received and debit same to the account of Messrs. Brown & Co. against your letter of credit No. 49.

To Messrs. Shipley, Janson & Co. JABBERJI & CO.
London.

No. 021. Exchange for £200. Delhi, March 1, 1929.

Three months after sight of this third of exchange (*first and second being unpaid*) pay to Messrs. Wilkinson & Co. or order the sum of two hundred pounds value received and debit same to the account of Messrs. Brown & Co. against your letter of credit No. 49.

To Messrs. Shipley, Janson & Co. JABBERJI & CO.
London.

**Indorser Liable on each Part Indorsed.**—The Act provides that

"Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills" (section 71 (2)). In the above example, if Wilkinson & Co., having received the whole of the parts, indorse the first part to A and the second part to B, they will be liable on each part to A and B respectively, and if A and B indorse, each will be liable on his part as if each part were a separate bill, although if Messrs. Shipley, Janson & Co. pay any one part (whether first, second, or third) they will discharge themselves and Messrs. Jabberji & Co. of the whole bill. They must, however, only accept one part and that is the part which they are liable to pay (see *infra*).

**Priority as between Holders in Due Course.**—The Act provides that

> "Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him"

(section 71 (3)). In the case of bills in a set it is therefore desirable to have some clear record of the date of negotiation.

**One Part only to be Accepted.**—The Act provides that

> "The acceptance may be written on any part, and it must be written on one part only"

(section 71 (4)). In the above instance, Messrs. Shipley, Janson & Co. would accept whichever part is first presented to them for acceptance and would refuse to accept on any part subsequently presented. If they did the latter, they might make themselves liable on each part accepted by them as if it were an independent bill, the Act providing that

> "If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill"

(*ibid.*).

**Acceptor must get Delivery of the Part Accepted.**—The Act provides that

> "When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof"

(section 71 (5)). *E.g.*, a bill is drawn in a set in favour of A. The drawee accepts on the first part. A negotiates that part to B, a holder in due course. On maturity the acceptor pays on presentation and delivery up of the second and third parts, without obtaining delivery of the first part. He will remain liable to B.

**Payment of One Part discharges Bill.**—The Act provides that

> "Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged"

(section 71 (6)). As to the meaning of the expression "or otherwise", see *ante*, Chapter XVIII, for the various methods of discharge alternative to payment.

### *Conflict of Laws.*

It happens frequently that the Courts of this country are called upon to determine the validity and effect of some transaction which took place in another country. In such cases it transpires sometimes that the laws of the two countries differ on the matter in question and that therefore the pronouncement of the foreign tribunals, had the matter come before them, would have differed from that of our tribunals had the transaction taken place in this country and our tribunals been called upon to pronounce upon it under such circumstances. This difference of legal interpretation in the two sets of Courts is called a "conflict of laws", and the question arises in each instance, by the rules of which law are our tribunals to be guided? Are they to apply the appropriate rules of our own law, *i.e.*, the law of the country in which the transaction is being adjudicated upon, or are they to apply those of the country where the transaction itself took place? In relation to bills, the Act sets out a series of rules to aid the Court in the determination of this question, which rules provide for the determination of

> "the rights, duties and liabilities of the parties"

in cases

> "where a bill drawn in one country is negotiated, accepted, or payable in another"

(section 72).

**Form.**—In the first place, the rules deal with the question of the formal sufficiency of the bill itself and of the various transactions which comprise its subsequent history, *e.g.*, acceptance, indorsement, etc.

As to the bill itself the Act provides that

> "The validity of a bill as regards requisites in form is determined by the law of the place of issue" (*f*)

(section 72 (1)). *E.g.*, a bill issued in France but not in the form required by French law and negotiated here, will be treated as invalid not only by the French Courts but by the English Courts also. On the other hand, a bill issued in France in accordance with the form required by French law, although not with that of English law, will be treated as valid by the English Courts. The Act, however, provides two exceptions to this rule, *viz.*:

> "(a) Where a bill is issued out of the United Kingdom (*g*) it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom"

(section 72 (1)).

As regards exception (a), it may be observed that by section 35

(*f*) For definition of "issue", see s. 2, *ante*, p. 97.

(*g*) It is to be assumed that this expression does not now include the Irish Free State (Eire) (see *ante*, p. 169).

of the Stamp Act, 1891, a bill issued abroad must, on coming into this country, be stamped before it is first dealt with (*h*).

Exception (b) may be illustrated thus: A bill issued in France does not express the value received as French law requires. English law, however, does not require the expression of the value received (*i*), if it is otherwise drawn in accordance with English law. The bill is sent to A here, who indorses it to B. B can sue A on the bill but he cannot sue any of those who became parties to it in France.

As regards the form of the transactions subsequent to issue, the Act provides that

> "the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made"

(section 72 (1)). For example, a bill is issued here, and its subsequent history includes an indorsement abroad. Such indorsement is in the form required by English law, but not in that required by the foreign law. The indorser cannot be sued here.

**Interpretation.**—In the next place, the Act deals with the legal effect of the various acts which go to the making and dealing with a bill, such as drawing, acceptance, etc., on the assumption that in point of form these acts were in order. Upon this the Act provides that

> "Subject to the provisions of this Act (*k*), the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill (*l*) is determined by the law of the place where such contract is made"

(section 72 (2)). *E.g.*, an English bill is negotiated abroad and is there accepted supra protest. In an action on the bill here

(*h*) By affixing and cancelling a proper adhesive stamp. A *bona fide* holder, however, who acquires such a bill duly stamped is not concerned to inquire whether it was stamped before the first dealing with it, and if he finds the stamp uncancelled he may cancel it himself.

(*i*) See s. 3 (4) (b), *ante*, p. 57.

(*k*) *I.e.*, sub-ss. (3), (4) and (5), *post*, pp. 220, 221.

(*l*) It will be observed that this sub-section does not cover all the possible contracts supervening upon issue (as does sub-s. (1), *supra*), but only those mentioned.

not only must it be shown that the form of such acceptance was in accordance with the foreign law (see *supra*), but our Courts will give the same legal effect to it as that given by the foreign law if that should happen to differ from the English law. In *Koechlin* v. *Kestenbaum*, [1927] 1 K. B. 889; 96 L. J. K. B. 675; 137 L. T 216; 43 T. L. R. 352, the plaintiffs' title to a French bill depended upon an indorsement, one M Vidgerhaus. It was not in fact indorsed by him but, with his authority, was indorsed by his son, E. Vidgerhaus, who signed his own name merely without any indication that he was signing on behalf of his father The Court accepted the evidence that such an indorsement was valid according to French law, and held the plaintiffs entitled to recover. The Courts will even give effect to a forged indorsement abroad if such an indorsement was valid in the country where it was made. In *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K B. 870; 73 L. J. K B. 993; 91 L. T 652, it appeared that by Austrian law the *bona fide* holder for value and without negligence of a cheque has a good title to it even though he takes it through a forged indorsement. Such a holder took the cheque in question (an English one) in Austria and paid it into a bank in England, which collected it from the bank upon which it was drawn The cheque was not crossed. It was held, nevertheless, that the collecting bank was not liable for receiving the proceeds, as the negotiation abroad was governed by the Austrian law, and that therefore section 24 of the Act (*ante*, p. 80) did not apply (*m*). An exception to the foregoing rule is, however, provided by the Act in the rule that

> "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom"

(proviso to section 72 (2) ). The emphatic word in this provision is "payer". In *Alcock* v. *Smith*, [1892] 1 Ch. 238; 61 L J. Ch. 161; 65 L. T. 335, an inland bill was indorsed in Norway and handed to S, the agent in Norway of an English firm, A & Co., consisting of A and J. While in S's hands it was seized in execution under a Norwegian judgment by a creditor of the

(*m*) It may be observed, however, that in *Koechlin* v. *Kestenbaum* (*supra*), Sargant, L.J., considered that the decision in *Embiricos* v. *Anglo-Austrian Bank* probably went beyond the actual language of s. 72 (2).

partner J of A & Co., and after the bill became overdue it was sold by public auction to M. According to Norwegian law, M had a perfect title free from all equities, as Norwegian law did not recognise the English doctrine that a purchaser of an overdue bill gets only such title as the vendor had, nor did it recognise any difference as to the extent of negotiability between a current and an overdue bill. M sold the bill to K in Sweden (where the law was the same as in Norway), K buying without knowledge of any infirmity in the title of the bill. K sent the bill for collection to agents in England. A and A & Co. claimed the bill from K. The acceptors, *i.e.*, the "payers" of the bill, paid the money into Court. It was held that as the action was not to recover the amount of the bill from the "payers" (the acceptors), but to decide between two persons, each claiming to be entitled to the bill as holders and as such to be paid, no question being raised by the "payers", the proviso to section 72 (2), *supra*, did not apply (*n*).

**Duties of Holder.**—As to what will be required of the holder of a bill in respect of the performance of his duties as such, the Act provides that

> "The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured"

(section 72 (3)). It must be observed that this question of the duties to be performed is irrespective of the form of the acts done in performance of such duties and of the legal effect of such performance, dealt with above. Furthermore, when a duty (*e.g.*, presentment for payment), required by the foreign law, is, in the circumstances, excused by English law, the foreign law becomes irrelevant, and the sub-section does not apply (*Cornelius* v. *Banque Franco-Serbe* (1941), 110 L. J. K. B. 573; 165 L. T. 374; 57 T. L. R. 610).

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(*n*) It was held, finally, that as the effect of the transaction in Norway must be determined according to Norwegian law, the result was to give M a complete title free from equities, and, therefore, the claim of K prevailed over that of A and A & Co.

**Calculation of Foreign Currency.**—The Act provides that

> "where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable"

(section 72 (4) (*o*)). The case of a bill payable out of the United Kingdom sued for here is dealt with by section 57 (2), *ante*, p. 108.

**Determination of Date.**—The Act provides that

> "where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable"

(section 72 (5)) *E g.*, a bill drawn in England payable in Paris is sued on here It is shown that it was presented on the exact date for payment expressed in the bill without allowing for days of grace. It will be held that it was not presented prematurely since the French law does not provide for days of grace. On the other hand, if a French bill is payable here, it is necessary to allow the days of grace.

**Proof of Foreign Law.**—It may be mentioned that when it is necessary to apply foreign law, which includes Colonial law, to the decision of a question raised in the English Courts, the foreign law must be proved as a *question of fact* (*p*).

(*o*) As to the case where a bill both drawn and payable in England is expressed in foreign currency, see *ante*, p 107, note (*h*)

(*p*) "When there is a question of foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself" (Stephen's Digest of the Law of Evidence). For an alternative method of ascertaining foreign and Colonial law by means of a case stated for the opinion of the foreign or Colonial Court, see the British Law Ascertainment Act, 1859, and the Foreign Law Ascertainment Act, 1861. It may be added that the law of foreign countries in respect of negotiable instruments is assumed to be the same as that of this country until the contrary be proved (see *Guaranty Trust Co. of New York* v. *Hannay*, [1918] 2 K. B. 623, at p 655; 87 L. J. K. B 223; 119 L. T. 321).

# CHAPTER XXI.

## CHEQUES (I)—GENERAL.

A CHEQUE is the normal means by which a person who has funds in the hands of a bank withdraws the same or some part of it. Money deposited with a banker on current account, or collected in by the banker on the customer's behalf and credited to his current account, is in law regarded as a loan made by the customer to the banker (*a*) subject to the implied stipulation (arising out of the custom of bankers (*b*)) that the banker will repay the same by honouring the customer's cheques upon the banker, provided that the balance due to the customer is sufficient to cover the cheque (*c*)

**Definition of Cheque.**—The Act defines a cheque as

"a bill of exchange drawn on a banker (*d*), payable on demand"

(*a*) Economically, it is regarded as the 'purchase of a credit"

(*b*) But incidentally recognised in the Act by s 75 (*post*, p 229), which refers to the banker's "duty" to honour his customer's cheques if he has the funds to do so

(*c*) It should be observed that a banker who collects a sum for a customer remains agent in respect of the sum until the account of the customer is fully credited with it *Re Farrow's Bank*, [1923] *1 Ch* 41, *92* L J Ch 153, *128* L T 332, where a customer paid in a cheque and was provisionally credited with the amount of it, and the bank suspended payment before the cheque had been fully cleared It was held that the customer could recover the full proceeds of the cheque from the liquidator as the cheque had never become cash held by the bank on a debtor and creditor account

(*d*) S. 2 of the Act provides that

"'Banker' includes a body of persons whether incorporated or not who carry on the business of banking"

Farther than this, the statute does not define the word and *no satisfactory definition* appears to exist—see Paget's Law of Banking Hart's Law of Banking, and Thomas' Principles of Banking In *Re Shields* (*infra*), "banker" was defined as "One who traffics with the money of others for the purpose of making a profit", but this is obviously too wide In *Re District Savings Bank* (1862), 31 L J Ch 319, 5 L T 566, Turner, L J, laid stress upon the power of customers to draw out their money by cheque, while in *Re Shields* [1901] 1 Ir R 172, Fitzgibbon, L J, emphasised the receipt of money upon deposit Generally, one knows a bank when one sees it, but if the question arises it appears to be one of fact (see *R* v *Bowerman*, [1891] 1 Q B 112, 60 L J M C 13 63 L T 532) Anyhow, a mere money-lending concern is not a bank (see Moneylenders Act, 1911, s 2) (section 73). Adapting the definition of bill contained in section 3 (1), *ante*, p. 54, we get the following extended definition of a cheque: A cheque is an unconditional order in writing addressed by a person to a banker, signed by such person, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer. If, therefore, we turn back to the statement of the requisites of a bill (*ante*, pp. 54 and 58 *et seq.*), we may take it that what is there stated is in substance applicable to a cheque except so far as it relates to bills not payable on demand and bearing in mind that the person to whom the order comprised in a bill is addressed can be no other than a banker (e).

**Form of Cheque.**—A cheque being a bill with a banker as drawee and payable on demand, it is a simple matter to adapt one of the ordinary forms of a bill, so as to represent a cheque thus—

EXAMPLE 32.

£240 3*s*. 9*d*. London, February 5, 1929.

(Stamp.) On demand pay Thomas Edwards & Co. or order the sum of two hundred and forty pounds, three shillings and ninepence, value received.

To the National Provincial
Bank of England, Limited,
St. Martin's-le-Grand,
185 Aldersgate St., E.C.

JOHN BROWN.

In fact, however, although the foregoing contains all the essential matter of a cheque and something more, the form in which such matter would appear in an ordinary cheque is wholly different. The following shows how it would actually appear.

(e) Of the nine requisites of a bill set out on p. 54, it will be seen that all except (4) and (8) are equally applicable to cheques. In connection with (4) it has merely to be remembered that the person to whom the order is addressed must be a banker, while (8) will only need modification to the extent of the omission of the part relating to "a fixed or determinable future time".

EXAMPLE 33.

No. $\frac{R}{1}$10725 London, February 5, 1929.

To the National Provincial Bank of England, Limited,
St. Martin's-le-Grand,
185 Aldersgate St., E.C.

Pay Thomas Edwards & Co. or Order Two hundred and forty pounds, three shillings and ninepence. (Stamp.)

£240 3*s.* 9*d.* JOHN BROWN.

