



1279
BANKS AND BANKING.

THE BANK ACT, CANADA.

AND

AMENDING ACTS,

WITH

NOTES, AUTHORITIES AND DECISIONS, AND THE LAW
RELATING TO WAREHOUSE RECEIPTS,
BILLS OF LADING, ETC.

*ALSO THE SAVINGS BANK ACT, THE ACT INCORPORATING THE
CANADIAN BANKERS' ASSOCIATION, THE BY-LAWS OF
THE ASSOCIATION, AND THE WINDING UP ACT.*

SECOND EDITION.

BY

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Cheques," Etc., Etc.*

WITH

AN INTRODUCTION ON BANKING IN CANADA.

BY

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PREFACE TO THE SECOND EDITION.

THE amending Act of 1900, making important changes in the Bank Act, and extending existing charters to 1911, renders necessary a new edition of the present work.

Decisions upon the Act rendered since the publication of the first edition, as well as those relating to warehouse receipts, cheques, etc., have been added, and a considerable portion of the work has been re-written.

The Act of 1900 incorporating the Canadian Bankers' Association, and the By-laws of the Association, including those relating to note circulation, to clearing houses, and to the appointment of curators to insolvent banks have been added.

There has also been incorporated in the Winding Up Act the amending Act of 1899. A number of recent decisions are also given.

J. J. M.

Toronto, September, 1901.

PREFACE TO THE FIRST EDITION.

OUR Canadian Statutes on general subjects are largely a reproduction of legislation previously enacted elsewhere, generally in Great Britain. The Bank Act is however an exception to this rule. Our financial conditions are very different from those of the mother country, and our whole banking policy has been widely divergent from that of the United States.

It is more than seventy years since charters were granted to banks in each of the old provinces that are now known as Ontario, Quebec, Nova Scotia and New Brunswick, and which comprised the whole Dominion as it was formed in 1867, and with a single exception these are all in successful operation to-day. The organization of other banks, and the periodical renewal of all bank charters, as well as the discussions incident to the frequent amendment and revision of our general banking laws, have in the course of time evolved a system that appears to be admirably adapted to the circumstances of a young and growing country like Canada.

On this account many of the rules and principles laid down in the general works on banking by writers in Great Britain and the United States are inapplicable here, and they are apt to prove misleading. The same is also true to a certain extent of the decisions of the Courts in these and other countries.

In the selection of cases as authorities and illustrations, the writer has sought to include all those in our Canadian reports which appear to embody or settle a principle, and which have not been overridden by subsequent legislation, or overruled by later decisions.

The leading cases in the higher Courts in England and in the United States, which seem to be in harmony with our law, have also been given. Of the cases cited three hundred and fifty are Canadian, and the references to Canadian Statutes number nearly three hundred.

The Introduction, on "Banking in Canada," by Mr. Walker will be found to be a very interesting and valuable contribution from one who is an acknowledged authority on the subject.

J. J. M.

Toronto, April, 1896.

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CORRIGENDA.

Page 11, line 18, after "Edward" read "Island."
" 14, " 1, for "charters" read "charter."
" 32, " 2, for "gave" read "have."
" 185, " 4, for "chap. 58" read "chap. 51."
" 212, " 27, for "63-64 Vict." read "62-63 Vict."

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ABBREVIATIONS.

A. & E.	Adolphus & Ellis' Reports, King's Bench.
A. C.	Appeal Cases, Law Reports, 1875-1901.
Atk.	Atkyn's Reports, Chancery.
B. & Ad.	Barnewall & Adolphus' Reports, King's Bench.
B. & Ald.	" Alderson's " " "
B. & C.	" Cresswell's " " "
B. & S.	Best & Smith's " " "
B. C. R.	British Columbia Reports.
B. N. A. Act.	British North America Act, 1867.
Beav.	Beavan's Rolls' Reports.
Bing. N. C.	Bingham's New Cases, Common Pleas.
C. & K.	Carrington & Kirwan's Reports, <i>Nisi Prius</i> .
C. B.	Common Bench Reports.
C. B. N. S.	" " " (New Series).
C. C.	Civil Code, Quebec.
C. L. J.	Canada Law Journal, Toronto.
C. L. T.	Canadian Law Times, Occasional Notes.
C. P. D.	Law Reports, 1865-9—Common Pleas Division.
Camp.	Campbell's Reports, <i>Nisi Prius</i> .
Ch. D.	Law Reports, 1875-90, Chancery Division.
Cl. & F.	Clark & Fennelly's Reports, House of Lords.
Con. Ord. N. W. T.	Consolidated Ordinances, North West Territories, 1898.
Cr. M. & R.	Crompton, Meeson and Rose's Reports, Exchequer.
DeG. M. & G.	DeGex, Macnaghten & Gordon's Reports.
Dorion	Dorion's Queen's Bench Reports, Montreal.
E. & B.	Ellis & Blackburn's Reports, King Bench.
E. & I. App.	Law Reports, 1865-75, English and Irish Appeals.
Ex.	Exchequer Reports, Welsby, Hurlstone & Gordon.
Ex. D.	Law Reports, 1875-9, Exchequer Division.
F. & F.	Foster & Finlason's Reports, <i>Nisi Prius</i> .
Grant	Chancery Reports, Upper Canada.
H. & C.	Hurlstone & Coltman's Reports, Exchequer.
H. & N.	" Norman's " "
H. L. C.	House of Lords Cases, Clark.
Jur. N. S.	Jurist, English New Series.
J. & H.	Johnson & Hemmings' Reports, Chancery.
L. C. J.	Lower Canada Jurist.
L. C. R.	Lower Canada Reports.
L. J.	Law Journal, English.
L. N.	Legal News, Montreal.
L. R. C. C.	Law Reports, 1865-75, Crown Cases Reserved.
" " Ch.	" " " Chancery Appeal Cases.
" " Eq.	" " " Equity Cases.
" " Ex.	" " " Exchequer Cases.

L. R. H. L.	Law Reports, 1865-75, House of Lords Cases.
" " P. C.	" " " Privy Council Cases.
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Mass.	Massachusetts "
Minn.	Minnesota "
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INTRODUCTION.

BANKING IN CANADA.*

In common with other social developments, modern banking is mainly the result of heredity and environment, and not of arbitrary legislation or the general admission in any wide degree of settled principles in the practice of banking. The student endeavouring to understand the science of banking, seeking to discover some body of principles underlying the practice of banking throughout the world, is confused by the radical differences between the systems of the various nations and the complicated nature of the conditions surrounding each of these systems. The most cherished dogma of one country is rank heresy in another. The principles suitable to an old country, with a compact population, a highly developed railroad and telegraph organization for the distribution of commodities and information, and wealth enough to be lenders to other nations, are not applicable to a new country with a scattered population, imperfect means of distribution, and little wealth apart from fixed property—a country, indeed, requiring to borrow largely from older and wealthier communities.

Again, if in any country banking has been left to develop itself in accordance alone with the requirements of trade, or nearly so, that country has been fortunate in this respect as compared with others, where the national debt, caused by war or extravagances in public works, has been made the basis of the currency. Sometimes, however, the condition of the present environment in two countries may

*Paper read before the World's Congress of Bankers and Financiers at Chicago, by B. E. Walker, General Manager of The Canadian Bank of Commerce, Toronto.

be in many respects similar, and yet a practice in banking which has worked out desirable results in one of these countries cannot be attempted in the other. The body of banking principles in the other country may be so different, because of hereditary influences, as to make it impossible by any kind of evolution to add the practice which has proved so serviceable elsewhere.

I am aware that there is nothing new in this point of view, but in attempting to treat of the subject of banking in Canada, I cannot avoid comparison with this great country where banking systems are being keenly discussed, and where it is admitted that changes, perhaps of a radical nature, are necessary. In contending for the comparative perfection of the Canadian system I do not wish to be understood as asserting that the points of superiority in our system could be adopted here. For over half a century banking in the United States has been following lines of development opposed in many respects to the Canadian system, and it may well be that no matter how desirable, it is too late to adopt our practices.

My main object, however, is to describe the banking of Canada, and to demonstrate, if I can, its suitability to the requirements of trade in that country and not its suitability elsewhere.

BANK CHARTERS.