It will be observed that the order of the matter is largely reversed in the cheque; also that the words "on demand" are omitted in reliance upon section 10 (1) (b), *ante*, p. 65, although they would be found in the bill (*f*), and the words "value received" are also omitted as superfluous by virtue of section 3 (4) (b), *ante*, p. 57.

**Applicability to Cheques of Provisions as to Bills.**—It follows from the fact that a cheque is merely a particular kind of bill that the provisions of the Act relating to bills (*g*) (and of the comment thereon contained in Chapters IX to XX of this work) will, generally speaking, apply to cheques, and indeed the Act itself expressly provides that

> "Except as otherwise provided in this Part (*h*), the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque"

(section 73).

**Cheques not Intended to be Accepted.**—It must, however, be borne in mind that a cheque is never intended to be accepted by the drawee, and, indeed, is never presented for that purpose, but for payment only. As a consequence the whole topic of

(*f*) In *Robinson* v. *Benkel* (1913), 29 T. L. R. 475, it was argued that if a cheque were post-dated it was not payable on demand, but the argument was unsuccessful. Reminder may be made that a cheque, being a bill payable on demand, the stamp upon it is twopence, whatever the amount for which it is drawn (see *ante*, p. 57, note (*g*)).

(*g*) *I.e.*, Parts I, II, and V of the Act.

(*h*) *I.e.*, in Part III of the Act, which consists of ss. 73—75, dealt with in this chapter, and ss. 76—82, dealt with in the next chapter.

acceptance, its requisites and consequences, may be regarded as omitted from the Act in its relation to cheques.

**Duty of Banker to Pay Cheques.**—As already indicated a banker is liable to his customer for non-payment of a cheque if he have sufficient funds of the customer in current account with which to meet it. Or if the banker has otherwise contracted to do so, as by an arrangement for an overdraft or by a direct promise to meet the cheque (*Sterling* v. *Barclays Bank*, reported in the "Times" newspaper of July 18, 1930). And a banker is liable for dishonouring a cheque if he has misled the customer into thinking that the customer has sufficient funds to meet the cheque, *e.g.*, in *Holland* v. *Manchester and Liverpool District Banking Co.* (1909), 25 T. L. R. 386, it was held that entries by a banker in his customer's pass book, although subject to adjustment, are *prima facie* evidence against the banker of the amount standing to the credit of the customer, and that the customer, in the absence of fraud, is entitled to rely upon such entries and to recover damages for dishonouring his cheque. The customer's right of action is, of course, not upon the cheque, but for damages for breach of the banker's implied contract to honour the cheque (*Foley* v *Hill* (1848), 2 H. L. Cas. 28), or for negligence (*Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; *Rolin* v. *Steward* (1854), 14 C. B. 595). The cheque, however, must be drawn or indorsed in favour of a third party (or, presumably, be payable to bearer), and presented by the holder and not by the customer himself (*Kinlan* v. *Ulster Bank*, [1928] Ir. R. 171). If the customer is a trader, actual loss to him need not be shown and he is entitled to general damages, the basis of his claim being injury to his commercial credit, *i.e.*, in effect, defamation (*Rolin* v. *Steward* (1854), 14 C. B. 595), and he may recover, in addition, for any actual loss if he alleges it as special damage and can prove it (*Fleming* v. *Bank of New Zealand*, [1900] A. C. 577; 69 L. J. P C. 120; 83 L. T. 1). If the customer is not a trader, he can only recover nominal damages, unless he can show special damage, such as collapse of a pending deal through the loss of credit caused by the dishonour of the cheque (*Gibbons* v. *Westminster Bank*, [1939] 2 K. B. 882; 108 L. J. K. B. 841: 161

L. T. 31; 55 T. L. R. 888) (*i*). But, in the absence of special stipulation, a banker can close his customer's account, even if in credit, upon giving him reasonable notice. What amounts to reasonable notice depends upon the nature of the account and the facts and circumstances of the case (*Prosperity, Ltd.* v. *Lloyds Bank* (1923), 39 T. L. R. 372) (*k*). It should be observed that the banker's responsibility is towards his customer, and not to the payee, as there is no privity of contract between him and the payee. Therefore, upon presentation for payment over the counter of a bill or cheque, the banker (at any rate in the absence of very special circumstances of suspicion) is entitled, so far as the payee is concerned, to pay the person presenting, although such person had, it may afterwards appear, no authority to receive payment (*Auchteroni* v. *Midland Bank*, [1928] 2 K. B. 294; 97 L. J. K. B. 625; 139 L. T. 344; 44 T. L. R. 441) (*l*).

**Liability of Banker for Wrongful Payment of Cheques.**—Of course, a banker who pays away a customer's money without the customer's authority cannot debit the customer with the amount so paid. In *Ligget (Liverpool), Ltd.* v. *Barclays Bank*, [1928] 1 K. B. 48; 97 L. J. K. B. 1; 137 L. T. 443; 43 T. L. R. 449, the bank had been instructed to pay cheques drawn by two directors and they paid a cheque drawn by one director only, *i.e.*, by a director properly appointed, and a person improperly appointed purporting to act as director. The bank was held liable (*m*). But if a customer constantly overlooks a departure

(*i*) The restriction of general damages to traders seems too technical and narrow. Presumably, "trader" would include such a professional man as a solicitor or accountant, but there are others (*e.g.*, paid officials, whose duty it is to handle funds other than their own) to whom their financial good name is of vital importance. It is open to the highest Courts to enlarge the rule to cover such persons, and possibly they may do so when the opportunity offers.

(*k*) As to the effect of a garnishee order upon the customer's account, see *Rogers* v *Whiteley*, [1892] A. C. 118, 61 L. J. Q. B 512; 66 L. T. 303. As to banker's lien, see *ante*, p 32.

(*l*) Otherwise the banker would frequently be in a difficult position, as refusal to pay the person presenting, upon a suspicion ultimately shown to be groundless, might land the banker in an action by his customer under the rule above set out. The unfortunate banker would not know which risk to run, towards the payee for payment to the wrong person, or towards the customer for refusing payment.

(*m*) It was held, however, that so far as the cheques had gone in payment of the company's creditors, the bank was entitled to subrogation, *i.e.*, to stand in the place of such creditors, and to reduce the amount of its liability to the extent to which the company had been relieved by such payment.

from his instructions, a "course of business" may be established which will justify the banker in such departure. It is necessary, however, in such cases to establish a strong case of "course of business" before the banker can rely upon it—see *Australian Bank of Commerce* v. *Perel*, [1926] A. C. 737; 95 L. J. P. C. 185; 135 L. T. 586 (*n*).

**Cheque must be Presented within Reasonable Time.**—The Act provides that

> "Subject to the provisions of this Act (*o*) (1) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him"

(section 74).

The effect of the foregoing provisions may be illustrated thus: A, a customer of the —— Bank, draws a cheque upon the bank for £100 in favour of B. B does not present the cheque within a reasonable time, and when he does present he finds that the bank has stopped payment. A had maintained sufficient funds at the bank to meet the cheque at any time during the reasonable

(*n*) The reader must not confuse payment by a banker of a cheque drawn with insufficient authority of the customer, from payment to the wrong person of a cheque drawn with proper authority. In the latter case, the banker may be protected by the operation of s. 60, dealt with later in the present chapter, and ss. 80 and 82 of the Act, dealt with in the following chapter.

(*o*) *I.e.*, subject to the excuses allowed by s. 46, *ante*, pp. 150—154, for delay in presentment or for non-presentment.

time when B should have presented it, and up to the time of actual presentation, so that when A comes to claim in the bankruptcy or winding-up of the bank he is a creditor for a larger sum by £100 than he would have been had B presented promptly. A, however, can treat the cheque as discharged, but in such case must reduce his proof against the bank by the £100, while, on the other hand, B is subrogated to the rights of A in respect of the £100 and can prove against the bank for that amount. If, however, in the foregoing example, the funds A had with the bank amounted to only £75, the bank might have dishonoured the cheque under any circumstances, and therefore A would have suffered no loss by the delay in presentation and the above provisions of the Act would not apply.

As to what is a "reasonable time" for presentation of a cheque, the rule in ordinary cases has been stated thus: "The question of the time for presentment has been held to depend on whether or not the person who receives the cheque lives in the same place as the bank on which the cheque is drawn. Thus it has been held that where the holder lives in the same place as the bank on which the cheque is drawn, he must present for payment not later than the day following receipt. Where the parties do not live in the same place, then the holder must forward the cheque by the next day's post at latest, either direct to the drawer's bank, or to his own banker or other agent for collection, who must in his turn forward or present it on the day after such receipt" (Byles).

It should be observed in connection with the above provision that it only applies where the drawer has sustained damage by the delay in presentation. If he has not sustained damage, *e.g.*, if he never had funds sufficient at the bank, he will not be discharged by delay (*p*). It is true that there is a general provision in section 45 (2) (*ante*, p. 147), that the drawer of a bill payable on demand will be discharged by unreasonable delay in presentment after issue, but it is generally assumed that this does not apply to cheques, and that the common law rule applies to them, *viz.*, that, as between the drawer of a cheque and the holder, no time, within six years, is unreasonable

(*p*) Unless, apparently, it reaches six years (see Chalmers).

for presentmen to the banker for payment, unless some loss to the drawer is occasioned by the delay (*Lawes* v. *Rand* (1857), 27 L. J. C. P. 76; 3 C. B. (N.S.) 442). The result is that "reasonable time" for presentment of a cheque has two different meanings as between drawer and holder. For the purpose of depriving the drawer of the benefit of section 74, it means a matter of a day: For the purpose of depriving him of the benefit of section 45 (2), it means anything up to six years (*q*).

As regards an *indorser*, although, as we have seen, the provisions of section 45 (2) are thought not to help the drawer, they do assist an indorser, as it is not doubted that that part of them which provides that an indorser shall be discharged if the holder does not present the bill within a reasonable time after indorsement will apply to cheques.

**Determination of Authority of Banker.**—The banker's authority to pay cheques may come to an end in two ways, the Act providing that

> "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) Countermand of payment; (2) Notice of the customer's death"

(section 75). Whether there has been a countermand is a question of fact dependent upon the circumstances of the case. In *Curtice* v. *London City & Midland Bank*, [1908] 1 K. B. 293; 77 L. J. K. B. 341; 98 L. T. 190, a customer sent a telegram countermanding payment of a cheque. The telegram arrived when the bank was closed and was placed in the letter-box. By an oversight it was not taken out the next morning, and the cheque being presented meanwhile was paid. It was held that countermanding was a question of fact. That the bank not having seen the telegram in time, the cheque was not in fact countermanded within section 75 (1) of the Act (*supra*). Therefore it could not be sued for money had and

(*q*) In *King and Boyd* v *Porter*, [1925] N Ir R, three years had elapsed between drawing and presentation. It may be added that, as between banker and customer, although there is no fixed rule, most banks will not pay a cheque more than six months old without obtaining instructions from the drawer received (r). Moreover, even had it seen the telegram, it would not have been bound to act upon it unless authenticated. If a cheque by way of gift is not paid by the donor's bank before his death, the donee cannot claim the amount from the personal representatives as a *donatio mortis causa*. In *Re Beaumont*, [1902] 1 Ch. 889; 71 L. J. Ch. 478; 86 L. T. 410, B, being ill and in expectation of death, and desiring to give E £300, drew and handed him a cheque for £300. E presented the cheque before B's death. B's account was overdrawn. It was admitted, however, that the bank would have cashed the cheque had it not been for the fact that the signature was not clear and the manager desired some confirmation. Before this could be obtained and the cheque re-presented, B died. Upon E claiming the amount of the cheque from the executors as a *donatio mortis causa*, it was held that E had no claim (s).

**Protection of Banker against Forged and Unauthorised Indorsements.**—A banker upon whom a cheque is drawn is expected to pay it promptly and so to have no opportunity of verifying any signature thereon, other than that of his customer, the drawer (t). Accordingly, the Act provides that

"When a bill payable to order on demand is drawn on

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(r) The bank may have been negligent, but it was not sued for negligence. There appears to be no reported case in which a bank has been held liable for negligence in not acting upon a purported countermand, but two recent instances, where the bank was held not liable, may be mentioned. In *Westminster Bank* v. *Hilton*, (1926) 136 L T 315; 43 T L R 124, it was held that a bank was not negligent because, having received a countermand of a cheque, it cashed a cheque payable to the same person and for the same amount, but bearing a different date and number, without reflecting that the countermand might have been intended to apply to the cashed cheque. And in *Baines* v *National Provincial Bank* (1927), 96 L. J. K B. 801, 137 L. T. 631, the bank was exonerated for cashing a cheque after its usual closing hour, whereas, if it had refused to cash it until the following morning, a countermand would have been received in time. It was held that the closing time of a bank is fixed for the convenience of the bank, and that there is no implied contract with customers that the bank will not cash cheques between hours.

(s) And see *Re Swinburne*, [1926] 1 Ch. 38; 95 L. J. Ch 104; 134 L. T. 121, where the bank held up payment of a cheque for verification, on account of the shaky signature, and the drawer died before payment It was held that the cheque was merely a revocable mandate to the bank, that the mandate had been revoked by the death, and that neither the bank nor the personal representatives of the drawer had authority to pay.

(t) It is submitted that a banker is not presumed to be familiar with the signature of his customer, except when affixed to a cheque *qua* drawer. If, for example, a cheque is made payable to another customer of the bank, and the a banker (*u*), and the banker on whom it is drawn pays the bill in good faith (*x*) and in the ordinary course of business (*y*), it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course (*z*), although such indorsement has been forged or made without authority "

(section 60) (*a*). For example, a cheque payable to A is stolen. The thief forges A's name on the cheque, presents it at the drawer's bank and receives payment. The bank will be discharged, although payment was made only to the possessor and not to the "holder" of the cheque, as, normally, it should be, to accord with section 59 (1), *ante*, p 193.

**Differences between Cheques and Other Bills.**—The following summary has been made of the chief differences between cheques and other bills: "Cheques are not accepted; hence the holder cannot sue the banker on whom they are drawn. The drawer is

indorsement forged, it is believed that the banker could invoke the aid of the section And it is to be observed that the section does not require that the banker shall have acted without negligence as do ss 79, 80 and 82 for the protection of bankers in the case of crossed cheques, dealt with in the ensuing chapter

(*u*) That is to say, when the instrument is a cheque See definition of "cheque", *ante*, p 222. The reason for using the circumlocution in s 60, instead of merely the word "cheque", is that the section defining a cheque does not occur until later in the Act

(*x*) For definition of "good faith", see s 90 (*ante*, p 184), and the expression is discussed apart from the Act, *ante*, pp 29 *et seq*

(*y*) While the Act provides that "good faith" is not incompatible with negligence, it does not provide similarly in regard to "the ordinary course of business". In *Carpenters Co* v. *British Mutual Banking Co*, [1938] 1 K B 511, 107 L J. K B 11, 157 L T 329, 53 T L R 1040, however, the majority of the Court expressed the view that a bank had acted in the ordinary course of business in spite of the fact that it had been guilty of negligence It has been held that a bank acts within its rights if it cashes a cheque within a reasonable business margin of its advertised closing time, as such time was fixed for the convenience of the bank (*Baines* v *National Provincial Bank* (1927), 96 L J K B 801, 137 L T 631)

(*z*) For "payment in due course", see *ante*, pp 193 *et seq*

(*a*) It may be mentioned that a similar provision, but relating to *any* draft or order upon a banker payable to order on demand, is contained in the only unrepealed section of the Stamp Act, 1853, *viz*, s. 19 Moreover, the provision in question does not impose the condition that the transaction must be in the ordinary course of business. It was, however, regarded (not actually decided) by a majority of the Court in *Carpenters Co* v *British Mutual Banking Co.*, *supra*, that the provision was impliedly repealed by s 60 of the Act, so far as concerns bills (including cheques).

not discharged by the holder's failure to present in due time, unless the banker fail (*b*). Notice of dishonour to the drawer is rarely legally necessary, as absence of effects in the drawee's hands, the almost universal cause of dishonour, excuses it, as does countermand of payment (*c*). They must be drawn on a banker, and be payable on demand (*d*), and are generally though not necessarily inland. Lastly, the banker is protected against a forged or unauthorised indorsement of a draft drawn on him payable to order on demand" (*e*) (Byles). One further difference may be added, *viz.*, that the provisions of the Act as to "crossing" are exclusively applicable to cheques as compared with bills or promissory notes, although they are applied to certain other instruments analogous to cheques, *viz.*, bankers' drafts and dividend warrants (see *post*, Chapter XXIV) (*f*). These remain to be dealt with.

There may also be mentioned here the difference between the acceptor of a bill and the drawer of a cheque in respect of unauthorised alteration. The former is under no obligation to see that the bill is in such a state as to preclude possible alterations in it (see *ante*, p. 102), whereas the relation of banker and customer places the drawer of a cheque under obligation to observe reasonable care, *i.e.*, usual precautions, in the drawing of the cheque so as to prevent forgery, say, by alteration in the amount of it. In *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777; 88 L. J. K. B. 55; 119 L. T. 387, the M firm had in their employment a clerk, whom they had no reason to suspect, and to whom they entrusted the filling in of cheques for signature. The clerk produced to one of the partners a cheque on the bank, where the firm had an account, for £2 (for petty cash), in order that the partner might sign it. The amount

(*b*) Based on s. 74, *ante*, p. 227. An *indorser* is, however, excused apart from the failure of the banker by virtue of s. 45 (2), *ante*, p. 147.

(*c*) Based on s. 50 (2) (c), (4) and (5) (*ante*, p. 167). But notice is almost always necessary to an *indorser*, as the excuses for non-notice referred to do not apply to him (see s 50 (2) (d), *ibid.*).

(*d*) Based on s. 73, *ante*, p. 222.

(*e*) Based on s. 60, *ante*, pp 230, 231.

(*f*) They apply also to any document, even though not a cheque, drawn by a customer of a banker for the purpose of obtaining payment from the banker of the sum mentioned therein (Revenue Act, 1883, s. 17). For an instance of such a document, see *Bavins* v. *London and South-Western Bank* (*ante*, p. 58), and note (1) on p. 272 of [1900] 1 Q. B was written in figures but not in words, the space for words being left blank. The partner, who was in a great hurry, signed the cheque, and the clerk filled in the words " One hundred and twenty pounds ", and altered the " £2 " to " £120 ", this being possible by there being a space on each side of the figure 2. The clerk then cashed the cheque at the bank and absconded with the money. The firm brought an action against the bank to recover the difference—£118. It was held that a customer owed a duty to his bank to draw cheques with reasonable care to prevent forgery, and as the forgery in the present case had taken place owing to neglect of this duty, the customer must bear the loss and the action failed (*g*). On the other hand, in *Slingsby* v. *District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T. 377; 48 T. L. R. 144, the Court declined to hold that it was a usual precaution for a customer drawing a cheque to fill in the space before or after the name of the payee so as to prevent the insertion of additional matter. In that case, a person entrusted with a cheque was able to insert the words " per C and P " between the name of the payee and the words " or order " and this enabled him, in the manner described in the case, to obtain payment of the cheque.

(*g*) Incidentally, the Court approved the decision in *Young* v. *Grote* (1827), 4 Bing. 253; 5 L. J. (O.S.) C. P. 165, which had been discredited (see *ante*, p. 182, note (*f*)).

# CHAPTER XXII.

## CHEQUES (II)—CROSSED CHEQUES.

**Object of Crossing.**—The object of crossing a cheque is to hamper or prevent its negotiation by a person who may have obtained it wrongfully, to the hurt of a party thereto. This object is attained by placing certain matter across the face of the cheque transversely to the matter of the cheque itself, and it is this added matter which is called the "crossing". The crossing may be such merely as to force such person to obtain payment of the cheque through the medium of a bank, so that he must either himself have an account at a bank or must negotiate the cheque to some one who has such an account; or it may go further and specify the bank, so that he must either have an account at that particular bank or negotiate the cheque to some one having an account there. In addition, the crossing may be added to by words absolutely destructive of that element in negotiability which confers upon a holder the ability to give a transferee a better title to the instrument than he, the transferor, himself possessed, and which, while leaving unaffected the transferability of the instrument by mere delivery, eliminates its transferability "free from equities"; in other words, which will render impossible the coming into existence of a "holder in due course" subsequent to the adding of the words in question.

**General and Special Crossing.**—When the crossing on a cheque assures payment through a bank without specifying which bank, the cheque is said to be "crossed generally". When the particular bank through which the payment is to be made is specified, the cheque is said to be "crossed specially". The additional words to destroy the property of transferability "free from equities", may be added to either a "general" or a "special" crossing (*a*).

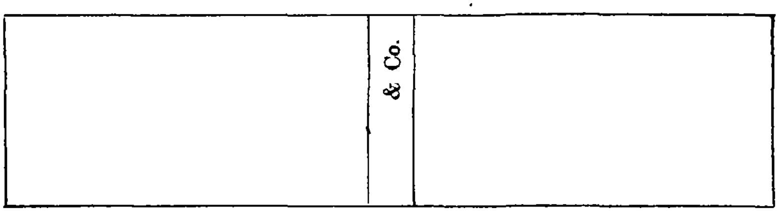
(*a*) Apparently these words are (at any rate for the specific purpose provided for in the Act) inoperative by themselves in the case of a cheque, and can only be added effectively to a crossing (see ss. 76 (*post*, pp 235, 236), 77 (4) (*post*, p. 237), and 81 (*post*, p. 242) ).

**Constitution and Form of "General" Crossing.**—The Act provides that

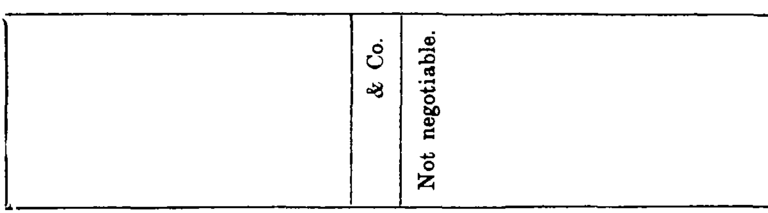
> "Where a cheque bears across its face an addition of —(a) The words 'and company', or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable'; or (b) Two parallel transverse lines simply, either with or without the words 'not negotiable'; that addition constitutes a crossing, and the cheque is crossed generally"

(section 76 (1)). The following indicate the forms of general crossing:—

EXAMPLE 34.

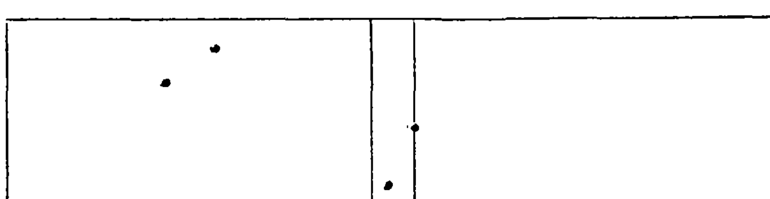



EXAMPLE 35.

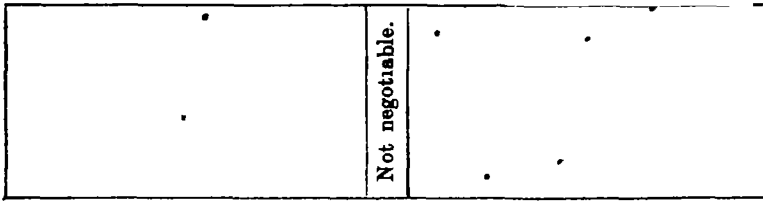



The above are in accordance with (a).

EXAMPLE 36.



EXAMPLE 37.



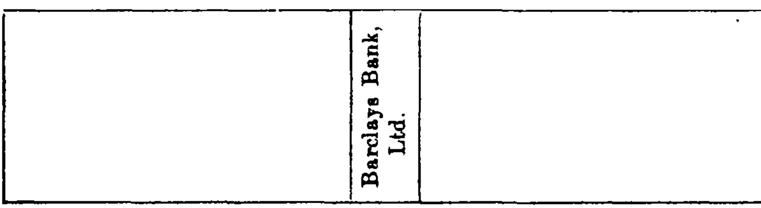

The above are in accordance with (b) (*b*).

**Constitution and Form of "Special" Crossing.**—The Act provides that

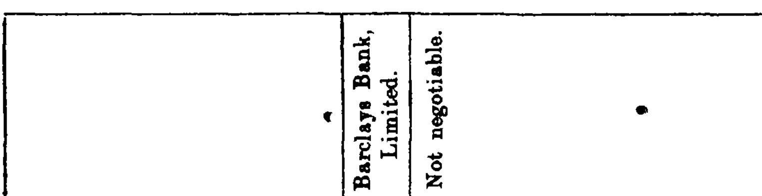
> "Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', that addition constitutes a crossing, and the cheque is crossed specially and to that banker"

(section 76 (2)). The following are forms of special crossing:—

EXAMPLE 38 (*c*).




EXAMPLE 39 (*c*).




**Crossing is Material Part of Cheque.**—The Act provides that

> "A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to

(*b*) Form 37 is, however, rarely used.

(*c*) Apparently the parallel transverse lines are not necessary in the case of a special crossing, since s. 76 (2) does not refer to them. They are, however, usual.

> obliterate, or, except as authorised by this Act, to add to or alter the crossing "

(section 78). The importance of thus making a crossing a material part of the instrument will be found on reference to section 64 (1), *ante*, p. 200 (*d*).

**Who may Cross a Cheque.**—The Act provides for crossing (i) by the drawer; (ii) by the holder; (iii) by banker to collecting banker; (iv) by collecting banker.

(i) *Crossing by Drawer*.—The Act provides that

> " (1) A cheque may be crossed generally or specially by the drawer "

(section 77 (1) ), *i.e.*, it may be crossed before issue

(ii) *Crossing by Holder*.—The Act provides that

> " (2) Where a cheque is uncrossed, the holder may cross it generally or specially. (3) Where a cheque is crossed generally the holder may cross it specially. (4) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable' "

(section 77 (2) (3) and (4) ). In other words, a full crossing may be built up by successive parties; thus the drawer may cross the cheque " & Co.", the payee may add the words " Coutts " and indorse to A, who may add the words " not negotiable "

(iii) *Crossing by Banker to Collecting Banker*.—The Act provides that

> " (5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection "

(section 77 (5) ). It will be observed that (a) the cheque must already be crossed specially; (b) the further crossing must be to another banker; (c) the latter banker must be employed to collect the cheque. For example, a cheque is crossed specially to the payee's bank. The payee pays it into his account. His bank employs another bank to collect the cheque from the

(*d*) The practice of the drawer who has crossed the cheque uncrossing it by striking it out (the crossing) and adding the words " Pay Cash " with his initials, verbally appears to conflict with the above provision but is quite common, and it is not clear how it can affect anybody injuriously. " The Act does not sanction the practice; but it is difficult to see who in such case could have any effective remedy " (Chalmers).

drawer's bank. The payee's bank may further cross the cheque specially to the collecting bank (*e*). This is the only case in which the drawer's bank may pay a cheque crossed to more than one bank, the Act expressly providing that

> "Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof"

(section 79 (1)).

(iv) *Crossing by Collecting Banker.* The Act provides that

> "(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself"

(section 77 (6)); *e.g.*, the payee pays an uncrossed cheque into his account at his bank. The bank sends it to another bank for collection. The latter bank may cross it generally or specially to itself. The object of so doing would be to guard against fraud by the bank's own staff.

**Effect of Crossing.**—It will have been gathered that a bank upon whom a crossed cheque is drawn may act improperly in the payment of such cheque in three ways, *viz.*, (i) It may pay a cheque crossed specially to more than one banker where the relationship between the two bankers to whom it is crossed is not that of principal and agent for collection, in breach of section 79 (1), *supra.* (ii) It may pay a generally crossed cheque to some one other than a banker. (iii) It may pay a cheque crossed specially to some one other than the particular banker to whom it is crossed, or his agent for collection. The consequences of so acting are thus provided for in the Act:

> "Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same (*f*), or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom

(*e*) If the cheque is not crossed or not crossed specially to the payee's bank, the latter may cross it specially directly to the collecting bank, or may first cross it specially to itself, and then further cross it to the collecting bank.

(*f*) Not necessarily in cash. The banker may, for instance, pay the customer by giving his, the banker's, own cheque upon another bank (*Meyer & Co.* v. *Sze Hai Tong Banking Co.*, [1913] A. C. 847; 83 L. J. P. C 103, 109 L. T. 691).

it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid" (section 79 (2)). This provision may be exemplified in this way. A receives a cheque payable to him and crossed generally. He indorses the cheque to B, who indorses it in blank preparatory to paying it into his bank Before he pays it in, the cheque is stolen from him, and the thief presents it at the drawer's bank and obtains payment. The drawer's bank will be liable to pay the amount again to B, because they paid it to some one other than a banker. They will be liable to B because he is the "true owner". Had the thief negotiated the cheque to C, who took it as a holder in due course, and it had been again stolen from C, and such thief had obtained payment from the drawer's bank, the bank would have been liable to C, and not to B, because C would then be the "true owner".

**Crossing must be Apparent.**—Suppose a cheque to be crossed but (i) the crossing was, or has become, so indistinct as not to be apparent, or (ii) the crossing has been obliterated, but no signs of an obliterated crossing appear, or (iii) the crossing has been added to, or altered, otherwise than as authorised by the Act, the drawer's bank may pay such cheque according to the tenor of its apparent state, provided that they acted without negligence and *bona fide*, the Act providing that

> "Where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith (*g*) and without negligence (*h*) shall not be responsible or incur any liability, nor shall the payment be questioned

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(*g*) For meaning of "good faith" see s 90 (*ante*, p. 184), and, generally, *ante*, pp. 29 *et seq*.

(*h*) The Act does not define negligence. It means the absence of proper care in the circumstances. "I think the duty of the defendants to the true owner of the cheque was (1) the exercise of the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own, and (2) to provide a reasonable and competent staff to carry it out"—*per* Sankey, L.J. in *Lloyds Bank* v. *Chartered Bank of India*, [1929] 1 K.B. 40; 97 L. J. K. B. 609; 139 L.T. 126; 44 T. L. R 534.

by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be"

(section 79 (2)) For example, a cheque is crossed specially to the X bank. That portion of the crossing which relates to the X bank has been obliterated, but the obliteration is not apparent, so that the cheque appears as though it were crossed generally. The drawer's bank, acting in good faith and without negligence, will not be liable for paying it to some bank other than the X bank (*i*).