It has been occasionally urged by writers in financial journals published in the United States, that banking in Canada is a monopoly, and therefore unsuited to the democratic principles of this country. These writers have overlooked the fact that the Province of Ontario, the centre of thought and progress in the Dominion, is the most democratic community in the British Empire, and that the legislation of Canada, whether in form or not, is in reality as liberal as it can well be. Banking in Canada is not in any sense a monopoly. Whether it can be said to be "free banking," as understood in the United States, depends on what is meant by that term. In the United States a

certain number of individuals having complied with certain requirements—more numerous and complicated, by the way than the Canadian requirements—become thereby an incorporated bank, if we regard the consent of the Comptroller of Currency as a matter of form. In Canada, merely in order to follow the British parliamentary methods, when a certain number of individuals have complied with certain requirements, they are supposed to have applied for a charter, which parliament theoretically might refuse, but which, as a matter of fact, would not be refused unless doubt existed as to the *bona fide* character of the proposed bank. Then, as in the United States, on complying with certain other requirements and obtaining consent of the Treasury Board (performing in this case the same function as the Comptroller of Currency in the United States), the bank is ready for business.

The main difference in the matter of obtaining the privilege from the people to carry on the business of banking is that in Canada the subscribed capital must be \$500,000, paid up to the extent of one-half, or \$250,000, and this fact must be proved by the temporary deposit of the actual money with the Treasury Department. If it is contended that a monopolistic element is introduced by making the minimum paid-up capital \$250,000, I have only to point to the varying minima of capital in the National banking system, based upon the population of the city or town where a bank is established. The minimum with us is placed so high because with the privilege to carry on the business of banking is attached the privilege to open branches and to issue a bank note currency not secured by special pledge with the Government. In the opinion of many Canadians the minimum is too small. So much for the statement that banking is less "free" in Canada than in the United States. I think the very term "free banking," about which so much was written in the *ante bellum* days, is a misnomer; and I hope there are many here who agree with me that a little less of freedom in the ability to create a bank, and a little more knowledge on the part of the people regarding the true function of banking, and its

high place in the world of commerce, would be for the public good. What we want is the most absolute evidence, when a bank is created, that its projectors are embarking in a *bona fide* venture and have put at risk a sum considerable enough to ensure that fact.

In Canada, as in the United States, shareholders in banks are subject to what is known as "double liability." I can remember when the practical value of this power to call on the shareholders in the event of the failure of a bank for a second payment to the extent of the subscribed amount of the shares was doubted by many. Shares were transferred just before failure to men unable to meet such calls and willing to be used in this manner, or shares were found to be held by men of straw who owed a corresponding amount to the bank. Or, again, many of the shareholders were borrowers for amounts far in excess of their holdings in shares, and the failure of the bank precipitated their failure as well, and they were thus unable to pay. Of course there were always some real investors among the shareholders, but the value of the double liability was a very variable and doubtful quantity. These features have not, as we know, all passed away, but we have done as much as we could to guarantee an honest share list and to prevent the shareholder from escaping his liability. Banks are not allowed to lend money on their own or the stock of any other Canadian bank, and as the minimum paid-up capital of \$250,000 must be deposited with the Finance Department before a bank commences business, this should ensure a *bona fide* capital at the start. All transfers of shares must be accepted by the transferee. No transfers within 60 days before failure avoid the double liability of the transferrer unless the transferee is able to pay. A list of the shareholders in all banks is published annually by the Government, and this book is eagerly examined by investors to ascertain changes in the share list of banks which might indicate distrust. As the capital of each bank is large and the number of banks small relatively to the United States, there is, regarding everything connected with the credit of a Canadian bank, an amount of public scrutiny which leads

to circumspection in the conduct of bank authorities. Again, the very fact that the capital is large and that the banks have many branches and a more or less national character, causes the stock to be widely held. In the largest banks the share list numbers from 1,800 to 2,000 names. We still, doubtless, have plenty of bad banking and will always have it. No legislative checks will prevent that, and even a severe public scrutiny will not altogether prevent it; but our banking history since the confederation of the old provinces into the Dominion in 1867, shows that the double liability has been a most substantial asset, and has done much towards enabling liquidated banks to pay in full. In my own Province of Ontario we have the fine record of no instance, save one, since Confederation in 1867, in which all creditors have not been paid in full.

In the case of this one blemish the dividends amounted to 99½ cents to depositors, only the unwarrantably high fees paid to the liquidators causing the dividend to fall below 100 cents. In the short life of this institution almost every sin in the calendar of banking had been committed.

TERM OF THE CHARTER.

Under the United States National banking system the life of a bank is limited to twenty years from the date of the execution of the particular bank's certificate of organization, but at the expiration of the first, or any succeeding period, the bank, if it elects to do so may have its corporate existence renewed for the same number of years. Under the Canadian system the charter of every bank expires at the same time, and the renewal period is only ten years. I do not intend to discuss the length of the period—most of us think it quite too short. It is the effect of all charters expiring at the same time to which I desire to draw your attention. This condition of things doubtless arose merely from the confederation in 1867 of the provinces which had granted the then existing charters, but which thereupon surrendered their authority over banking institutions to the Federal Government. As the charters

granted by the old provinces expired, the banks working under them became institutions subject to the new Federal or Dominion Banking Act, and by its conditions every charter expires at the same time. This ensures a complete discussion of the principles underlying the Act, and of the details connected with the working of it, once in ten years. In the interval we are almost free from attempts by demagogues or ambitious but ill-informed legislators to interfere with the details of our system, but during the session of Parliament preceding the date of the expiry of the charters we have to defend our system from the demagogue, the bank-hater, the honest but inexperienced citizen who writes letters to the press, sometimes the press itself—indeed from all the sources of attack which institutions possessing a franchise granted by the people experience when they come before the public to answer for their stewardship. But while resisting the attacks of ignorance, we are, of course, called upon to answer such just criticism as may arise from the existence of defects in our system developed by the experience of time. Or perhaps, as when the Act was under discussion in 1890, we may see the defects even more clearly than the public, and may ourselves suggest the remedies. Whatever may be said for or against these decennial battles, the product of the discussion is a Banking Act, improved in many respects by the exchange of opinion between the bankers and the public. The banking system having been subjected to unsparing analysis by an unusually enlightened people—perhaps too democratic in tendency and too jealous of every privilege granted, but anxious to build rather than to destroy—is brought at each period of renewal to a higher degree of perfection.

BANKING PRINCIPLES.

What is necessary in a banking system in order that it may answer the requirements of a rapidly growing country and yet be safe and profitable?

1. It should create a currency free from doubt as to value, readily convertible into specie, and answering in

volume to the requirements of trade. In saying this I do not wish to be understood as asserting that banks should necessarily enjoy the right to issue notes. Whether they should or should not issue notes must always, I presume, end in a discussion as to expediency in the particular country or banking system.

2. It should possess the machinery necessary to distribute money over the whole area of the country, so that the smallest possible inequalities in the rate of interest will result.

3. It should supply the legitimate wants of the borrower, not merely under ordinary circumstances, but in times of financial stress, at least without that curtailment which leads to abnormal rates of interest and to failures.

4. It should afford the greatest possible measure of safety to the depositor.

We think in Canada that our system possesses all these qualities, and we are confident that we have a currency perfectly suited to our trade and other requirements. We have not, however, arrived at our present reasonably comfortable condition by any other process than the usual slow development from a past full enough of error and bitter experience.

HISTORICAL SKETCH.

It is perhaps not generally known that we were among the first in modern times to issue fiat paper-money for general circulation. In 1685, in the time of the French regime in Canada, the Intendant could not pay his soldiers. The little struggling colony, after the manner of all new countries, was an absorbent of money, and France was nearly bankrupt and could afford no aid. So the Intendant, left to his wits alone and having a helpless people to deal with, cut playing cards into small pieces, wrote thereon his promises to pay, accompanied by the seal of France, and thus led the way in North America in this seductive method of paying debts. For the next thirty years this was the money of Canada. Although always written, because the people would not have accepted printed promises to pay, the volume

rose to about \$20 per head, when the usual results of fiat money followed. It was compromised, and the Government promised never to repeat the experiment. The poor colony, left with no regular currency, struggled for a time, but in 1729, at the request of the people, card money was issued again. They had now some experience, but did not understand how to draw lessons from it, and the amount issued was so excessive that when the British took Quebec, and assumed the government of Canada, one of the most troublesome features in the settlement with France was the arrangement for the retirement of this currency. It would have been well if this complete exposition, although on such a small scale, of the unsoundness of fiat money, had served for all North America. Mr. Summer says there was a bank in Massachusetts as early as 1686 which may have issued notes, but there is a story in this connection so picturesque that I hope it is true. A couple of Massachusetts fur traders are supposed to have visited Canada a few years after the card money first appeared, and to have reported at home the prosperity resulting from the experiment, and so when the military expedition against Canada was organized in 1690, what more natural than that Massachusetts should have paid the cost in the first of that currency, which in its final stages of collapse has given our language that expressive phrase, "not worth a continental"? We were even smaller, relatively, in population then than we are now, yet apparently you did not hesitate to adopt a very bad feature in our development. If we have anything to-day in our financial conditions worth your attention, I hope it will not the less merit your approval because the development is on such a small scale. Sound or unsound principles are perhaps more easily detected when a system has not become complicated beyond the capacity for analysis of the ordinary individual.

I will now, in as few words as possible, finish the historical sketch which is necessary to the clear understanding of our currency and banking as it exists at present. Shortly after a bank was organized in Philadelphia in 1781 and another in New York in 1784, the merchants of Quebec

and Montreal began to agitate for a bank of issue. In those days a bank without the power to issue notes was of little use; but the people of Canada having very strong opinions on this subject, the attempt was a failure, although in 1792 a private bank of deposit resulted. The merchants tried again with the same result in 1807-8. But during the war of 1812 the Government found it necessary to issue some kind of paper money, and an Army Bill Office was created. These were the first paper notes put in circulation in Canada under British authority, and as they were paid in full, the people must have been at last convinced that all paper money was not bad. In the Province of Nova Scotia, not then joined with us in the Dominion of Canada as it is now, Treasury notes were also issued in 1812. At the same time banking was growing rapidly in Great Britain and the United States, and in 1817 our first joint stock bank was created—that great institution of which we are all so proud, and which I am sure has done its share in making Chicago what it is to-day—the Bank of Montreal.

From 1817 to 1825, two banks were established in Lower Canada (Quebec), and one each in Upper Canada (Ontario), New Brunswick, and Nova Scotia, all now doing business except one.

I will not attempt to follow the course of banking in the old provinces, but it is necessary to indicate the condition of banking and currency at the time of the Confederation of the provinces into the Dominion of Canada in 1867. There were thirty-nine charters, but only twenty-seven banks doing business. The charters expired at various dates from 1870 to 1892, and varied in accordance with the views regarding banking in the different provinces. In Upper and Lower Canada (Old Canada), shareholders were liable for double the amount of their stock, except that there was one bank, *en commandite*, the “principal partners” having unlimited personal liability. In most cases notes could be issued equal to the paid-up capital plus specie and Government securities held. In New Brunswick charters had been granted without the double liability,

but the principle was being insisted on in renewals, while in Nova Scotia in the opinion of some there was no double liability. In Old Canada and Nova Scotia, as a rule, total liabilities were restricted to three times, and in New Brunswick to twice the amount of capital. There was also one bank with a royal charter, head office in England, and shareholders not under double liability. The situation was further complicated by the "Free Banking Act," under which notes could be issued secured by deposit of Government debentures, and by the legal tender issues of the Governments of Old Canada and Nova Scotia. In 1866-67 two of the largest banks in Upper Canada failed, resulting in a very severe financial crisis.

Under these conditions, and after tentative legislation in 1867 and 1870, the first general Bank Act of the Dominion was passed in 1871 (34 Viet. chap. 5). It confirmed the special features in the bank working under a royal charter, and that with "principal partners" personally liable, and it will be understood in any statements hereafter regarding banks as a whole that these institutions are not referred to. As the charters of other banks expired they were renewed under the Dominion Act. The first Act extended all charters for ten years, which practice has been followed thus far. There were various amendments during the first few years, but since then changes have been infrequent, except at the regular revisions in 1880 and 1890. The Act hereafter referred to is that assented to May, 1890, and which came into force July, 1891. (53 Viet. chap. 31.)

NOTE ISSUE.

In the successive Banking Acts of the Dominion Parliament banks have been empowered to issue circulating notes to the extent of the unimpaired paid-up capital. By the first Act the note-holders had no greater security than the depositors and other creditors. At the renewal of charters in 1880, the circulation note was made a prior lien upon all assets; and at the last renewal in 1890 the banks, at their own suggestion, were in addition required to create in two years a guarantee fund of 5 per cent. upon their circulation, to

be kept unimpaired, the annual contribution, however, if the fund is depleted, to be limited to 1 per cent. The fund is to be used whenever the liquidator of a failed bank is unable to redeem note issues in full after a lapse of sixty days. Notes of insolvent banks are to bear 6 per cent. interest from the date of suspension, until the liquidator announces his ability to redeem. Banks are also required to make arrangements for the redemption at par of their notes in the chief commercial cities in each of the provinces of the Dominion. The change in 1880 was caused by the failure of a small bank with a circulation of about \$125,000, paying all creditors, note-holders included, only 57½ per cent. The change in the Act now in force was due to the demand for a currency which would pass over the entire Dominion without discount under any circumstances. The history of banking in Canada since Confederation shows no instance in which a depletion of such a guarantee fund would have occurred. Fines from \$1,000 to \$100,000 may be imposed for the over-issue of notes. The pledging of notes as security for a debt, or the fraudulent issue of notes in any shape, renders all parties participating liable to fine and imprisonment. As the crown prerogative to payment in priority to other creditors had been set up on behalf of both Dominion and Provincial Governments, the Act places the claims of the Dominion second to the note issues, and those of the provinces third. Notes of a lesser denomination than \$5 may not be issued, and all notes must be multiples of \$5. Notes smaller than \$5 are issued by the Dominion Government.

The distinctive features, therefore, of our bank note issues are:—

(a) They are not secured by the pledge or special deposit with the Government of bonds or other securities, but are simply credit instruments based upon the general assets of the bank issuing them.

(b) But in order that they may be not less secure than notes issued against bonds deposited with the Government, they are made a first charge upon the assets.

(c) To avoid discount for geographical reasons each bank is obliged to arrange for the redemption of its notes in the commercial centres throughout the Dominion.

(d) And, finally, to avoid discount at the moment of the suspension of a bank, either because of delay in payment of note issues by the liquidator or of doubt as to ultimate payment, each bank is obliged to keep in the hands of the Government a deposit equal to five per cent. on its average circulation, the average being taken from the maximum circulation of each bank in each month of the year. This is called the Bank Circulation Redemption Fund, and should any liquidator fail to redeem the notes of a failed bank, recourse may be had to the entire fund if necessary. As a matter of fact, liquidators almost invariably are able to redeem the note issues as they are presented, but in order that all solvent banks may accept without loss the notes of an insolvent bank, these notes bear six per cent. interest from the date of suspension to the date of the liquidator's announcement that he is ready to redeem.

I have already stated, in attempting to outline what is necessary in a banking system in order that it may answer the requirements of a rapidly growing country, that "it should create a currency free from doubt as to value, readily convertible into specie and answering in volume to the requirements of trade." In an admirable paper on "The Note Circulation" read in December, 1889, before the Institute of Bankers, in London, England, by Mr. Inglis Palgrave, only two requisites in a note circulation are directly stated as essential: "First, that it should be completely secured. Second, that it should be readily convertible into metallic money." But the discussion which follows bears directly upon a third requisite, that it should answer in volume to the fluctuating requirements of trade, in a word that it should be elastic. This last is a much less important point, however, in England than in North America.

In discussing bank issues I will reverse the order in which the three requirements are placed in Mr. Palgrave's paper and the ensuing discussion, and take up the question

of elasticity first. I shall not attempt to discuss the many and conflicting views held regarding paper money, its use and abuse, and whether there is any scientific basis for its issue; but I shall endeavor to show to what extent it seems possible for note issues in North America to have a scientific basis with regard to elasticity. In Canada, as in the United States, the resulting difference in business transactions, after cheques and all other modern instruments of credit have been used, is almost entirely paid in paper money. It is therefore of the greatest importance that the amount of this paper money existing at any one time, shall be as nearly as possible just sufficient for the purpose. That is, that there shall be a power to issue such money when it is required, and also a power which forces it back for redemption when it is not required.

I may, therefore, I think, safely lay it down as a principle that: (1) There should be as complete a relation as possible between the currency requirements of trade and whatever are the causes which bring about the issue of paper money; (2) and, as it is quite as necessary that no over-issue should be possible, as that the supply of currency should be adequate, there should be a similar relation between the requirements of trade and the causes which force notes back for redemption.

Now, certainly, one of the causes of the issue of bank notes is the profit to be derived therefrom, and it is clear that an amount sufficient for the needs of trade will not be issued unless it is profitable to issue. Likewise it is clear that it should not be possible to keep notes out for the sake of the profit if they are not needed.