**Protection of Drawer and his Banker for Payment of Crossed Cheque.**—While a banker is under a liability to pay a cheque only in accordance with its crossing or apparent crossing, if in fact he does so, he (and also the drawer) is placed in the same position as though the payment, instead of being made to the bank, had been made direct to the true owner of the cheque, the Act providing that

"Where the banker, on whom a crossed cheque is drawn, in good faith (*g*) and without negligence (*h*) pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof"

(section 80). In other words, when a banker pays a crossed cheque to another banker (or if the cheque is crossed specially, to the particular banker), he need not trouble himself about the title of the person on whose behalf the other banker has presented the cheque, or the authority of the other banker to

(*i*) In *Slingsby* v. *District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T 377; 48 T. L. R. 114, an unsuccessful attempt was made to apply the provisions of s. 79 (2) to parts of a cheque other than the crossing.

present the cheque, so long as he acts *bona fide* and without negligence. *E.g.*, A draws a cheque in favour of B, and sends it to B. It is stolen from B. The thief forges B's indorsement and negotiates it to C. C crosses it and pays it into his own bank. The drawer's bank pays the amount of the cheque to C's bank. Both they and A will be in the same position as if the cheque had been paid to B. But, of course, B can claim against C, who had no title to the cheque, the negotiation to him depending upon a forged indorsement (*j*). An instance of negligence by the paying banker is furnished by *Slingsby* v. *District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T. 377; 48 T. L. R. 114. In that case it appeared that executors, of whom J. C. was one, drew a cheque for £5,000 upon the defendant bank (where the executors kept the estate account) in favour of a firm of stockbrokers for the purpose of investment in War Loan. The cheque was handed to J. C. to send to the stockbrokers. Instead of doing so, J. C. fraudulently manipulated the names of the payees and the indorsement, with the result that there was a discrepancy between the statement of the payees on the front of the cheque and the indorsement on the back. He then paid the cheque into an account at the W bank which collected the amount of the cheque from the defendant bank. The result was that the £5,000 went into the pocket of J. C. instead of that of the stockbrokers and proved irrecoverable from J. C. It was held that the defendant bank was liable to the executors for paying the cheque notwithstanding the discrepancy mentioned, which should have put the bank upon inquiry; and had inquiry been made the cheque would not have been paid.

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(*j*) If the cheque had not been crossed and the drawer's bank had paid it, they would have been protected by s. 60 (*ante*, pp. 230, 231). It may be mentioned here that when a cheque in payment of a debt is lost in the course of post, the loss falls upon the sender unless there is an express or implied request on the part of the creditor that it shall be so transmitted (*Norman* v. *Ricketts* (1886), 3 T. L. R. 182). Such a request, however, is not to be implied from the mere fact that the usual course of business is to send the cheque by post (*Baker* v *Lipton* (1899), 15 T. L. R. 435, *Pennington* v. *Crossley* (1897), 77 L. T. 43). And see *Ose Gesellschaft* v. *Jewish Colonial Trust* (1927), 43 T. L. R. 398, where a customer instructed his bank to send a cheque to someone abroad. The bank sent it by registered post, but it never arrived. The customer sued the bank for alleged negligence in not insuring the cheque The Court held against the customer, on the ground that the customer expected too much, *i.e.*, he expected not merely proper care, but an extraordinary precaution.

**"Not Negotiable."**—The effect of these words upon a cheque is stated in the Act thus:—

"Where a person takes a crossed cheque (*k*) which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had" (section 81). In other words, the cheque is deprived of one of the two attributes of negotiability, *viz.*, transferability free from equities, but is left the other, *viz.*, transferability by delivery, unaffected, or, in short, once the words "not negotiable" are added, there can be a subsequent "holder", but not a "holder in due course". *E.g.*, a cheque payable to bearer, crossed generally and marked "not negotiable", is stolen from A. The thief negotiates to B, who takes in good faith and for value. B banks the cheque, and his banker collects it from the drawer's banker. The latter, as also the drawer, will be protected from further payment by virtue of section 80 (*ante*, p. 240). It will be seen that B's banker will be protected by section 82 (*infra*). But B will be liable to A, as B cannot be a holder in due course of an instrument deprived of its quality of transferability free from equities. If, however, a cheque marked "not negotiable" is negotiated to a holder for value without any defect in his title, he can recover from prior parties, because the cheque remains transferable by delivery (*l*).

**Protection of Banker receiving Payment of Crossed Cheque.**—The Act provides that

"Where a banker in good faith (*m*) and without negli-

(*k*) As the section relates only to *crossed* cheques bearing the words in question, it seems to follow that, while in the case of other bills and promissory notes the words may stand by themselves, in the case of cheques they may be employed only as additional to a crossing, a view expressed in *National Bank* v. *Silke*, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199; 63 L. T 787. But when employed on other than a crossed cheque they bear a different meaning—see *Hibernian Bank* v. *Gysin and Hanson*, *ante*, p. 68.

(*l*) In other words, in those sections of the Act which relate to crossed cheques, the word "negotiable" bears the meaning of transferable free from equities, and "not negotiable" is equivalent simply to "subject to equities"—see note on the use of the term "negotiable", *ante*, p. 46.

(*m*) For meaning of "good faith", see s. 90 (*ante*, p. 184), and, generally, *ante*, pp. 29 *et seq.*

gence (n) receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment "

(section 82).

The effect of this section may be ilustrated as follows: X purchases from the thief a cheque stolen from Y, which cheque was crossed generally, and indorsed specially to Y. The thief had forged Y's indorsement. X pays the cheque into his account at his bank, and the bank collects the amount of the cheque from the drawer's bank and credits X's account with it. X's bank will not be liable to Y for the amount of the cheque, although the money passed through its hands. Moreover, the drawer's bank and the drawer himself will not be liable to Y, because they will be protected by section 80 (*ante*, p. 240). But X himself will be liable to Y, because X had no right to the cheque, his title depending upon a forged indorsement. If, in the foregoing example, the cheque had been indorsed by Y before it was stolen from him (thereby becoming payable to bearer) but the crossing had included the words "not negotiable", the result would have been precisely the same. *i.e.*, the drawer and the drawer's bank would have been protected by section 80, X's bank would have been protected by the section under consideration, while X himself would have been liable to Y because, by virtue of section 81 (*ante*, p. 242), he would have had no better title to the cheque than had the thief himself.

Four points must be borne in mind in connection with the present section:—

(i) The banker must have received the cheque already crossed. He will not get the benefit of the provision if he receives the cheque uncrossed and crosses it himself (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574).

(ii) The banker must have received payment for a *customer*. The primary test is whether the person from whom the bank

(n) For meaning of "negligence", see *ante*, p. 239, note (h).

received the cheque has an account with them. "It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a bank" (*per* Lord Davey, in *Great Western Ry.* v. *London and County Bank*, [1901] A. C. 414; 70 L. J. K. B. 915; 85 L. T. 152). Hence, where a bank collected a cheque for a person who had no account with them, it was held that he was not a "customer" (*Mathews* v. *Williams, Brown & Co.* (1894), 63 L. J. Q. B. 494). In *Kleinwort* v. *Comptoir d'Escompte*, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674, the payee of a cheque indorsed it specially to the plaintiffs. In the course of transit, a stranger obtained possession of the cheque, obliterated the indorsement to the plaintiffs, substituted a special indorsement to himself, presented it at the defendant bank, and requested them to collect it for him, which they did and paid him the money. It was held that the bank were liable to the plaintiffs for the amount of the cheque (*o*). Even where for years a bank had been in the habit of cashing cheques for a person who had no account there, he was held not to be a "customer" (*Great Western Ry.* v. *London and County Bank Co.*, *supra*). On the other hand, the expression "customer" does not connote any length of time. In *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*, [1920] A. C. 683; 89 L. J. P. C. 181; 123 L. T. 34, it was held that a person was a customer although he had only opened his account the day previously; and in *Ladbroke & Co.* v. *Todd* (1914), 111 L. T. 43; 30 T. L. R. 433, it was held that where a person went to a bank with money or a cheque, asked to have an account opened in his name, and the bank accepted the money or cheque, and was prepared to open the account, the person became a customer forthwith. It must be observed, however, that the test prescribed by Lord Davey (*supra*) is by no means exhaustive. "Banks do various kinds of business, and in all these various kinds of business either the individuals or

(*o*) The forger was not a customer of the bank, or, possibly, the bank might have claimed the protection of s. 82. This case was followed in *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; 66 L. J. Q. B. 226, 75 L. T. 514, where the facts were similar.

the companies with whom they do the business may properly be called customers" (*per* Bankes, L.J., in *Importers' Co.* v. *Westminster Bank* (*post*, p. 251), where it was held that if a bank, instead of itself collecting its customers' cheques, employs another bank to do so, the employing bank is a "customer" of the collecting bank, and the latter is entitled to the benefit of section 82.

(iii) The bank must have received payment for the customer, and not merely for themselves. In *Capital and Counties Bank* v. *Gordon* (*ante*, p. 243), it was held that where a bank at once gave credit to a customer for cheques paid in by him, and allowed him, if he so desired, to draw upon them before they were collected, the bank collected the cheques not for the customer, but on their own account. This finding (*p*), however, is not now law, as it has been provided by the Bills of Exchange (Crossed Cheques) Act, 1906, that

> "A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof"

But, of course, if a bank were to purchase from or discount cheques for a customer as ordinary bill brokers and not merely by way of crediting his account so as to enable him to anticipate the collection of the cheques by drawing upon his account against the cheques, the bank would not be able to claim the benefit of section 82 of the Act, or of the amending statute above mentioned, and it would be liable in the ordinary way to the true owner of any such cheque for the amount collected in by

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(*p*) It is desirable to point out that the findings in this case were three:—(1) That a bank is not protected by s. 82 where it receives the cheque uncrossed and itself crosses the cheque. (2) That where a bank allows a customer to draw in advance upon a crossed cheque which the bank afterwards collects, it receives payment of the cheque on its own account, and not for the customer. (3) That as bankers' drafts are not bills, and therefore not cheques (see *post*, Chap. XXIV), a bank is not entitled to the protection afforded by s. 60 of the Act (*ante*, pp. 230, 231) when it pays such drafts upon a forged or unauthorised indorsement, but that it gets a similar protection by virtue of s. 19 of the Stamp Act, 1853, which section has been preserved although the rest of the statute has been repealed. The first of the above findings is still good law (*ante*, p. 243), the second is overruled by the Bills of Exchange (Crossed Cheques) Act, 1906 (*supra*), while the third has become superfluous if the drafts are crossed, by virtue of the Bills of Exchange Act (1882) Amendment Act, 1932, *post*, Chap. XXIV.

it if the customer's title included a forged indorsement, or if the cheque were crossed "not negotiable". The fact, however, that the cheque was credited to an overdrawn account was never regarded as allowing the customer to draw upon the cheque before collection. In *Clarke* v. *London and County Bank*, [1897] 1 Q. B. 552; 66 L. J. Q. B. 354; 76 L. T. 293, a solicitor's clerk received a crossed cheque from a client on behalf of his principal. He forged the indorsement and paid the cheque into his own account (which was overdrawn) at the defendant bank. The bank afterwards collected the cheque. It was held that the bank was entitled to the protection of section 82.

(iv) The banker must have received the payment *in good faith* and *without negligence*. The meanings of "good faith" and "negligence" have already been discussed, but in relation to collecting bankers the following further observations upon the latter words are offered: "Such negligence must be negligence in collecting the cheque, and not in opening the account. The test is whether the transaction of paying in any given cheque, coupled with the circumstances, antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiries" (Byles). For example, a banker who receives for collection a cheque crossed "a/c payee" (see *post*, pp. 250, 251), and collects it for the person who has paid it in, without inquiry as to the identity of such person and the payee, will be held to have acted negligently (see cases cited *ibid.*, and *Souchette* v. *London County and Westminster Bank* (1920), 36 T. L. R. 195). *A fortiori*, where there is something actually suggesting that the customer may have no right to the cheque. In *Hannan's Lake View* v. *Armstrong* (1900), 5 Com. Cas. 188, the secretary of a company paid into his account at his own bank a cheque drawn in favour of the company, but fraudulently indorsed by the secretary. The bank knew where the company banked, but made no inquiries as to the secretary's rights with regard to the cheque. It was held that the bank was guilty of negligence within the meaning of section 82, and therefore liable for the amount of the cheque to the company. See also *Ross* v. *London County and Westminster Bank*, [1919] 1 K. B.

678; 88 L. J. K. B. 927; 120 L. T. 686 (where the banker, without inquiry, collected for a customer cheques payable to, and indorsed by, a public official, thereby suggesting, which turned out to be the fact, that they were intended for a public department); *Underwood* v. *Bank of Liverpool and Martins*, [1924] 1 K. B. 775; 93 L. J. K. B. 690; 131 L. T. 271; 40 T. L. R. 302 (where the managing director of a company paid cheques payable to the company into his private account); *Hampstead Guardians* v. *Barclays Bank* (1923), 39 T. L. R. 229 (where there was obviously a "missing link" in the chain of identification of the customer with the payee); and *Lloyds Bank* v. *Chartered Bank of India*, [1929] 1 K. B. 40; 97 L. J. K. B. 609; 139 L. T. 126; 44 T. L. R. 534 (where an official of the plaintiff bank fraudulently procured the signature of cheques drawn by the plaintiff bank upon the defendant bank (at which the plaintiff bank had an account), and purported to instruct the defendant bank on behalf of the plaintiff bank to place the amount of the cheques to an account in the names of himself and his wife, which the defendant bank did without inquiry). If the customer's antecedents are unsatisfactory, *e.g.*, where his bank has had frequent occasion to dishonour his cheques, and therefore knows that he suffers from chronic "tightness of the chest", his bank is put upon a more searching inquiry into his right to a cheque not payable to him but purporting to be indorsed to him, than would have been the case had his record been clean (*Motor Traders Guarantee Corporation* v. *Midland Bank* (1937), 157 L. T. 498; 54 T. L. R. 10). On the other hand, the mere fact that a cheque is crossed "not negotiable" does not put the collecting banker on inquiry as to the title of the person who paid it in (*Crumplin* v. *London Joint Stock Bank* (1913), 109 L. T. 856; 30 T. L. R. 99). As regards cheques signed per procuration, it is to be observed that section 82 is distinct from section 25 (*ante*, p. 82), and that the latter "relates only to liabilities on the instrument, and does not apply to collecting bankers; but in determining whether the banker is or is not guilty of negligence, the fact that a cheque is drawn or indorsed 'per pro' is always an element to be taken into consideration in connection with the other circumstances of the case" (Chalmers). In other words, "a banker who collects in good faith a cheque signed 'per pro' is not negligent merely because he does not inquire into the drawer's authority, though otherwise, were he not acting as collecting banker, he would, by section 25, ignore such inquiry at his own risk" (Byles)—see *Morison* v. *London County and Westminster Bank*, [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114, and *Crumplin* v. *London Joint Stock Bank*, *supra*. Nevertheless, in *Bissell* v. *Fox* (1884), 51 L. T. 663, the fact of a signature *per pro* was one of the elements in fixing the collecting bank with negligence. In that case, the plaintiffs employed a traveller who was to remit all cash, bills, and cheques to the plaintiffs every week. The traveller opened an account at the defendant bank, and paid into this account, without the sanction or knowledge of the plaintiffs, cheques received by him on account of the plaintiffs, and payable to the plaintiffs or order. For this purpose he indorsed them "per pro" the plaintiffs, without their authority. The bank, without inquiry as to the traveller's authority to indorse, and with knowledge of his position, received the cheques as cash and placed them to the traveller's credit. The bank collected the amount of the cheques from the various banks upon which they were drawn. The traveller drew out the sum thus placed to his credit and absconded. It was held, *inter alia*, in an action by the plaintiffs to recover the proceeds of the cheques from the bank, that the latter was not protected by section 82 because it had not received payment "without negligence" (q).