In Canada, bank notes, as we have seen, are secured by a first lien upon the entire assets of the bank, including the double liability, the security being general and not special—not by the deposit of Government bonds, for instance. Therefore it is clear that it will always pay Canadian banks to issue currency when trade demands it. Because bank notes in Canada are issued against the general estate of the bank, they are subject to daily actual redemption; and no bank dares to issue notes without reference

to its power to redeem, any more than a solvent merchant dares to give promissory notes without reference to his ability to pay. The presentation for actual redemption of every note not required for purposes of trade, is assured by the fact that every bank seeks by the activity of its own business to keep out its own notes, and therefore sends back daily for redemption the notes of all other banks. This great feature in our system as compared with the National Banking System, is generally overlooked, but it is because of this daily actual redemption that we have never had any serious inflation of our currency, if indeed there has ever been any inflation at all. Trade, of course, becomes inflated, and the currency will follow trade, but that is a very different thing from the existence in a country of a great volume of paper money not required by trade. I will not discuss at length this quality of elasticity in our system, because it is generally admitted. But some critic may endeavor to show that a similar quality might be given to a currency secured by Government bonds, and I desire to make it clear that such elasticity as is required in North America is impossible with a currency secured by Government bonds. In the older countries of the world it may be sufficient if the volume of currency rises and falls with the general course of trade over a series of years, and without reference to the fluctuations within the twelve months of the year. In North America it is not enough that the volume of currency should rise and fall from year to year. In Canada we find that between the low average of the circulation during about eight months of each year and the maximum attained at the busiest period of the autumn and winter, there is a difference of twenty per cent., the movement upward in the autumn and downward in the spring being so sudden that without the power in the banks to issue, in the autumn serious stringency must result, and without the force which brings about redemption in the spring there must be plethora. As a matter of fact it works automatically, and there is always enough and never too much.

If our currency were secured by Government bonds the volume in existence at any one time would be determined by the profit to be gained by the issue of such bond-secured currency. It would, therefore, be necessary to fix a maximum beyond which no currency could be issued, but as such an arbitrary limit would be mere legislative guess work, it would be productive of the evils incident to all efforts to curb natural laws by legislation. As we all know, when the National Bank charters were offered by the Federal Government to the State Banks, the bonds of the United States bore 5 to 6 per cent. interest, and the business of issuing currency against such bonds was so profitable that a maximum such as I have referred to was fixed, with an elaborate provision stating how the banking charters were to be distributed as to area, in order that each State or section of country might have a fair share. This was followed by several adjustments, the last limit being \$354,000,000, no one being satisfied with the interference with free banking, and the cry of monopoly being frequently heard. Subsequently the maximum was abandoned; indeed the business of issuing notes against Government bonds had become unprofitable, and there was no longer any fear of inflation.

The condition in the United States under which the issue of currency was unduly profitable, and the fear of inflation was present, did not actually last many years, but it lasted long enough to create in the people a hatred of banks which does not seem yet to have quite passed away. The condition which followed showed, it seems to me, conclusively the unsoundness of the system in the matter of providing an elastic currency, a currency at all times adequate in volume. The currency wants of the country increased with the great increase in population, but the volume of National Bank currency decreased because by the repayment of the national debt and the improvement in the national credit the bonds which remained outstanding yielded so low a rate of interest as to make the issue of National Bank notes unprofitable. The Comptroller's statement shows that the volume of circulation secured by United States bonds, which ranged

from 1866 to about 1880 at from about \$300,000,000 to \$350,000,000, has declined until the amount subject to redemption by the banks is now only about \$130,000,000. The moral of this is plain. If the Government bond yields such a low rate of interest as to make it unprofitable to issue currency, banks will not provide sufficient currency for the wants of the country. I need not remind an American audience that it was this unfortunate contraction which to a great degree made it possible for the Bland Act silver issues, from 1878 to 1890, to create so little financial disturbance.

I hope I have made it clear that if the business of issuing currency against Government bonds were profitable, too much currency would be the result; and if it were unprofitable, too little would be issued. We would require to have a condition of things under which the profit of issuing notes would at all times bear an exact relation to the amount of currency required by the country, the profit therefore changing not only as the currency rises and falls over a series of years, but at the time of the sharp fluctuations within each year, already referred to. No such relation, however, could very well exist with an issue based upon Government bonds.

The next quality in a currency to be considered is, "That it should be readily convertible into metallic money." I do not propose to discuss this at length. As I have pointed out, our safety lies in the actual daily redemption which arises out of our circulation being generally instead of specially secured. This is the best possible safeguard against suspension of specie payments. The United States National Banking System was created during a suspension of specie payments, and doubtless would never have been heard of but for that fact.

My last point is that placed first by Mr. Palgrave in his discussion with the English bankers: "That the currency should be completely secured." I do not know whether we are to understand also that a note must pass throughout the entire country without discount for any reason, but I

include that in the point to be discussed. Now, I contend that it is better for the reasons given, that bank issues should be based for security on the general assets of the bank, with a prior lien to other creditors; and also, that taking the world as a whole, such notes will be actually safer because the effect of a system of notes secured by Government bonds—a loan forced by the Government, practically—must sometimes be to produce national bankruptcy, as in the case of the Argentine Republic. Still, I cheerfully admit that the United States National Banking System has taught us that a currency issued by banks may be made to pass over the entire area of a great nation without discount. This is a great quality in currency. To the ordinary individual, who knows and cares little about banking except as it affects the bank note he happens to carry in his pocket, it appears to be the one quality necessary.

In Canada, experience has shown that as long as the notes are a prior lien on the assets of the bank, including the double liability, ultimate loss is scarcely possible,—has not at all events occurred as yet. To secure a circulation—at the close of December, 1892, of \$36,194,023—the banks had assets of \$305,730,910, to which the double liability of \$63,169,643 is to be added, making a total of \$368,900,553 or \$10.19 of assets against every dollar of currency. It has been pointed out, however, that the assets are not thus aggregated against the circulation, and that all banks are not as secure as these figures seem to show. But the security in this respect, in regard to each bank, varies little from the general average, the lowest percentage being 6.18 as against the general average of 10.19. The lowest percentage applies to but two or three small banks, none others falling below about \$8 for every dollar of circulation. To this we have added the five per cent. guarantee fund applicable in its entirety to meet the notes of any individual bank.

THE BORROWER AND THE BRANCH SYSTEM.

In discussing the banking systems in older countries, the borrower is not often considered. Men must borrow

where and how they can, and pay as much or as little for the money as circumstances require. I believe too strongly in the necessity for an absolute performance of engagements, to think that it is a requirement in any banking system that it shall make the path of the debtor easy. Every banker should discourage debt, and keep before the borrower the fact that he who borrows must pay or go to the wall. But in America the debtor class is apt to make itself heard, and I wish to show what our branch system does for the worthy borrower as compared with the United States National Banking System.

In a country where the money accumulated each year by the people's savings does not exceed the money required for new business ventures, it is plain that the system of banking which most completely gathers up these savings and places them at the disposal of the borrowers, is the best. It is to be remembered that this involves the savings of one slow-going community being applied to another community where the enterprise is out of proportion to the money at command in that locality. Now, in Canada, with its banks with forty and fifty branches, we see the deposits of the saving communities applied directly to the country's new enterprises in a manner nearly perfect. The Bank of Montreal borrows money from depositors at Halifax and many points in the Maritime Provinces, where the savings largely exceed the new enterprises, and it lends money in Vancouver or in the North-west, where the new enterprises far exceed the people's savings. My own bank in the same manner gathers deposits in the quiet, unenterprising parts of Ontario, and lends the money in the enterprising localities, the whole result being that forty or fifty business centres, in no case having an exact equilibrium of deposits and loans, are able to balance the excess or deficiency of capital, economizing every dollar, the depositor obtaining a fair rate of interest, and the borrower obtaining money at a lower rate than borrowers in any of the colonies of Great Britain, and a lower rate than in the United States, except in the very great cities in the east. So perfectly

is this distribution of capital made, that as between the highest-class borrower in Montreal or Toronto, and the ordinary merchant in the North-west, the difference in interest paid is not more than one to two per cent.