**When Banker both Pays and Collects.**—If A and B have accounts at the same bank it may happen that the banker is called upon to debit the account of A with the amount of a crossed cheque drawn upon the banker by A, and to credit such sum to the account of B, into which account B has paid the cheque. In such case the banker acts as paying banker for

(q) It would seem, from the long succession of cases in which the question of his negligence has arisen, that the collecting banker has received hard treatment at the hands of the Courts. A valiant attempt to stem the stream was made by the Court of first instance in *Slingsby* v. *Westminster Bank*, [1931] 1 K. B. 173; 100 L. J. K. B. 195; 144 L. T. 369; 47 T. L. R. 1, and *Slingsby* v. *Westminster Bank* (No. 2), [1931] 2 K. B. 583; 101 L. J. K. B. 291 n.; 146 L. T. 89, but the former was disapproved and the latter overruled in *Slingsby* v. *District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T. 377; 48 T. L. R. 114.

A and as collecting banker for B in respect of the same cheque. If B had no right to the cheque and has emptied his account, upon whom does the loss fall, upon A or upon the banker? This was the question to be answered in *Carpenters Co.* v. *British Mutual Banking Co.*, [1938] 1 K. B. 511; 107 L. J. K. B. 11; 157 L. T. 329; 53 T. L. R. 1040, where the plaintiffs and a clerk in their employ banked at the defendant bank. The clerk received cheques payable to tradesmen, forged the indorsements and paid the cheques into his account. The defendant bank debited the plaintiffs' and credited the clerk's account. The clerk drew the money out. The bank was held to have been negligent in assuming the clerk to be entitled to the cheques. It could not, therefore, claim the benefit of section 82 of the Act as the collecting banker but it pleaded section 60 (*ante*, pp. 230, 231) as the paying banker, negligence being in such case immaterial. The Court held (*r*) that the plea failed. Had the clerk banked at another bank, the other bank would clearly have been liable to the plaintiffs, and the defendant bank was not relieved from liability because it happened to be the paying as well as the collecting bank.

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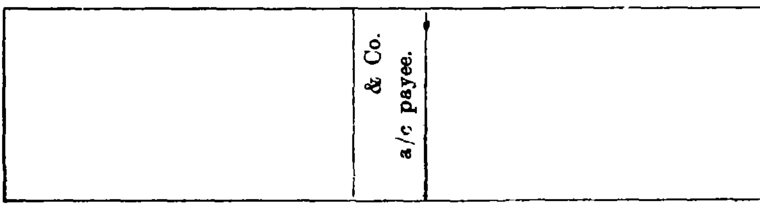
(*r*) *I.e.*, the majority held. The dissenting Judge stated that he would have agreed had he not felt himself bound by certain pronouncements in *Gordon* v. *London, City and Midland Bank*, [1902] 1 K. B. 242; 71 L. J. K. B. 215; 86 L. T. 98, which the majority regarded as merely *obiter dicta* and refused to follow. It should be observed that the position is not altered if the two accounts are at different branches of the same bank (*Lloyds Bank* v. *Savory & Co.*, [1933] A. C. 201; 102 L. J. K. B. 224; 148 L. T. 291; 49 T. L. R. 116).

# CHAPTER XXIII.

## CHEQUES (III)—ACCOUNT PAYEE: CERTIFIED CHEQUES.

**"Account payee."**—A very frequent addition to a crossing, either general or special, are the words "a/c payee", thus:—

EXAMPLE 40.




These words are, strictly, not regarded as part of the crossing (so as, for example, to constitute them an unlawful addition to an authorised crossing within section 78, *ante*, pp. 236, 237), but as a mere direction to the collecting banker to place the proceeds to the credit of the actual payee specified in the cheque (*Akrokerri Mines* v. *Economic Bank*, [1904] 2 K. B. 465, at p. 472). The object of this crossing is to ensure not only that the cheque shall be collected through a bank (or a particular bank), but that it shall be collected on account of none other than the payee. The complete effect of the words in question has yet to be determined (*a*), but the decisions indicate that effect in two directions. In the first place, they do not restrict the negotiability of the cheque (*National Bank* v. *Silke* (*b*)); but, secondly, they put upon the bank the onus of exercising care to see that the customer for whom it collects the cheque, and whose account it credits, is really the payee named in the cheque (*Bevan* v. *National Bank* (1906), 23 T. L. R. 65; *Ladbroke & Co.*

(*a*) "The status of these cheques [*i.e.*, cheques crossed 'a/c payee'] requires further consideration" (Chalmers).

(*b*) *Ante*, p. 69. If the view expressed therein (see *ante*, p. 242, note (*k*)), that a cheque (as distinct from a bill, or promissory note) can only be made non-negotiable by crossing, together with the addition of the words "not negotiable", is correct, it would seem to follow that the common addition of the word "only" after the words "account payee" adds nothing to the effect of the phrase (whatever that may be) when used on a cheque.

v. *Todd* (1914), 111 L. T. 43; 30 T. L. R. 433; *House Property Co.* v. *London County and Westminster Bank* (1915), 84 L. J. K. B. 1846; 31 T. L. R. 479). On the other hand, the words would not appear to afford a complete protection against payment to other than the payee named in the cheque, as, presumably, if the bank reasonably concluded that its customer were such payee, even if wrong it would not be liable for crediting him with the amount of the cheque. In other words, the addition in question will not deprive the banker of the protection afforded him by section 82 (*ante*, pp. 242, 243) as the collector of a crossed cheque. Accordingly, where X received cheques payable to Y and crossed "a/c payee", forged the indorsements and paid the cheques into his own account at bank A, and bank A collected the cheques from the drawer's bank through the agency of bank B, and credited the account of X, knowing that X was not the payee; it was held that there was no liability on the part of bank B, as it had collected for bank A, and not for X (*Importers Co.* v. *Westminster Bank*, [1927] 2 K. B. 297; 96 L. J. K. B. 919; 137 L. T. 693; 43 T. L. R. 639).

**Certified Cheques** (c).—It happens sometimes that it is desired to pay by cheque in a transaction where the payee of a sum is not bound to receive the money in such a form. For example, upon the completion of a purchase of land, the purchaser is bound strictly to pay in cash, but the amount being large, his solicitor does not wish to carry such a large amount about with him to the place of completion. In such cases it was formerly the practice for the vendor's solicitor to accept the purchaser's solicitor's cheque, certified by his bankers. This is an instance of a certified cheque, and it means that the bankers have the necessary amount to the credit of the drawer, and will set it aside for the purpose of meeting the cheque. The certification takes various forms, *e.g.*, initialing the cheque, marking

(c) This subject is obsolete so far as England is concerned, as the banks of this country will not now certify cheques, owing to certain questions which arose in connection with them. Their place, for the purposes for which they were employed, is now taken by bankers' drafts. It will be observed that the cases cited are appeals to the Privy Council from Canada, where certified cheques are still in use.

it "good", or "approved", etc. The effect of a certified cheque was thus stated in the judgment of the Privy Council in *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281: "A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn." In that case the cheque was paid into the payee's bank and drawn upon in the ordinary way, but on presentation for collection to the drawer's bank it was found that it had failed. The payee contended that, by crediting her with the amount, her bank had become purchasers of the cheque at their own risk, and could not upon its dishonour debit her with the amount of it. This contention failed, the Court holding that the position in the case of a certified cheque was precisely the same as it would have been in the case of an uncertified cheque. The rule thus laid down was applied later in *Imperial Bank of Canada* v. *Bank of Hamilton* (*ante*, p. 194), and the effect of the two cases has been summarised thus: "Where a cheque is marked or certified by being initialled by the bank on which it is drawn, the marking operates as a representation that the bank, at the time of certifying, has funds of the drawer in its hands sufficient to meet payment of the cheque but, at any rate in the absence of any specific usage, the marking appears to have no other effect" (Chalmers).

# CHAPTER XXIV.

## BANKERS' DRAFTS : DIVIDEND WARRANTS.

### *Bankers' Drafts.*

EXAMPLE 41.

SOUTHMINSTER BANK, LIMITED.

No. P. 418843. London, November 22, 1942.

£100.

On demand pay John Smith or order the sum of one hundred pounds value received.

To Southminster Bank,
Limited,
23 Bodkin Street, E.C.5.

For and on behalf of
Southminster Bank, Limited.
EDWARD PARLO,
*Chief Cashier.*

A banker's draft may be defined as a bill drawn by a banker upon himself payable on demand. It is a negotiable instrument by usage, recognised by statute, *inter alia*, by section 5 (2) of the Act, which provides that a " bill " in which drawer and drawee are the same person may be treated by the holder either as a bill or a promissory note—see *ante*, p. 62. A banker's draft is used when one has to pay a large sum which one does not desire to carry upon one in cash, and when a cheque would not be acceptable to the recipient of the payment, *e.g.*, when a buyer completes the purchase of some property. The instrument is treated with the same respect as cash, at any rate when it emanates from the Bank of England or one of the " big five ". The usual way of obtaining a draft is for the customer to direct a request for it to his bank (and sometimes, in addition, to hand the bank a cheque upon his account drawn in favour of the bank itself) giving the amount of the draft required and the name of the person in whose favour it is to be drawn. The bank gives the customer the draft and debits the customer's account with the amount.

It will be seen from the above example that the instrument resembles a cheque, although rather the form of Example 32 (*ante*, p. 223) than of Example 34 (*ante*, p. 235). There is a difference, however, *viz.*, that the instrument is not drawn by a customer upon his bank, but by a bank upon itself. Since it is not addressed by a person to *another*, it does not comply with the definition of a bill (see *ante*, p. 54), and as it is not a bill it does not comply with the definition of a cheque (see *ante*, p. 222). As it is not a bill, the banker is not within the protection of section 60 of the Act (*ante*, pp. 230, 231), although he is entitled to the protection of section 19 of the Stamp Act, 1853 (*ante*, p. 231, note (*a*))—*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 547. Although not a bill in fact, the holder may, pursuant to section 5 (2) of the Act (*ante*, p. 62), treat the instrument, at his option, either as a bill or as a promissory note. The ambiguous character of the instrument led to a doubt as to whether the holder could cross it as a cheque. The doubt was set at rest by the Bills of Exchange Act (1882) Amendment Act, 1932, which provides that

> "Sections 76 to 82 of the Bills of Exchange Act, 1882 (which relate to crossed cheques (*a*)), as amended by the Bills of Exchange (Crossed Cheques) Act, 1906 (*b*), shall apply to a banker's draft (*c*) as if the draft were a cheque (*d*)" (section 1), and that
>
> "For the purposes of this section, the expression 'banker's draft' means a draft payable on demand drawn

(*a*) See previous chapter.

(*b*) See *ante*, p. 245.

(*c*) This appears to be the first occasion on which the Legislature in the Bills of Exchange Acts has referred to a banker's draft by name.

(*d*) The provision is unnecessary if the draft happens to be a dividend warrant, as it is then covered by s. 95 of the principal Act—see later under "Dividend Warrants".

by or on behalf of a bank (*e*) upon itself, whether payable at the head office or some other office of the bank (*f*)" (*ibid.*).

It will be seen that, in one way or other, the banker's draft has acquired almost the same properties as a cheque. Nevertheless, it is not a cheque, and this fact must be borne in mind, as circumstances may present themselves when it would be of importance (*g*).

### *Dividend Warrants.*

EXAMPLE 42.

This Warrant will not be paid after Six Months unless verified by the Secretary.

No. ............

SMITH & WILKINS, LIMITED,
Ordinary Shares.
Dividend Warrant.

To Southern Bank, Limited, May 1, 1942.
372 Aldersgate Street, E.C.1.

Pay Robert Brown
the sum of

For and on behalf of Smith & Wilkins, Limited,

£ : :

R. L. VOSS, *Director.*

Exd.

E. W. GARDEN, *Secretary.*

Signature of Payee

Note.—This Warrant must be signed by the Payee before being presented for payment.

(*e*) This is also the first occasion on which "bank" as distinguished from "banker" is used in the Bills of Exchange Acts. In the Act of 1932 the Legislature suddenly "went modern".

(*f*) The words "whether payable, etc." merely embody previous legal decisions—see, for example, *Lloyds Bank* v. *Savory & Co.*, *ante*, p. 249, note (*r*).

(*g*) For example, suppose the holder of a draft crosses it "not negotiable". If he elects to treat it as a bill, *i.e.*, as a cheque, the words will have the meaning given to them by s. 81 of the Act (*ante*, p. 242); but if he elects to treat it as a promissory note, will they not have the meaning given to them by *Hibernian Bank* v. *Gysin and Hanson* (*ante*, p. 68)? since the meaning given to them by s. 81 is confined to crossed cheques. Or by crossing the instrument does he elect to treat it as a cheque?

EXAMPLE 43.

This Warrant will not be paid after Six Months unless verified by the Secretary.

No. ............

SMITH & WILKINS, LIMITED.

6 per cent. Cumulative Preference Shares.

Dividend Warrant.

& Co.

To Southern Bank, Limited, May 1, 1942.
372 Aldersgate Street, E.C.1.

Pay Edward Smith

the sum of

For and on behalf of Smith & Wilkins, Limited,

£ : :

R. L. VOSS, *Director.*

Exd.

E. W. GARDEN, *Secretary.*

Signature of Payee

Note.—This Warrant must be signed by the Payee before being presented for payment.

EXAMPLE 44.

This Warrant will not be paid after Six Months unless verified by the Secretary.

No. ............

SMITH & WILKINS, LIMITED.

4½ per cent. First Mortgage Debenture Stock.

Interest Warrant.

& Co.

To Southern Bank, Limited, May 1, 1942.
372 Aldersgate Street, E.C.1.

Pay Robert Brown and Edward Smith

the sum of

For and on behalf of Smith & Wilkins, Limited,

R. L. VOSS, *Director.*

Exd.

E. W. GARDEN, *Secretary.*

Signature of Payee

Note.—This Warrant must be signed by the Payee before being presented for payment.

## EXAMPLE 45.

No.

SMITH & WILKINS, LIMITED.

Ordinary Shares.

Final Dividend—$5\frac{1}{2}$ per cent.

137 Walbrook, London, E.C.4.

May 1, 1942.

Dear Sir (or Madam),

I am instructed to send you the annexed Warrant in payment of a Final Dividend of $5\frac{1}{2}$ per cent. in respect of the Year ending January 31, 1942, on the Ordinary Shares of this Company registered in your name at April 9, 1942.

| Shares | Gross Amount | | | Less Tax @ 5/- in the £ | | | Amount of Warrant | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |

## EXAMPLE 46. CERTIFICATE OF DEDUCTION OF INCOME TAX.

(*h*) I hereby certify that Income Tax on the profits of the Company, of which profits this Dividend forms a portion, has been or will be duly paid to the proper Officer for the receipt of Taxes.

Yours faithfully,

E. W. GARDEN,

*Secretary.*

(*h*) The Income or Property Tax (Schedule "A" Tax) is deducted from the dividend and a certificate, more or less in the above form, is sent attached to the warrant, certifying that the tax has been deducted. This certificate is accepted by the recipient's own particular taxing authority as equivalent to payment of the tax by the recipient.