In the United States, as we know, banks have no branches. There are banks in New York and the east seeking investment for their money, and refusing to allow any interest because there are not sufficient borrowers to take up their deposits; and there are banks in the west and south which cannot begin to supply their borrowing customers, because they have only the money of the immediate locality at their command, and have no direct access to the money in the east, which is so eagerly seeking investment. To avoid a difficulty which would otherwise be unbearable, the western and southern banks sometimes re-discount their customers' notes with banks in the east, while many of their customers, not being able to rely on them for assistance, are forced to float paper through eastern note-brokers. But, of course, the western and southern banks wanting money, and the eastern banks having it, cannot come together by chance, and there is no machinery for bringing them together. So it follows that a Boston bank may be anxiously looking for investments at four or five per cent., while in some rich western state ten and even twelve per cent. is being paid. These are extreme cases, but I have quoted an extreme case in Canada, where the capital marches automatically across the continent to find the borrower, and the extra interest obtained scarcely pays the loss of time it would take to send it so far, were the machinery not so perfect.

As I have indicated, it should be the object of every country to economize credit, to economize the money of the country so that every borrower with adequate security can be reached by some one able to lend, and the machinery for doing this has always been recognized in our banks. That is surely not a perfect system of banking under which the surplus money in every unenterprising community has a tendency to stay there, while the surplus money required

by an enterprising community has to be sought at a distance. But if by paying a higher rate of interest, and seeking diligently, it could always be found, the position would not be so bad. The fact is that when it is most wanted, distrust is at its height, and the cautious eastern banker buttons up his pocket. When there is no inducement to avert trouble to a community by supplying its wants in time of financial distress, there is no inclination to do so. The individual banks, east or west, are not apt to have a very large sense of responsibility for the welfare of the country as a whole, or for any considerable portion of it. But the banks in Canada, with thirty, forty or fifty branches, with interests which it is no exaggeration to describe as national, cannot be idle or indifferent in time of trouble, cannot turn a deaf ear to the legitimate wants of the farmer in the prairie provinces, any more than to the wealthy merchant or manufacturer in the east. Their business is to gather up the wealth of a nation, not a town or city, and to supply the borrowing wants of a nation.

There was a time in Canada, about twenty years ago, when some people thought that in every town, a bank, no matter how small, provided it had no branches, and had its owners resident in the neighborhood, was a greater help to the town than the branch of a large and powerful bank. In those days, perhaps, the great banks were too autoeratic, had not been taught by competition to respect fully the wants of each community. If this feeling ever existed to any extent, it has passed away. We are, in fact, in danger of the results of over-competition. I do not know any country in the world so well supplied with banking facilities as Canada. The branch system not only enables every town of 1,000 or 1,200 people to have a joint stock bank, but to have a bank with a power behind it generally twenty to fifty times greater than such a bank as is found in towns of similar size in the United States would have.

But one of the main features of the branch system is connected intimately with our power to issue notes based upon the general assets of the bank. When the statement

of a large Canadian bank is examined by an American banker, the comparatively small amount of actual cash must be noticeable. He will notice that the bank is careful to have large assets in the United States which may be taken back to Canada in times of financial strain there, and large assets in convertible shape at home, but having regard to actual cash as the machinery for carrying on the business at the counter, how can a bank for forty or fifty branches get along with so little cash? The simple answer is that the tills of our branches are filled with notes which are not money until they are issued, and which, therefore, save just that much idle capital and just that much loss of interest.

THE DEPOSITORS.

The legal position of the depositor is about the same in both countries. The note-holder's claim is preferred to his. We must not, however, expect that any Government will relieve a depositor from the necessity of using discretion as to where he places his money. Governments never have done and never can do that. Men must look around, and after measuring the security offered, judge where they should entrust their money. It is perhaps easier for a man, with limited intelligence to make a selection if the banks have large capital and are of semi-national importance, provided, of course, the basis of the system is not unsound, as in Italy and Australia. In Canada, we do not borrow from abroad, although we would not object to do so if money could be obtained at low enough rates of interest; our banks have large capital and small deposits relatively, and we do not lend on real estate. The Government statement at 31st December, 1892, shows that before depositors having claims amounting to \$180,000.00 can suffer, shareholders must lose in paid-up stock and double liability as much as \$126,000,000, and \$25,000,000 of surplus funds, in all \$151,000,000. There is probably no country in the world where greater security is offered to depositors.

When our charters were under discussion two or three years ago, I had occasion to defend our system, and I have

copied freely from a pamphlet written by me at that time. I must not, therefore, omit to repeat a statement made then, which might excite criticism more readily, now that the banking system of Australia has collapsed. In making a comparison between individual banks with small capital, and banks with branches and large capital, I urged that:—

“The probability of loss to the depositors in one bank with several millions of capital, is less than the probability of loss to some of the depositors in ten or twenty small banks, having in the aggregate the same capital and deposits as the large bank.”

The retort will be quickly made:—“But if the large bank fails, the ruin will be just so much the more widespread.”

This is quite true, but while it appears to be an answer to the point it is not. If the conditions of two countries are about the same and the ability of the bankers and the principles of the banking system, are in other respects equally excellent, it must still remain true that the probability of loss to the depositors in one or more of the ten or twenty small banks is greater than the probability of loss to any of the depositors in the one large bank.

There are some features in our deposit business which may be interesting to American bankers. There are perhaps not half a dozen savings banks, as the term is understood in North America, in the whole of Canada, and those only in the largest cities, and there is really little need for the existence of any. The Government carries on the Post Office Savings Bank system, copied in some respects from Great Britain. It is unnecessary and unsuited to our country, but it perhaps affords the very ignorant a refuge from the dread of bank failures. The safeguards always necessary when a government undertakes to carry on a regular business are so many and so tedious that the leading banks do not find it necessary to allow as high a rate of interest as the Government.

In addition to the Government we have as competitors for deposits the companies authorized to lend on real estate.

Most of those companies, however, now borrow only on debentures, at fixed periods. Some of this money is borrowed in Great Britain, but much of it is obtained at home. I may say here that while, as with you, banks have fortunately no power to lend on real estate, the restriction is perhaps no longer necessary, as land banking and mercantile banking are clearly separated in the minds of every intelligent man of business in Canada. And as the banks do not buy paper made for the purpose of obtaining money, as you do in the United States, but loan only to their own customers, supplying their entire wants, and seeing that the money is to make or move some product about to be sold, we do not so often discover that we have unwittingly been booming a corner lot, building a mill, or helping to float a company.

Returning from this digression to the subject of deposits, I have to deal with the objection, present I am sure in the minds of many of my hearers, that we pay interest on deposits. I am aware that many eminent bankers in the United States have expressed the opinion very decidedly that it is inconsistent with sound banking to pay interest on deposits. On the other hand, bankers in Great Britain and in Canada would say that any system of banking which will not afford interest on certain classes of deposits is unsound. I must hold with this latter opinion. It is entirely a question of the character of the deposit. Well managed Canadian banks do not give interest on active current accounts. But all Canadian banks issue interest-bearing receipts, and, as you will have gathered, all, or almost all have Savings Departments. These deposits, great or small, are in the nature of investments by the depositor, and are not like the temporary balances of a merchant. They are entitled to interest. It is of vital importance to every nation that its people should have the saving habit. It is also of vital importance that all the money disbursed for labor, or to the farmer or otherwise, should find its way back as early as possible into the channels of commerce. Will it find its way back unless interest is offered for it? It will be said that the ordinary savings

bank is the proper organization to take care of such deposits. So far as the very large cities are concerned this may be quite true. The mercantile banks of Chicago would not like to have been the creditors of the excited savings bank depositors who clamored for their deposits a few weeks ago. But is the ordinary savings bank an effective instrument for collecting the miscellaneous savings of the smaller communities? I think not. Be this as it may, we by our branch system, with the savings department added, provide in small towns where the ordinary savings bank is impossible, a secure place of deposit, and the quite large deposits of our leading banks are certainly the accumulation of tens of thousands of such depositors.

Banks are required once a year to make a return to the Government, which is published as a blue-book, of all unclaimed dividends, deposits or other balances of five years' standing.

BANK INSPECTION.