EXAMPLE 47.

— Div. DIVIDEND WARRANT.

£ % CONSOLIDATED STOCK.

Per Act Vict. ch. .

(Dividends £ per Cent. to April 5,
and subsequently £ per cent.)

To the Cashiers of the Bank of England.

ONE QUARTER of a Year's Dividend on the Sum of ... | £ ...

£ % CONSOLD STOCK, due

Less Property Tax at —*d.* per £

*Chief Accountant.*

The Act makes two provisions relating to dividend warrants—

> "The provisions of this Act as to crossed cheques (*i*) shall apply to a warrant for payment of dividend"

(section 95), and

> "Nothing in this Act or in any repeal effected thereby shall affect . . . the validity of any usage relating to dividend warrants, or the indorsements thereof"

(section 97 (3) (d)).

Apparently the only known usage to which the second of the foregoing provisions can refer is that which enables a banker to accept the indorsement of any one payee in cases where the warrant is made payable to two or more.

**Are Dividend Warrants negotiable?**—The question of the negotiability of dividend warrants is discussed in several works upon negotiable instruments or on banking (*k*). It seems unnecessary to continue the discussion here. Their negotiability

(*i*) That is, ss. 76—82.
(*k*) *E.g.*, Paget.

appears never to have been questioned in the Courts (*l*), which have invariably tacitly recognised it, and if we could imagine some learned counsel audacious enough to put it in issue, the volume of evidence of usage in its favour would be overwhelming. The real matter for consideration is, which of the many types of instrument which bear, or could be made to bear, the name of "dividend warrant" are the ones referred to in the provisions of the Act given above.

**When is a Dividend Warrant not a Dividend Warrant?**—A dividend warrant is an instrument given in payment of a dividend, and a dividend in its broadest sense is A's share of some amount or quantity divisible among a number of persons, of whom A is one (*m*). In its broadest sense, therefore, it may relate to land or goods, or to money. We may exclude land or goods because, as previously pointed out (*n*), the Courts will not recognise as negotiable an instrument the obligation under which is other than monetary. But a monetary distribution may relate either to capital, or to income, *i.e.*, profits or interest. It is submitted that instruments for the distribution of capital may be excluded from consideration, and that, for example, the cheques sent to creditors by the trustee under a Deed of Composition, in the proportionate share-out of the residue of the debtor's estate, are not dividend warrants, although the sums distributed are called "dividends". The writer knows of no direct authority for this submission but, on the other hand, he has been unable to find any case in which an instrument for capital distribution has been treated as a dividend warrant in the technical sense, and it is believed that the evidence of mercantile usage would be against such treatment. If, however, we confine the expression "dividend warrants" to instruments

(*l*) In *Partridge* v. *Bank of England* (1846), 9 Q. B. 396, it was held that they were not negotiable when payable to a particular person and not to order or to bearer, but doubt was cast upon that limitation in *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 337, at p. 354, and it may be considered now as not good law.

(*m*) In a division sum, the dividing number is called the "divisor", the number to be divided is called the "dividend", and the result of the division is called the "quotient". "Dividend", as used in "dividend warrant", is, therefore, more nearly equivalent to the quotient than to the dividend as the terms are used in arithmetic.

(*n*) *Ante*, p. 16.

for the distribution of income, the question arises whether or not it applies only to profits, since it has been doubted (o) whether "dividend warrants" include what are called "interest warrants". It is submitted that there is no reasonable doubt about the propriety of such inclusion. No doubt, there is a difference between a share of profits won by trading and remuneration for the loan of money, which may be of importance for certain purposes, but not necessarily for the one in hand, where it sounds artificial. Both popularly and officially the income from investments is called "dividends", whether it comes from shares yielding profits or from debentures bearing interest. Warrants for interest on Government loans are described on the instruments themselves as dividend warrants, and the interest is described therein as dividend (p). From now on, therefore, in this chapter, interest warrants are included in the expression "dividend warrants". If what has been said is applied to the case of a public company with a capital structure consisting of Ordinary Shares, shares with a fixed dividend, *e.g.*, Preference Shares (q), and Debenture Stock, the warrants sent to shareholders for dividends on ordinary and preference shares (which are labelled "dividend warrants"), and those sent to debenture stockholders for interest (which are labelled "interest warrants"), are all dividend warrants. Bonus warrants would also be dividend warrants, since bonus is merely a distribution of non-recurring profits or of surplus profits accumulated as reserves. On the other hand, if the company reduced its capital by repaying surplus capital to shareholders, the instruments sent in respect of the repayment would not be dividend warrants. Nor, if the company should go into liquidation, would the cheques sent to creditors as "dividend", if the company proved insolvent, be dividend warrants. Nor, again, if after paying the creditors in full there was a surplus for the shareholders, would the warrants sent in distribution be dividend warrants. All the last three mentioned

(o) By Paget, for example.

(p) See example 47, and see also *Slingsby* v. *Westminster Bank*, [1930] 1 K. B. 173, 100 L. J. K. B. 195; 144 L. T. 369; 47 T. L. R. 1, where any distinction between distribution of profits and distribution of interest was rejected.

(q) If the distinction between interest and trading profits is rejected, there is no need to consider whether the dividend on fixed dividend shares is to be regarded as interest or dividend.

cases would be a distribution of capital, not of profits. Even this does not, in the writer's view, complete the process of narrowing down. Suppose the trustees of a settled fund to send out cheques periodically to, say, half a dozen beneficiaries, between whom the income of the fund is to be divided proportionately—would one properly term these cheques "dividend warrants"? It is thought not. The test is whether the bank upon which the cheques were drawn would consider itself, in accordance with the above-mentioned usage, at liberty to accept the indorsement of one payee only where one of the cheques was made out to two beneficiaries who were jointly entitled. It is not thought that the bank would do so, *i.e.*, it would not recognise the cheque as a dividend warrant. Much the same, it is thought, may be said concerning cheques sent out for dividend on shares or debenture interest in private companies, in the capital of which the public is not interested, and concerning cheques for a distribution of profits in partnerships. In actual practice, dividend warrants in the legal sense appear to resolve themselves into two types—(i) those sent out by public trading companies, trading corporations and public utility corporations in distribution of profits or debenture interest; and (ii) those sent out by British, Dominion, Colonial and foreign governments and municipalities for interest on loan stock. It is submitted that these alone represent the class of instrument recognised by usage as dividend warrants, that is to say, they are the only instruments which fall within sections 95 and 97 (3) (d) of the Act. This, however, is not the whole story.

**The Forms of Dividend Warrants.**—In the Examples given, it will be seen that Nos. 42, 43, 44 and 45 are in the form of cheques, while No. 47 is in the form of a banker's draft. The instruments in cheque form, however, as a rule contain certain words (apart from those which describe the instrument and the investment in respect of which it is given) which are not to be found on ordinary cheques. These words state, *firstly*, that the instrument will not be paid without verification by the secretary of the company unless presented within six months, and *secondly*, that the payee must sign it before presentation. It was contended in *Thairlwall* v. *Great Northern Ry.*, [1910] 2

K. B., 509; 79 L. J. K. B. 924; 103 L. T. 186; 26 T. L. R. 555, that the words in question took the instrument out of the category of a cheque on the ground that they restricted its negotiability. The Court refused to accept the contention and has been criticised therefor (*r*). It is difficult to see why. The earlier words merely warn the payee of the custom of banks not to pay a "stale" cheque without reference to the customer (see *ante*, p. 229, note (*q*)), and the later words are no more than a reminder to the payee that the instrument, not being payable to bearer, requires indorsement. Neither appears to restrict the negotiability of the instrument (*s*). As regards the Treasury Warrant (Example 47), it is, as already pointed out, a banker's draft (*t*). The question arises whether these two forms exhaust the formal capabilities of a dividend warrant. For instance, if a company paid its dividends by promissory notes or by bills drawn upon someone other than a banker, would the instruments be dividend warrants within the meaning of section 95 of the Act? It is submitted not. A glance at the sections of the Act relating to crossed cheques will show that they cannot possibly be applied except to instruments drawn upon a banker, *i.e.*, for present purposes, cheques and bankers' drafts. It is believed, therefore, that dividend warrants within the application of section 95 and section 97 (3) (d) are confined to these two forms. If the writer's conclusions are correct, the following definition may be tentatively suggested: "Dividend warrants within the meaning of section 95 and section 97 (3) (d) of the Bills of Exchange Act, 1882, are cheques or bankers'

(*r*) *E.g.*, by Paget.

(*s*) *They are inserted to prevent delay in cashing the warrants so that the* company shall not have any of them outstanding too long.

(*t*) In some cases the statute under which the warrant is issued provides that it is to be *deemed* a cheque, *e.g.*, the National Debt (Conversion) Act, 1888, by s. 30 (5). In *Slingsby* v. *Westminster Bank* (*ante*, p. 260, note (*p*)), the Judge held that a Treasury warrant was a cheque as the chief accountant of the Bank of England, who signed it, was really acting as the agent of the Government, which was the customer of the bank. To the writer, this seems far-fetched, as, if it were true, would not every banker's draft be a cheque? In the case of a banker's draft, the banker debits the customer's account with the amount of it, and it takes the place of a cheque drawn by the customer. If the argument used by the Judge in the above-mentioned case were adopted, why should not the representative of the banker, who signs the draft on behalf of the banker, be regarded as the agent of the customer, and the draft be regarded as a cheque. But, in fact, a banker's draft is not a cheque, nor, it is submitted, is a Treasury warrant.

drafts given in distribution of profits or interest, from investments of a public nature" (*u*).

In conclusion, it may be pointed out that where a dividend warrant is a cheque, section 95 of the Act of 1882 is superfluous with regard to it; while if it is a banker's draft the Bills of Exchange Act (1882) Amendment Act, 1932, is superfluous with regard to it, as it is already covered for crossing purposes by section 95 of the Act of 1882 (*x*). In other words, sections 76 to 82 of the Act of 1882 apply to it if it is a cheque, while the same sections are applied to it by section 95 if it is a banker's draft. What really remains in relation to dividend warrants, if the writer's conclusions are justified, is section 97 (3) (d) of the Act of 1882. Although its practical application is small and is confined to a single usage, it is always possible that other usages may emerge or spring up.

(*u*) That is of those typified *ante*, on p. 261.

(*x*) The Act of 1932 was, however, not superfluous in respect of bankers' drafts which are not dividend warrants, as it settled a point upon which there was a difference of opinion—see *ante*, p. 254.

## CHAPTER XXV.

### PROMISSORY NOTES.

Where A issues an unaccepted bill of exchange he does not, as a rule, contemplate having to pay it himself. It takes the form of an order to B to become the payer, and the part played by A is to guarantee that B will accept the position of payer and bind himself as such before the time for payment arrives. A promissory note, however, takes the form of a direct promise to pay on the part of the issuer, and not of an indirect promise to pay in the event of someone else not entering into such a promise, or entering into such a promise and afterwards not paying. Hence a bill is defined as an order addressed by one person to another; a note as a promise made by one person to another.

Now, suppose the bill to be "accepted" by the person ordered to pay, the position then is that such person becomes primarily liable on the instrument, and the drawer becomes secondarily liable, or liable as surety for the acceptor. As compared with the case of a note, it will be seen that it is really the position of the acceptor (and not of the drawer) of a bill which is comparable with that of the maker of a note; the acceptor of the bill and the maker of the note being respectively the parties primarily liable. In other words, the contract contained in a full-blown bill contemplates ultimately three interests, *viz.*, those of the drawer, the acceptor, and the payee; that contained in a promissory note two only, *viz.*, those of the maker and the payee. But in the former case the party intended to be primarily liable does not necessarily become a party before the bill is issued, while in the latter case he is a party at the inception of the note.

It is the foregoing which accounts for such differences as there are in the law relating to bills and notes respectively. The whole doctrine of acceptance, which plays such a large part in the rules relating to bills (as distinct from cheques), is inapplicable to notes. A note is not only not intended to be accepted, but (unlike a cheque) its conception and form do not admit of such a thing. There being no acceptance, there is no presentation for acceptance, no dishonour by non-acceptance, no notice of dishonour by non-acceptance, no protest for dishonour by non-acceptance, and no acceptance for honour supra protest. Apart from this, however, the law relating to bills applies to notes subject to certain not very important differences which will appear presently.

**Definition and Form.**—A promissory note is defined by the Act as

> "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer"

ection 83 (1)). The following may be given as the ordinary rm of a promissory note:—

EXAMPLE 48 (*a*).

£100 0*s*. 0*d*. London, 4th April, 1929.

Stamp.

Six months after date I promise to pay Mr. John Brown or order the sum of one hundred pounds for value received.

WILLIAM JONES.

In the above form "William Jones" is the "maker" (*b*), *i.e.*, person making the promise, and "John Brown" is the "payee" or person to whom the promise is made.

It will be observed that (as in the case of bills) certain features not required by the definition are to be found in notes,

(*a*) Other forms may be constructed without difficulty by reference to the Table of Variants of Bills (at the end of Chap. IX, *ante*).

(*b*) Sometimes the maker is called the "drawer", but the practice is misleading, as the maker of a note does not, generally speaking, correspond with the drawer of a bill but with the acceptor (see *ante*, p 264, and s 89 (2), *post*, p. 272). A person who has signed as acceptor an instrument intended for a bill, but incomplete for that purpose, may be liable thereon as the maker of a promissory note (*Fielder* v. *Marshall*, and *Mason* v. *Lack*, *ante*, p. 61) *viz.*, (i) The appearance of the sum in figures as well as in words in the body of the note; (ii) The date of the note; (iii) The place of making; (iv) The expression "value received"; and (v) The stamp (*c*). As to these matters, see *ante*, pp. 55—57, what is there stated being applicable to notes.

Apparently, by a series of statutory provisions, really aimed at bank notes (*d*), promissory notes, payable to bearer on demand, for less than £5 are void unless issued by the Bank of England (see Byles, under section 9 (2), and Chalmers under section 83 (1)) (*e*).

**Analysis of Definition of Note.**—Adopting the method employed in the case of a bill (*ante*, p. 54), the requisites of a promissory note may be stated as follows: (1) It must be a promise, (2) which must be unconditional, (3) and in writing, (4) and made by one person to another, (5) and signed by the person making it, (6) and engaging to pay money, (7) which money must be a sum certain, (8) and payable (a) on demand or (b) at a fixed or determinable future time, (9) and payable (a) to or to the order of a specified person or (b) to bearer.

(1) *A Note must be Promise.*

Hence a mere acknowledgment of a sum owed, but which does not contain an express promise to pay, is not a note (*Gould* v. *Coombs* (1845), 1 C. B. 543); but it may be a note if it contains such a promise (*Brooks* v. *Elkins* (1836), 2 M. & W. 74) (*f*).

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(*c*) For the stamp duties, see *ante*, p. 57, note (*g*). It will be noted, however, that, unlike the case of a bill payable on demand, or at sight, or on presentation, or within three days after sight (including a cheque), the duty on a promissory note is always *ad valorem*. It should be noted, also, that if an instrument falls within the definition of a bill requiring only to be stamped 2d., and also within the definition of a promissory note (definition, that is, according to the Stamp Acts) it must be stamped *ad valorem* as a promissory note (*Œttinger* v. *Cohn*, [1908] 1 K. B. 582; 77 L. J. K. B. 299; 98 L. T. 678).

(*d*) A bank note is a promissory note (see *ante*, p. 20, note (*x*)). The Bank of England now issues notes for 10s. and £1 (see *ante*, p. 15).

(*e*) The Promissory Notes Act, 1863, repealing all statutory provisions prohibiting promissory notes under £5 not payable to bearer on demand, was a temporary statute, renewed annually. By the Expiring Laws Continuance Act, 1922, it has now been made permanent.

(*f*) And see note on I.O.U.'s, *ante*, pp. 45, 46.

### (2) *The Promise must be Unconditional.*

As to the meaning of "unconditional", see *ante*, p. 58, and observe the application of section 3 (3) of the Act. There is an additional provision in the Act as to notes. *viz.*, that

> "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof"

(section 83 (3)). In this way the instrument may include a charge upon property in manner instanced by the ordinary bearer debenture of a company (see Example 6, *ante*, p. 23). In *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531; 72 L. J. K. B. 208; 88 L. T. 52, a promissory note made by two persons jointly and severally contained the words "No time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party". It was held that this was an unconditional promise to pay. An instance to the contrary is contained in *Wirth* v. *Weigel* (1939), 161 L. T. 243, where the defendants wrote to the plaintiff's agent a letter in the following terms: "We confirm herewith that we undertake to pay to you irrevocably the sum of £ —— in respect of the above-mentioned reference". The "above-mentioned reference" consisted of some letters and figures at the head of the notepaper relating to an agreement which affected the liability set out in the letter. It was held that the promise in the letter was not unconditional, and, therefore, the letter was not a promissory note (*g*).

### (3) *The Promise must be in Writing.*

See *ante*, p. 60.

### (4) *The Promise must be made by one Person to Another.*

As to meaning of "person", see *ante*, p. 60.

The Act provides that

> "(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly

(*g*) The letter was unstamped and it was held that it required stamping 6d. as an ordinary agreement.

> and severally according to its tenour. (2) Where a note runs 'I promise to pay' and is signed by two or more persons it is deemed to be their joint and several note"

(section 85). It should be observed in this connection that although the maker of a note corresponds with the acceptor of a bill, if there are several acceptors they must, apparently, be liable jointly. At any rate, there cannot be alternative or successive acceptors, except by the addition of a referee in case of need or of an acceptor for honour (see section 6 (2), *ante*, p. 61).

The maker and payee of a note may be the same person, but the instrument is inchoate until indorsed, the Act providing that

> "An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker"

(section 83 (2)). *E.g.*, a note made and signed by A runs, "I promise to pay A or order", etc. If A indorses it in blank, it becomes a note payable to bearer. If A indorses it specially to B, it becomes a note payable to B or order.

### (5) *A Note must be Signed by the Maker.*

As to the meaning of "signed", see *ante*, p. 63.

### (6) *The Promise must be to Pay Money.*

As to the meaning of "money", see *ante*, p. 63.

### (7) *The Promise must be for a Sum Certain.*

As to the meaning of "sum certain", see *ante*, p. 64.

### (8) *The Sum must be payable* (a) *on Demand or* (b) *at a fixed or determinable Future Time.*

For meaning of "on demand" and "fixed or determinable future time", see *ante*, pp. 65—67.

### (9) *The Note must be Payable* (a) *to or to the Order of a Specified Person or* (b) *to Bearer.*

For meaning of "specified person", "to the order of", and "bearer", see *ante*, pp. 67 *et seq.*

**Necessity for Delivery.**—The Act provides that

> "A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer"

section 84). This is substantially the same rule as in the case of a bill, the Act providing as to the latter that a party's liability on a bill is not complete until delivery of the instrument (see section 21 (1), *ante*, p. 91).

**Special Rules where Note Payable on Demand** (*h*).—The Act provides that

> "(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged. (2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case"

(section 86 (1), (2)) This rule is similar to that applicable in the case of bills (see section 45 (2), *ante*, p. 147).

The Act further provides that

> "Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue"

(section 86 (3)). This rule differs from that in the case of bills, as to which see section 36 (3), *ante*, p. 124.

It may be mentioned that in the case of a note payable on demand the Statute of Limitations will begin to run in favour

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(*h*) As to what is included in this expression, see s. 10, *ante*, pp. 65, 66.

of the maker from the date of the note, and not from the date of demand. Cf. rule as to bills, *ante*, pp. 202, 203.

**Special Rules as to Presentment for Payment.**—The Act provides that

> "(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable. (2) Presentment for payment is necessary in order to render the indorser of a note liable. (3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice"

(section 87). The foregoing may be re-stated as follows:—

(i) *As regards the Maker.*—Presentment for payment is unnecessary except where a place of payment is specified in the body of the note, in which case it must be presented for payment at that place. If a place of payment is not specified in the body of the note, but merely by way of memorandum on the note, it will not make it necessary to present the note for payment at that place or at all. Example of place of payment specified in the body of the note would be " . . . I promise to pay X or order at Lloyds Bank Limited . . ." Example of place of payment indicated merely by way of memorandum would be the adding of the words "Payable at Lloyds Bank Limited" after the maker's signature. In the former case presentment for payment at the bank in question is necessary; in the latter case no presentment at all is necessary.

(ii) *As regards Indorser.*—Presentment for payment is necessary; and if a place of payment is specified in the body of the note, presentment at that place is necessary. If a place of payment is merely indicated by way of memorandum, presentment for payment there is not necessary, but it may be made there, although presentment elsewhere will also suffice.

Of course, both in (i) and (ii) presentment means presentment to the maker. For what amounts to due presentment, see section 45, *ante*, pp. 145 *et seq.*, and for excuses for delay in presentment, or for non-presentment, see section 46, *ante*, pp. 150 *et seq.* It should be observed that, even where presentment is necessary in order to charge the maker of a note, it is not necessary for such presentment to be punctual (section 89 (2), *post*, p. 272, applied to section 52 (2), *ante*, p. 155). It should also be observed that presentment for payment at a particular place will not be rendered unnecessary merely because a place of payment was inserted for some object other than that of securing presentment at that place (*Josolyne* v. *Roberts*, [1908] 2 K. B. 349; 77 L. J. K. B. 845; 99 L. T. 282, where place of payment was inserted in order to give jurisdiction, in any action on the bill, to the Court of the district in which the place was situate).

(iii) "In the body" of the note means that the place of payment must form part of the contract for payment, In *Re British Trade Corporation*, [1932] 2 Ch. 1; 101 L. J. Ch. 273; 147 L. T. 46, a bill was drawn by a bank at one place upon the same bank at another place. In accordance with *Miller* v. *Thomson* (*ante*, p. 62), the holder was able to treat the document as a promissory note, and since the place of payment was not part of the contract for payment, it was held to have been indicated merely by way of memorandum and not in the body of the note, and presentment for payment at such place was held to be unnecessary.

**Liability and Estoppels of Maker.**—The Act provides that

"The maker of a promissory note by making it—

(1) Engages that he will pay it according to its tenour.

(2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse"

(section 88). If the maker of a note be regarded as corresponding to the acceptor and the first indorser (*i.e.*, the payee) of a note as corresponding to the drawer of a bill (see section 89, (2), *infra*), it will be seen that the elaborate estoppels in the case of the acceptor of a bill (section 54 (2), *ante*, p. 102) really work down to the above simple ones in the case of the maker of a note.

**Application of Provisions of Bills to Notes.**—The statutory provisions relating to promissory notes are contained in Part IV of the Act (*i*). The Act provides that,

> "Subject to the provisions in this Part (*k*) and, except as by this section (*l*) provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes"

(section 89 (1)).

Further,

> "In applying those provisions (*m*) the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order"

(section 89 (2)). The two provisions of this sub-section should be considered separately:—

(i) *Maker of note to correspond with acceptor of bill.*—It is important not to confuse the drawer of a bill with the maker of a note. As before stated (*ante*, p. 264), the person primarily intended to pay a bill is not the drawer, but the drawee. If the drawee accepts, he becomes in fact primarily liable, and any other parties (drawer or indorsers) are only liable to the holder in default of payment by the acceptor (see *ante*, pp. 99—100). Now, on a note, it is the maker who is primarily liable, and other parties (*i.e.*, indorsers) can only be secondarily liable. It is, therefore, the maker of a note who corresponds with the

(*i*) Those relating to bills are contained in Parts I, II, and V. Part III relates to cheques.

(*k*) *I.e.*, Part IV.

(*l*) *I.e.*, s. 89, the various sub-sections of which are dealt with in this paragraph.

(*m*) *I.e.*, the provisions relating to bills.

acceptor of a bill, and the Act, as we have seen, expressly provides that he shall be deemed to do so (*n*).

(ii) *First indorser of note to correspond with drawer of accepted bill payable to drawer's order.*—Suppose A to owe B £100. B may draw on A in his own favour, thus "pay to my order" (see Example 15, *ante*, p. 64, A accepting. Or A may give a promissory note to B (see Example 48, *ante*, p. 265. In either case B may indorse to C. It will be seen that from the point of view of C in each case A is the person primarily, and B is the person secondarily, liable. In each case C will first present the bill to A for payment, and in the event of dishonour will have resort to B. In other words, the drawer or payee (B) in the case of the bill will correspond with the first indorser or payee (B) in the case of the note, and this is precisely what the Act provides shall be deemed to be the case (*o*).

Finally,

> "The following provisions as to bills do not apply to notes: namely, provisions relating to (a) Presentment for acceptance; (b) Acceptance; (c) Acceptance supra protest; (d) Bills in a set"

(section 89 (3)); and

(*n*) "The maker is sometimes called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange. In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both. A note indorsed by the payee resembles an accepted bill payable to drawer's order and indorsed by the drawer, the payee corresponding with the drawer. The distinctions that exist between maker and acceptor arise from this. The acceptor is not the creator of a bill, his contract is supplementary, while the maker of a note originates the instrument. Hence (a) a note cannot be made conditionally, while a bill may be accepted conditionally, (b) the provisions of s. 19 (2) [*ante*, p. 89] relating to bills accepted payable at a particular place have no application to notes, (c) maker and payee are immediate parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties" (Chalmers)

(*o*) Where the drawer and *drawee* of a bill are the same person or the drawee is a fictitious person or a person not having capacity to contract, no further party to the bill is introduced (*i.e.*, *there is no real drawee*), and the *instrument becomes* in effect simply a promise by the drawer. The position of the drawer in such case is in substance that of the maker of a promissory note, and the Act expressly provides that the holder may treat the instrument either as a bill or as a promissory note (see s. 5 (2), *ante*, p 62) As to the effect of a note where the maker and payee are the same person, see s. 83 (2), *ante*, p 268.

"Where a foreign (*p*) note is dishonoured, protest thereof is unnecessary"

(section 89 (4)). With reference to the last provision, this only means that the protest is unnecessary for the purpose of suing on the note in the Courts of this country. It may, however, be necessary to protest the note in this country in order to sue on it abroad.

(*p*) "A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note."
(s. 83 (4).) For present meaning of "British Islands", see *ante*, p. 169, note (*s*).

# APPENDIX A.

## NOTES ON THE EMERGENCY LEGISLATION.

(1) Under the **National Loans Act, 1939,** the Treasury may make cash payments upon the exchange of certain securities for securities issued under the Act. By section 2 (4) a warrant given by the Bank of England or Bank of Ireland for making such payment shall be deemed to be a cheque within the meaning of the Bills of Exchange Act, 1882, and shall be exempt from stamp duty.

(2) By section 15 of the **War Risks Insurance Act, 1939,** (authorising the Board of Trade to undertake the insurance of goods against war risks) "goods" is given the same meaning as in section 62 of the Sale of Goods Act, 1893. The last mentioned section defines goods as including all chattels personal other than *choses in action* and money. Compensation, therefore, cannot be claimed for the loss of negotiable instruments, *i.e.*, of course, so long as they are such. A waste paper merchant who had a stack of paid cheques could claim for their loss through enemy action.

(3) By section 1 (2) of the **Trading with the Enemy Act, 1939** (amended by the Defence (Trading with the Enemy) Regulations, 1940 (S. R. & O., 1940, No. 1092)), a person shall be deemed to have traded with the enemy if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy and in particular (*inter alia*) if he has paid or transmitted any money, negotiable instrument, or security for money to or for the benefit of an enemy or to a place in enemy territory. Section 2 (1) defines "enemy" as (a) any State, or Sovereign of a State, at war with His Majesty, (b) any individual resident in enemy territory, (c) any body of persons (whether corporate or unincorporate) carrying on a business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy, (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, (e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business; but does not include any individual by reason only that he is an enemy subject, and sub-section 2 provides that the Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy.

It will be observed that an individual is not an enemy merely because he is an enemy subject, unless the Board of Trade directs that he shall be deemed an enemy. Enemy subjects resident in this country can, therefore, deal and be dealt with as freely as British subjects. On the other hand a British subject resident in enemy territory is an "enemy" within the meaning of the Act. By section 15, "enemy subject" means (a) an individual who, not being a British subject or British protected person, possesses the nationality of a State at war with His Majesty, or (b) a body of persons constituted or incorporated in, or under the laws of, any such State; and "enemy territory" means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty. For example, a neutral country is not enemy territory; the Italian colonies were, but are not now, enemy territory. Poland, Holland, Belgium, Greece, etc., are enemy territory, and so are the Channel Islands. Under the powers conferred by S. R. & O., 1940, No. 1214, any territory may also be placed on the same footing as enemy territory, and a number of orders have been made from time to time under this power.

By section 4 of the Act (as amended by S. R. & O., 1941, No. 51), (1) No assignment of a *chose in action* made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies is in respect of the *chose in action*; and neither a transfer of a negotiable instrument by or on behalf of an enemy, nor any subsequent transfer thereof, shall, except with the sanction of the Treasury, be effective so as to confer any rights or remedies against any party to the instrument. (2) The preceding sub-section shall apply in relation to any transfer of any coupon or other security transferable by delivery, not being a negotiable instrument, as it applies in relation to any assignment of a *chose in action*. (3) If any person by payment or otherwise purports to discharge any liability from which he is relieved by this section, knowing the facts by virtue of which he is so relieved, he shall be deemed to have thereby traded with the enemy. Provided that in any proceedings for an offence of trading with the enemy which are taken by virtue of this sub-section it shall be a defence for the defendant to prove that at the time when he purported to discharge the liability in question he had reasonable grounds for believing that the liability was enforceable against him by order of a competent court, not being either a court having jurisdiction in the United Kingdom or a court having jurisdiction in enemy territory, and would be enforced against him by such an order. (4) Where a claim in respect of a negotiable instrument or *chose in action* is made against any person who has reasonable cause to believe that, if he satisfied the claim, he would be thereby committing an offence of trading with the enemy, that person may pay into the High Court or Court of Session any sum which, but for the provisions of sub-section 1 of this section, would be due in respect of the claim and thereupon that sum shall, subject to rules of Court, be dealt with according to any order of the Court, and the payment shall for all purposes be a good discharge to that person.

(4) The **Defence (General) Regulations, 1939,** reg. 60F, made under the Emergency Powers (Defence) Act, 1939, enables banks, which by reason of enemy action cannot get cheques, etc., stamped, to make special arrangements with the Commissioners of Inland Revenue appropriate to the emergency.