We have in Canada no public bank examiner as in the United States, nor are our annual statements audited as in Australia. When the audit system was proposed, we resisted because we felt that it pretended to protect the shareholders and creditors, but did not really do so, and if the audit did not really protect it seemed better that shareholders and creditors should not be lulled by imaginary safeguards, but be kept alert by the constant exercise of their own judgment. So far as we have ever discussed with the Government the question of public bank examiners, apart of course from denying the necessity for anything of the kind, we have confined our arguments to pointing out the impracticability when banks have many branches. This may in the minds of some constitute an argument against branch banking. I simply state the facts. But we say that, while it may be very well—if it really does lessen bank failures—to have public examiners for the protection of the people, it is much more necessary with branch banking to have bank examiners, or as we call them, inspec-

tors, on behalf of the executive of the bank. And I am aware that the practice is growing in the United States, where everything is under one roof. When it comes to the quality of the work done by our inspectors, I would not admit that anything could well be better. In my own bank it takes a staff of five trained men an entire year to make the round of all the branches. Some of these officers devote themselves to the routine of the branches, verifying all cash, securities, bills, accounts, etc., testing the compliance of officers with every regulation of the bank, reporting on the skill and character of officers, etc., while the chiefs devote themselves to the higher matters, such as the quality of the bills under discount, loans against securities, indeed the quality and value of every asset found at the branch. They also deal with the growth and profitability of the branch, its prospects, etc. Now all these matters have already passed the judgment of the branch manager, and the more important have been referred to and approved by the executive, so that it may be said that three different judgments are passed upon the business of the branch. But it will be said that the chief inspector may be under the sway of the executive and his reports a mere echo of the opinion of the latter. This is quite true—the reports may be dishonest. We do not tell the public that the inspector is specially employed for its protection. He, like the general manager, is merely a part of the bank's machinery for conducting business, and the public is left to judge of the bank by its chief officers, its record in the past, its entourage.

Our banks make a very full return to the Government at the close of each month. These are published during the month and are keenly discussed by the public. The Deputy Minister of Finance has the power to call for statements of any character at any time.

In the larger banks the officers insure their fidelity by funds established within the bank. Many of the banks also have funds for the superannuation of their officers.

RESERVES.

If this paper were not already too lengthy I would like to have discussed the question of reserves. We hold with the majority of the banking world outside of the United States against fixed reserves. With us no reserves are actually required by law. The cash reserve in gold and legal tenders has averaged for some years about ten per cent., but you will remember that our till money is almost entirely supplied by the bank note circulation. The smaller banks keep their available resources in securities, call loans at home and balances with their bankers in Montreal and New York. The large banks, as you know, in addition to their securities and call loans in Canada, lend largely on easily liquidated securities in the United States.

The change making notes, those of denominations less than \$5, are issued by the Dominion Government. The settlements at the clearing houses are made in legal tenders, notes of large denominations being issued by the Government for the purpose. Forty per cent. of whatever cash reserves a bank may keep must be in Dominion legal tenders, a provision entirely in the interest of the Government, and so unworthy of our otherwise creditable system that we must hope our Government will some day relieve us of such an unscientific arrangement.

THE BANK ACT, CANADA.

1890,

AS AMENDED IN 1899 AND 1900.

53 VICTORIA, CHAPTER 31; AMENDED BY 62-63 VICTORIA,
CHAPTER 14; AND 63-64 VICTORIA, CHAPTERS
26 AND 27.

AN ACT RESPECTING BANKS AND BANKING.

[Assented to 16th May, 1890.]

HER MAJESTY, by and with the advice and consent
of the Senate and House of Commons of Canada,
enacts as follows:—

SHORT TITLE.

1. This Act may be cited as "The Bank Act."

Before Confederation the Banks doing business in the old Province of Canada were governed by their special charters and by the provisions of chapters 54 and 55 of the Consolidated Statutes of Canada, intituled respectively "An Act respecting Incorporated Banks," and "An Act respecting Banks and Freedom of Banking," and by amending Acts passed in 1861 and 1866. These charters were granted usually for a term of ten years at a time, most of them expiring at the end of the session of Parliament after the first of June, 1870. The provisions of these special charters were not always uniform.

In the old Province of Nova Scotia there was no general banking Act, special provisions being embodied in the respective charters, which were, as a rule, granted for fifteen years at a time, terminating at different periods.

New Brunswick, the remaining province which made up the original Dominion in 1867, like Nova Scotia, had no general Act, but had granted charters for terms varying from twenty to twenty-six years.

When British Columbia joined the Dominion in 1871, it had the Bank of British Columbia, which was organized under an Imperial charter, with its head office in London, England.

Prince Edward Island became a province of the Dominion in 1873, and had then three banks with special charters, which had been extended to 1890, 1892, and 1900, respectively.

By the British North America Act, section 91, sub-section 15, the right to legislate respecting "Banking, Incorporation of Banks, and the Issue of Paper Money" was assigned exclusively to the Dominion Parliament. At its first session in 1867, it passed the Act 31 Vict. chap. 11, which gave the banks of Upper and Lower Canada, Nova Scotia and New Brunswick the right to do business throughout the Dominion until 1870, under certain regulations and restrictions. In 1869, by the Act 32-33 Vict. chap. 49, these provisions were still further extended, and certain expiring bank charters continued temporarily. In 1870 the Act of 1867 was extended until 1872 by the Act 33 Vict. chap. 11, which introduced certain new provisions for the protection of the interests of shareholders and of the public. In 1871 the first comprehensive Dominion Banking Act, 34 Vict. chap. 5, was passed. It was made applicable to ten banks having their head office in Quebec, six in Ontario, and three in Nova Scotia, and continued their charters until July 1st, 1881. It also applied in part to the Bank of British North America, which had an Imperial charter, and to La Banque du Peuple, which was organized as a limited partnership or partnership *en commandite*. In 1880, by 43 Vict. chap. 22, the Act of 1871, with certain amendments, was continued until July 1st, 1891, and was declared to be applicable to the thirty-six banks therein named, of which sixteen had their head

office in Quebec, nine in Ontario, nine in Nova Scotia, and two in New Brunswick. When the Dominion statutes were consolidated in 1886, the laws then in force on the subject became chapter 120 of the Revised Statutes of Canada, intituled "An Act respecting Banks and Banking." On the 1st of July, 1891, this was superseded by the present Act, which came into force on that day by virtue of section 104, and extended the bank charters to the 1st of July, 1901.

In 1899 by 62-63 Vict. chap. 14, Canadian banks were authorized to issue bank notes of one pound sterling or of any multiple of that sum at their offices in any British colony or possession other than Canada, and to make them redeemable at such offices, or in Canada in case they closed such other offices.

In 1900 the Bank Act was revised in view of the approaching expiry of the bank charters in 1901, and the Bank Act Amendment Act was passed, which embodied certain important changes and extended the charters to the 1st of July, 1911. Provisions as to the business and powers of a bank were extended, further returns and statements were provided for, and authority was given to the Canadian Bankers' Association, incorporated during the same session, to appoint a curator to a suspended bank. Provision was also made for the purchase of the assets of one bank by another, and by a supplementary Act for any increase of the capital stock of the purchasing bank rendered necessary thereby. These provisions will be set forth and discussed in connection with the sections of the Bank Act which they respectively affect, and the amending Acts will be found in full at the close of the principal Act in the present volume. Section 2 of the amending Act of 1900, provides that the Bank Act of 1890, as amended by any subsequent Act, shall be read and construed as if the provisions of the Act of 1900 were incorporated therein and formed a part thereof.

The right of the Dominion Parliament to pass the Acts of 1880 and 1890 was challenged as an interference

with the powers conferred on the provincial legislatures by section 92 of the British North America Act, especially as an invasion of the domain of "Property and Civil Rights." The provisions relating to warehouse receipts were claimed to be invalid as being in conflict with the Mercantile Amendment Act, chap. 122, of the Revised Statutes of Ontario on the same subject. The Supreme Court in *The Merchants' Bank v. Smith*, 8 S. C. Can. 512 (1884), upheld these provisions of the Dominion Act. The Privy Council subsequently gave a decision to the same effect in *Tennant v. The Union Bank*, L. R., [1894] A. C. 31. In this case the doctrine was clearly laid down, as had been previously done in *Cushing v. Dupuy*, L. R. 5 A. C. 409 (1880), that inasmuch as section 91 of the B. N. A. Act expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes, this is a plain indication that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority, even though it trenches upon matters assigned to the local legislatures by section 92. They further lay down the doctrine that the legislative authority conferred by the words "Banking, Incorporation of Banks, and the Issue of Paper Money" is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers; that it extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it; and that it also comprehends "banking," an expression wide enough to embrace every transaction coming within the legitimate business of a banker. They also say that the power to legislate on the subject of banking conferred upon the Dominion Parliament by section 91 may be fully exercised, even though it may have the effect of modifying civil rights in the province.