(5) It is scarcely necessary to remind readers that by the **Courts (Emergency Powers) Act, 1939,** actions on negotiable instruments, as in other cases, cannot proceed beyond judgment without the consent of the Court first obtained.

(6) By Regulation 3 of the **Defence (Finance) Regulations, 1939,** (made under the Emergency Powers (Defence) Acts, 1939 and 1940) it is provided that, subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury, take or send out of the United Kingdom any bank notes, postal orders, gold, securities or foreign currency. For the purposes of this Regulation any bill of exchange or promissory note payable otherwise than in sterling is deemed to be foreign currency, excepting, however, bills or notes payable in any currency issued by the Government of, or under the law of, any part of the sterling area, not being bills or notes which are legal tender in any part of that area. By Regulaton 6 it is provided that, subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury, to make in the United Kingdom any capital issue or any public offer of securities for sale, or renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom. "Security" includes, *inter alia*, a bill of exchange other than a bill payable on demand or at a fixed period not exceeding six months after date or after sight, a promissory note of a local authority, or a promissory note payable more than six months after date. This leaves permissible the payment of debts by cheque, or by bill or note payable not more than six months ahead. That is to say, ordinary transactions are not interfered with except those which involve an increase in the capital of a concern.

(7) The **Defence (Whitsun Bank Holiday) Regulations, 1940,** provided that the day of the Whitsun Bank Holiday in that year should not be a bank holiday and made consequential provision with regard to the effect of this provision on bills of exchange. Similar regulations were passed relating to succeeding bank holidays, the latest being the Defence (December Bank Holidays) Regulations, 1941.

(8) Under the **War Damage Act, 1941,** section 95, it is provided that the goods in respect of which compensation can be claimed for destruction or injury are not to include negotiable instruments.

# APPENDIX B.

## BILLS OF EXCHANGE ACT, 1882.

(The figure after the section or sub-section refers to the page where the section or sub-section is set out in the text or notes.)

### PART I.

PRELIMINARY.

**1.** This Act may be cited as the Bills of Exchange Act, 1882.

**2.** In this Act, unless the context otherwise requires,—

"Acceptance" means an acceptance completed by delivery or notification (93).

"Action" includes counter claim and set off (185).

"Banker" includes a body of persons whether incorporated or not who carry on the business of banking (222).

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy (140).

"Bearer" means the person in possession of a bill or note which is payable to bearer (75).

"Bill" means bill of exchange, and "note" means promissory note (49).

"Delivery" means transfer of possession, actual or constructive, from one person to another (91).

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (130).

"Indorsement" means an indorsement completed by delivery (76)

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder (97).

"Person" includes a body of persons whether incorporated or not (60).

"Value" means valuable consideration (115).

"Written" includes printed, and "writing" includes print (60).

### PART II.

BILLS OF EXCHANGE.

*Form and Interpretation.*

**3.**—(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer (54).

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange (54).

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section (59); but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional (59).

(4) A bill is not invalid by reason—

(a) That it is not dated (56);

(b) That it does not specify the value given, or that any value has been given therefor (57);

(c) That it does not specify the place where it is drawn or the place where it is payable (56).

4.—(1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill (169).

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty (169).

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill (171).

5.—(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee (71).

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note (62).

6.—(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty (60).

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange (61).

7.—(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty (69).

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees (71). A bill may also be made payable to the holder of an office for the time being (70).

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer (72).

**8.**—(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable (67, 68).

(2) A negotiable bill may be payable either to order or to bearer (67).

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (72).

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (67).

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option (72).

**9.**—(1) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a) With interest (64).

(b) By stated instalments (64).

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due (64).

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill (64).

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable (55).

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof (64).

**10.**—(1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation (65); or

(b) In which no time for payment is expressed (65).

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand (66).

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

(1) At a fixed period after date or sight (66).

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain (66).

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (67).

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly (97).

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date (97).

13.—(1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be (56).

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday (56).

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

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (145). Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case herein-after provided for, due and payable on the preceding business day (145);

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day (146).

(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment (146).

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery (146).

(4) The term "month" in a bill means calendar month (146).

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in

the option of the holder to resort to the referee in case of need or not as he may think fit (98).

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

(1) Negativing or limiting his own liability to the holder (104):

(2) Waiving as regards himself some or all of the holder's duties (136).

**17.**—(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (86).

(2) An acceptance is invalid unless it complies with the following conditions, namely:

(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient (86).

(b) It must not express that the drawee will perform his promise by any other means than the payment of money (86).

**18.** A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete (87):

(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment (87):

(3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance (87).

**19.**—(1) An acceptance is either (a) general or (b) qualified (88).

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (88).

In particular an acceptance is qualified which is—

(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated (89);

(b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn (89):

(c) local, that is to say, an acceptance to pay only at a particular specified place (89):

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere (89):

(d) qualified as to time (89):

(e) the acceptance of some one or more of the drawees, but not of all (89).

**20.**—(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit (93).

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact (94).

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (94).

**21.**—(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto (91).

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable (93).

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be (92)·

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill (92).

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed (93).

(3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved (93).

*Capacity and Authority of Parties.*

**22.**—(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (77).

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations (78).

(2) Where a bill is drawn or indorsed by an *infant, minor*, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto (77).

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

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name (81).

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm (82).

**24.** Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (80).

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery (80).

**25.** A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (82).

**26.**—(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability (83).

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted (84).

*The Consideration for a Bill.*

**27.**—(1) Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract (115);

(b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time (115).

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time (113).

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (117)

**28.**—(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person (113)

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not (114)

**29.**—(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions (180); namely,

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact (180)

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it (180)

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (184, 185)

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (187)

**30.**—(1) Every party whose signature appears on a bill is primâ facie deemed to have become a party thereto for value (112)

(2) Every holder of a bill is primâ facie deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (185)

*Negotiation of Bills*

**31.**—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill (118)

(2) A bill payable to bearer is negotiated by delivery (118)

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery (118)

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor (125).

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability (128).

**32.** An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient (119).
An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself (119).

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill (119, 120).

(3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others (120).

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature (120).

(5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved (120).

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive (120).

**33.** Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (123).

**34.**—(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer (120).

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable (120, 121).

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement (121).

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person (121).

**35.**—(1) An *indorsement* is *restrictive* which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "*Pay D. for the account of X.,*" or "*Pay D. or order for collection*" (121).

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so (122).

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement (123).

**36.**—(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise (123).

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (123, 124).

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact (124).

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is primâ facie deemed to have been effected before the bill was overdue (124).

(5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course (124, 125).

**37.** Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable (125).

**38.** The rights and powers of the holder of a bill are as follows:

(1) He may sue on the bill in his own name (133):

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill (136):

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill (134), and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill (135).

*General Duties of the Holder.*

**39.**—(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument (138).

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment (138).

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill (138).

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (151).

**40.**—(1) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time (139).

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged (139).

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (139).

**41.**—(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue (139, 140):

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only (140):

(c) Where the drawee is dead presentment may be made to his personal representative (140):

(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee (140):

(e) Where authorised by agreement or usage, a presentment through the post office is sufficient (140):

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill (141):

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected (141, 142):

(c) Where although the presentment has been irregular, acceptance has been refused on some other ground (142).

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (142).

**42.** When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers (142).

**43.**—(1) A bill is dishonoured by non-acceptance—

(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained (143); or

(b) when presentment for acceptance is excused and the bill is not accepted (143).

(2) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (143).

**44.**—(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance (144)

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill (144).

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance (144).

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto (144).

**45.** Subject to the provisions of this Act a bill must be duly presented for payment (145). If it be not so presented the drawer and indorsers shall be discharged (154).

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due (145).

(2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable (147).

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case (147).

(3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf (148) at a reasonable hour on a business day (147), at the proper place as herein-after defined (148), either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found (149).

(4) A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented (148).

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented (148).

(c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known (148).

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence (148).

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required (148, 149).

(6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all (149).

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found (149).

(8) Where authorised by agreement or usage a presentment through the post office is sufficient (150).

46.—(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence (150).

(2) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected (151).

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment (153, 154).

(b) Where the drawee is a fictitious person (151).

(c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (151, 152).

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented (153).

(e) By waiver of presentment, express or implied (153).

47.—(1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid (156).

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder (156).

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged (157); Provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission (158).

(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted (158).

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill (158).

(2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not (159).

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers

who have a right of recourse against the party to whom it is given (159).

(4) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given (159, 160).

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment (160).

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour (160).

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby (160).

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf (161).

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found (161).

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee (161).

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others (162).

(12) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter (162).

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill (162).

(b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter (162).

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill. or he may give notice to his principal. If he give notice to

his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder (164).

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour (164).

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office (160).

**50.**—(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence (165).

(2) Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged (166):

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice (167):

(c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment (167):

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation (167, 168).

**51.**—(1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser (172).

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously

dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary (173).

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment (174).

(4) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (174).

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers (179).

(6) A bill must be protested at the place where it is dishonoured (175): Provided that—

(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day (175):

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary (176).

(7) A protest must contain a copy of the bill, and must be signed by the notary making it (176), and must specify—

(a) The person at whose request the bill is protested (176):

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found (176).

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (178).

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour (178). Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence (178).

52.—(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable (154, 155).

(2) When by the terms of a qualified acceptance presentment for

payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (155).

(3) In order to render the acceptor of a bill liable it is not necessary to protest it (174), or that notice of dishonour should be given to him (157).

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it (150).

*Liabilities of Parties.*

**53.**—(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland (101).

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee (101).

**54.** The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance (102):

(2) Is precluded from denying to a holder in due course:

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill (102);

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement (102);

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement (102, 103).

**55.**—(1) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (103);

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (104).

(2) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (104);

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements (105);

(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto (105).

**56.** Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course (105).

**57.** Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser (106)—

(a) The amount of the bill (107):

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case (107):

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest (107).

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment (108).

(3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper (109).

**58.**—(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery" (110).

(2) A transferor by delivery is not liable on the instrument (110).

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (110).

*Discharge of Bill.*

**59.**—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor (193)

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (193)

(2) Subject to the provisions herein after contained, when a bill is paid by the drawer or an indorser it is not discharged (195), but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer the drawer may enforce payment thereof against the acceptor, but may not re issue the bill (195)

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill (195)

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged (196)

**60.** When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority (230, 231)

**61.** When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged (196)

**62.**—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged (197)

The renunciation must be in writing unless the bill is delivered up to the acceptor (197)

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation (198)

**63.**—(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged (199)

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged (199)

(3) A cancellation made unintentionally, or under a mistake, or

without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority (200).

**64.**—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers (200).

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour (200).

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (201).

*Acceptance and Payment for Honour.*

**65.**—(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security (204), and is not overdue (205), any person, not being a party already liable thereon (205), may, with the consent of the holder (205), intervene and accept the bill suprà protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (206).

(2) A bill may be accepted for honour for part only of the sum for which it is drawn (206).

(3) An acceptance for honour suprà protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour (206):

(b) be signed by the acceptor for honour (206).

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (206).

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour (207).

**66.**—(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts (207).

(2) The acceptor for honour is liable to the holder and to all parties

to the bill subsequent to the party for whose honour he has accepted (207).

67.—(1) Where a dishonoured bill has been accepted for honour suprà protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need (208).

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him (208).

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (208).

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him (209).

68.—(1) Where a bill has been protested for non-payment, any person may intervene and pay it suprà protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (209).

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference (209).

(3) Payment for honour suprà protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it (210).

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays (210).

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party (210, 211).

(6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages (211).

(7) Where the holder of a bill refuses to receive payment suprà protest he shall lose his right of recourse against any party who would have been discharged by such payment (211).

*Lost Instruments.*

**69.** Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again (212).

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so (212).

**70.** In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question (212, 213).

*Bill in a Set.*

**71.**—(1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill (213).

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills (214, 215).

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him (215).

(4) The acceptance may be written on any part, and it must be written on one part only (215).

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill (215).

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof (216).

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged (216).

*Conflict of Laws.*

**72.** Where a bill drawn in one country is negotiated, accepted, or payable in another (217), the rights, duties, and liabilities of the parties (217) thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined

by the law of the place of issue (217), and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance suprà protest, is determined by the law of the place where such contract was made (218).

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue (217):

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom (217).

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance suprà protest of a bill, is determined by the law of the place where such contract is made (218).

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom (219).

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (220).

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (221).

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable (221).

## PART III.

### CHEQUES ON A BANKER.

**73.** A cheque is a bill of exchange drawn on a banker payable on demand (222).

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque (224).

74. Subject to the provisions of this Act—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid (227).

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (227).

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him (227).

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment (229):

(2) Notice of the customer's death (229).

*Crossed Cheques.*

76.—(1) Where a cheque bears across its face an addition of—

(a) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or

(b) Two parallel transverse lines simply, either with or without the words "not negotiable";

that addition constitutes a crossing, and the cheque is crossed generally (235).

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker (236).

77.—(1) A cheque may be crossed generally or specially by the drawer (237).

(2) Where a cheque is uncrossed, the holder may cross it generally or specially (237).

(3) Where a cheque is crossed generally the holder may cross it specially (237).

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable" (237).

(5) Where a cheque is crossed specially, the banker to whom

it is crossed may again cross it specially to another banker for collection (237).

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (238)

**78.** A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing (236, 237).

**79.**—(1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof (238).

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (239).

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be (239, 240).

**80.** Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker. and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof (240).

**81.** Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (242).

**82.** Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment (242, 243).

## PART IV.

### Promissory Notes.

**83.**—(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer (265).

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker (268).

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof (267).

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note (274).

**84.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (269).

**85.**—(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenour (267, 268)

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note (268).

**86.**—(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged (269).

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case (269).

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (269).

**87.**—(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable (270).

(2) Presentment for payment is necessary in order to render the indorser of a note liable (270).

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice (270).

**88.** The maker of a promissory note by making it—

(1) *Engages that he will pay it according to its tenour* (271);

(2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (271).

**89.**—(1) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes (272).

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order (272).

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(a) Presentment for acceptance (273);

(b) Acceptance (273);

(c) Acceptance suprà protest (273);

(d) Bills in a set (273).

(4) Where a foreign note is dishonoured, protest thereof is unnecessary (274).

## PART V.

### SUPPLEMENTARY.

**90.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not (184).

**91.**—(1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority (80).

(2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal (85).

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal (85).

**92.** Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded (163).

"Non-business days" for the purposes of this Act mean—

(a) Sunday, Good Friday, Christmas Day.

(b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it.

(c) A day appointed by Royal Proclamation as a public fast or thanksgiving day.

Any other day is a business day (141).

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting (175).

94. Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill (177).

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient (177).

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend (258).

96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97.—(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques (52).

(3) Nothing in this Act or in any repeal effected thereby shall affect—

(a) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

(b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies:

(c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(d) The validity of any usage relating to dividend warrants, or the indorsements thereof (258).

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect, the law and practice in Scotland in regard to summary diligence.

**99.** Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

**100.** In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution, as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

# SCHEDULES.

## FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained (given *ante*, p. 177).

## SECOND SCHEDULE.

ENACTMENTS REPEALED.

(See p. 52.)

# INDEX

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