The Supreme Court also in *Quirt v. The Queen*, 19 S. C. Can. 510 (1891), upheld the validity of the Dominion

Acts which authorized the trustees of the Bank of Upper Canada to carry on the business of the bank, so far as was necessary to wind it up, and which finally transferred to the Dominion Government all the property of the bank and the powers of the trustees. The majority of the Court did so, however, on the ground that it came under the head of "bankruptcy and insolvency," and not under the head of "banking." The doctrine was also laid down that the Dominion Parliament had not the power to deal with either real estate or personal property simply on the ground that a bank was interested in the transaction, when it did not come within the scope of the ordinary business of banking.

On the other hand, the right of the Quebec Legislature to pass the Act of 1882, imposing a special tax on banks and other commercial corporations, was claimed to be an interference with the exclusive rights of the Dominion Parliament as to Banking, and the Regulation of Trade and Commerce, and as being indirect taxation. The Privy Council, however, in *The Bank of Toronto v. Lambe*, L. R. 12 A. C. 575 (1887), upheld the validity of the tax. It was held that it was not a fatal objection that the tax was on the whole paid-up capital of the bank, while only a portion of it was employed in the Province of Quebec; nor that the legislature might lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to create banks.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

- (a) The expression "the bank" means any bank to which this Act applies; R. S. C. chap. 120, sec. 2, sub-sec. e.

By section 3 of the Act of 1890, the provisions of that Act apply to the thirty-six banks named in schedule A, and to every bank incorporated after the 1st of January, 1890. Section 6 provides that certain sections there enumerated, and no others, shall apply to the Bank of British

North America and the Bank of British Columbia. By section 8 provision is made for the Merchants' Bank of Prince Edward Island coming under the Act.

By section 4 of the amending Act of 1900, schedule A to that Act is substituted for schedule A to the Act of 1890, and by section 5 the provisions of the Bank Act of 1890, and of any amendment thereof, shall continue to apply to any bank included in schedule A to the Act of 1890, and not in schedule A to the Act of 1900, only in so far as may be necessary to wind up the business of any such bank.

"This Act" in the above clause includes not only the Act of 1890, in which the words occur, but also any amendment thereto, including the amending Act of 1900.

- (b) The expression "Treasury Board" means the board provided for by section nine of chapter twenty-eight of the Revised Statutes of Canada, or any Act in amendment thereof or substitution therefor;

The section above mentioned was amended by chapter 13 of the Statutes of 1887, and the Treasury Board is now composed of the Minister of Finance and Receiver-General, and any five of the Ministers belonging to the King's Privy Council for Canada, to be nominated from time to time by the Governor in Council.

- (c) The expression "goods, wares and merchandise" includes, in addition to the things usually understood thereby, timber, deals, boards, staves, saw-logs and other lumber, petroleum, crude oil, and all agricultural produce and other articles of commerce; R. S. C. chap. 120, sec. 2, sub-sec. a.

This expression has been frequently the subject matter of judicial decision, especially in connection with its use in the 17th section of the Statute of Frauds. See *Atkinson v. Bell*, 8 B. & C. 277 (1828); also *Lee v. Griffin*, 1 B. & S. 272 (1861). It does not include fixtures: *Hallen v. Runder*, 1 Cr. M. & R. 266 (1834); *Lee v. Gaskell*, 1 Q. B. D. 700 (1876). It does include timber and growing crops, because the clear intention being that they shall be severed,

they are taken as by a fiction of law as being actually severed: *Smith v. Surman*, 9 B. & C. 561 (1829); *Parker v. Staniland*, 11 East 362 (1809); *Mayfield v. Wadsley*, 3 B. & C. 357 (1824). A *fortiori*, trees felled, are within the phrase: *Acraman v. Morrice*, 8 C. B. 449 (1849). Choses in action are not within the expression: *Humble v. Mitchell*, 11 A. & E. 205 (1839); nor shares in a company: *Latham v. Barber*, 6 T. R. 67 (1794); *Bowlby v. Bell*, 3 C. B. 284 (1846); *Watson v. Spratley*, 10 Ex. 222 (1854); *Duncuft v. Albrecht*, 12 Sim. 189 (1841); nor are bonds or certificates of stock: *Heseltine v. Siggers*, 1 Ex. 856 (1848); *Freeman v. Appleyard*, 32 L. J. Ex. 175 (1862); *Pawle v. Gunn*, 4 Bing. N. C. 445 (1838); *Knight v. Barber*, 16 M. & W. 66 (1846).

- (d) The expression "warehouse receipt" means any receipt given by any person for any goods, wares, or merchandise, in his actual, visible and continued possession, as bailee thereof, in good faith, and not as of his own property, and includes receipts given by any person who is the owner or keeper of a harbor, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods, wares or merchandise, for goods, wares and merchandise delivered to him as bailee and actually in the place, or in one or more of the places owned or kept by him, whether such person is engaged in other business or not; R. S. C. chap. 120, sec. 2, sub-sec. b.

To this definition there has been added by the amending Act of 1900, the following:—

3. [The expression "warehouse receipt," defined by subsection (d) of section 2 of The Bank Act, includes receipts given by any person in charge of logs or timber in transit from timber limits, or other lands, to their place of destination.] 63-64 Vict. chap. 26, sec. 3.

The former part of this definition is taken, as above indicated, from chapter 120 of the Revised Statutes of Canada, but with some modifications. The word "owner" is new, as are also the words "for the storage of goods,

wares or merchandise." The words "tannery" and "mill" there follow the word "storehouse," and "specifications of timber" were included.

The definition was originally introduced in the Bank Act of 1880, apparently to overcome the decisions of the Ontario Courts, to the effect that a warehouse receipt could be given only by one who followed the business of a warehouseman.

In *Re Monteith*, 10 O. R. 529 (1885), Chancellor Boyd expressed the opinion that the definition comprised two classes of persons who were authorized to issue such receipts: (1) Any *bona fide* bailee of goods which are in his actual, visible and continued possession; (2) Any person who is the keeper of a warehouse or other place for goods in respect of goods being in that warehouse or place. In the second case the validity of the receipt would not depend on proving that he was actually, visibly and continuously in the possession of the goods from first to last. On the other hand, Proudfoot, J., was of opinion that the bailee named in the first clause was a warehouseman, and that the second class was really comprised in the first, and was subject to the provision as to possession. In *Williamson v. Rhind*, 22 L. C. J. 166 (1877), it was decided that a warehouse receipt given by a warehouseman for goods not in his possession was null and void. Also in *Milloy v. Kerr*, 8 S. C. Can. 474 (1880). In *Tenant v. Union Bank*, 19 Ont. A. R. 1 (1892), it was held that a warehouse receipt for logs lying in certain lakes on the way from the woods to the mill was not valid as not being in a place kept by the signers of the receipt. See to the same effect, *Ross v. Molsons Bank*, 2 Dorion, 82 (1881). The amendment of 1900, above quoted, was made so as to render valid such receipts as these.

By section 54 of R. S. C. c. 120, as amended by the Act of 1888, 51 Vict. chap. 27, receipts given by certain manufacturers, dealers, etc., for goods their own property, were recognized as warehouse receipts. Under the present Act such receipts do not come under section 73, which re-

lates to warehouse receipts, but under section 74, where such an instrument is called a "security," and is restricted to certain classes of persons and certain classes of goods therein named. The omission of the words "tannery" and "mill" from the definition in the present Act is in harmony with this change.

The first statutory recognition of warehouse receipts in Canada in connection with banking is found in the Act of 1859, which became section 8 of chapter 54 of the Consolidated Statutes of Canada.

In 1861 warehouse receipts given by warehousemen, millers and wharfingers, for cereal grains, goods, wares, or merchandise, their own property, were placed as to banks on the same footing as those given for the property of others. See *Molsons Bank v. Lanaud*, 2 Dorion, 182 (1881).

In England, warehouse receipts were not fully recognized as negotiable instruments, like bills of lading and other documents of title, until the Factors Act, 1877.

In a warehouse receipt the goods should be described with reasonable certainty, and where practicable by distinguishing marks. Ordinarily it does not cover substituted or subsequently received goods: *Llado v. Morgan*, 23 U. C. C. P. 517 (1874). Where, however, as in the grain trade, there is a usage of trade that different lots of the same quality are stored together and mixed, the receipt is satisfied by the delivery of the specified quantity and quality: *Coffey v. Quebec Bank*, 20 U. C. C. P. 555 (1870); *Bank of Hamilton v. Noye Manufacturing Co.*, 9 O. R. 638 (1885). So also in the case of wheat to be made into flour: *Wilmot v. Mailland*, 3 Grant 107 (1851); *Mason v. G. W. R. Co.*, 31 U. C. Q. B. 73 (1871); *Bank of Hamilton v. Noye Manufacturing Co.*, supra.

- (e) The expression "bill of lading" includes all receipts for goods, wares or merchandise, accompanied by an undertaking to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever; R. S. C. chap. 120, sec. 2, sub-sec. c.

The bill of lading is a very ancient document, and by the custom of merchants is negotiable, when made to bearer or order or to assigns. It is in general use among all commercial nations, and is much the same in its form and provisions. It was originally used only for transportation of goods by water. By legislation and usage it has come to be applied to transportation by land. A "shipping note" given by the G. T. R. Co. was held to be a "bill of lading" within the Ontario Statute, 33 Vict. chap. 19, sec. 3; *Royal Canadian Bank v. G. T. R. Co.*, 23 U. C. C. P. 225 (1873). It is not the contract, for that had been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract: *Sewell v. Burdick*, 10 A. C. at p. 105 (1884). When the goods have been received and the bill of lading signed, it is in general the evidence of the contract, and cannot be varied by parol evidence: *Leduc v. Ward*, 20 Q. B. D. 475 (1888).

- (f) The word "manufacturer" includes malsters, distillers, brewers, refiners and producers of petroleum, tanners, curers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process or mechanical means any goods, wares or merchandise.

To this definition there has been added by the amending Act of 1900, the following:—

2. [The word "manufacturer," defined by paragraph (f) of section 2 of the said Act, includes a manufacturer of logs, timber or lumber.] 63-64 Vict. chap. 26, sec. 3, sub-sec. 2.

APPLICATION OF ACT.

3. The provisions of this Act apply to the several banks enumerated in schedule A to this Act, and to every bank incorporated after the first day of January, in the year one thousand eight hundred and ninety, whether this Act is specially mentioned in its Act of incorporation or not, but not to any other bank, except as hereinafter specially provided.

By section 4 of the Bank Act Amendment Act, 1900, schedule A to that Act was substituted for schedule A to the Bank Act, 1890. There are a few changes. In the latter appeared the names of thirty-six banks. One of them, the Commercial Bank of Manitoba, suspended payment on the 3rd of July, 1893, and went into liquidation under the Winding-up Act.

Another bank in this list, La Banque du Peuple of Montreal, suspended payment on the 16th of July, 1895. It was not subject to the provisions of the general Winding-up Act, its composition and government being different from other banks. It was wound up under the special Dominion Acts, 60-61 Vict. chap. 75, and 62-63 Vict. chap. 123.

A third bank named in schedule A to the Act of 1890, La Banque Ville Marie, of Montreal, suspended payment on the 25th of July, 1899, and is being wound up under the Winding-up Act.

The name of the Merchants' Bank of Prince Edward appears in schedule A to the amending Act of 1900. It did not appear in that of 1890, but it was added to the list on the 1st of March, 1892.

There are at the present time thirty-five banks doing business in Canada, the thirty-four named in schedule A and the Bank of British North America. Of these, ten have their head office in Ontario, eleven in Quebec, eight in Nova Scotia, three in New Brunswick, two in Prince Edward Island, and one in London, England.

Section 4 of the amending Act of 1900, reads as follows:—

4. [New schedule substituted.—Schedule A to this Act is substituted for schedule A to the Bank Act, and when "La Banque Jacques Cartier" changes its name to "La Banque Provinciale du Canada," and "The Merchants Bank of Halifax" changes its name to "The Royal Bank of Canada," under the provisions of Acts of this session of Parliament, such banks shall be deemed to be included in schedule A to this Act under their new names.]

By 63-64 Victoria chapter 102, La Banque Jacques Cartier was allowed to change its name to "La Banque Provinciale du Canada." This was done at a meeting of shareholders held on the 3rd of July, 1900, and notice of the change was given in the *Canada Gazette* of the 7th of July, 1900.

By chapter 103 of the same year, permission was given to the Merchants Bank of Halifax to change its name to "The Royal Bank of Canada," provided such change should be approved at a special meeting of shareholders, and a copy of the resolution published in the *Canada Gazette* fifteen days thereafter. This was done on the 2nd of January, 1901, the new name being used from that date.

The following section of the amending Act of 1900 applies to the above insolvent banks:—

5. [Suspended banks.—The provisions of the Bank Act and of any amendment thereof shall continue to apply to any bank which is included in schedule A to the Bank Act and not in schedule A to this Act, but such provisions shall continue to apply to any such bank only in so far as may be necessary to wind up the business thereof, and the charter or Act of incorporation of such bank, and any Act in amendment thereof, or any Act in relation to such bank, now in force, shall continue in force for such purpose and for such purpose only.]

Section 4 of the Bank Act, 1890, reads as follows:—

4. Charters continued to 1st July, 1901.—The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in schedule A to this Act are continued in force, so far as regards the incorporation and corporate name, the amount of capital stock, the amount of each share of such stock and the chief place of business of each bank, until the 1st day of July, in the year one thousand nine hundred and one, subject to the right of each bank to increase or reduce its capital stock in the manner hereinafter provided; and as to all other particulars this Act shall form and be the charter of each of the said banks until the said first day of July,

in the year one thousand nine hundred and one,—subject in the case of La Banque du Peuple to the provisions hereinafter made in respect to that bank: Provided always, that the said charters or Acts of incorporation are hereby continued in force only in so far as they, or any of them, are not forfeited or rendered void under the terms thereof, or of this Act, or of any other Act passed or to be passed, by reason of the non-performance of the conditions thereof, or by insolvency, or otherwise.

This section of the Bank Act was not repealed by the amending Act of 1900, but it is superseded by section 6 of the latter Act, which is as follows:—

6. [Charters continued to 1st July, 1911.—The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in schedule A to this Act are continued in force, so far as regards the incorporation and corporate name, the amount of capital stock (as authorized at the time of the passing of this Act), the amount of each share of such stock and the chief place of business of each bank, until the first day of July, in the year one thousand nine hundred and eleven, subject to the right of each bank to increase or reduce its capital stock in the manner provided by the Bank Act; and as to all other particulars the provisions of all such charters, Acts of incorporation, and Acts in amendment thereof are repealed, and the Bank Act and any amendment thereof and this Act form and are the charter of each of the said banks until the said first day of July, in the year one thousand nine hundred and eleven: Provided always, that the said charters or Acts of incorporation and Acts in amendment thereof are hereby continued in force only in so far as they, or any of them, are not forfeited or rendered void under the terms thereof, or of the Bank Act, or of this Act, or of any other Act passed or to be passed, by reason of the non-performance of the conditions thereof, or by insolvency, or otherwise.]

It will be seen from this section that the thirty-four banks named in schedule A are substantially in the same position as if their respective charters had been taken away and they had been granted new charters in the form of schedule B as amended.

The question as to whether the charters of a bank might be annulled by a writ of *scire facias* in the Exchequer Court at the instance of the Minister of Justice was considered by the latter in a matter of *Sarazin v. Bank of St Hyacinthe*, 28 L. C. J. 270 (1881). The application was refused on the merits, and doubts expressed as to the regularity of such a proceeding.

5. La Banque du Peuple.—All the provisions of this Act, except those contained in sections three, six to seventeen (both inclusive), nineteen to twenty-seven (both inclusive), thirty-three, forty-five, and eighty-nine to ninety-six (both inclusive), apply to La Banque du Peuple: Provided, that wherever the word "directors" is used in any of the sections which apply to the said bank, it shall be read and construed as meaning the principal partners or members of the corporation of the said bank; and so much of the Act incorporating the said bank, or of any Act amending or continuing it, as is inconsistent with any section of this Act applying to the said bank, or which makes any provision in any matter provided for by such sections other than such as is hereby made, is hereby repealed; otherwise the said Acts are continued in force, subject to the proviso contained in section four of this Act.

This section of the Bank Act was not repealed by the Act of 1900, but is now obsolete, as the bank became insolvent in 1895, and was wound up under the Dominion Acts, 60-61 Vict. chap. 75, and 62-63 Vict. chap. 123, as already mentioned in the notes to section 3.

It was organized in 1835, under the name of Viger, Dewitt & Co., as a limited partnership, or partnership *en commandite*, as it is called in French law; the principal or general partners being jointly and severally liable for the whole of the debts of the partnership, and the special partners incurring no liability beyond the amount of their respective shares. In 1844 it was incorporated as a public bank, as La Banque du Peuple, but retained its original constitution; the general partners becoming the directors and the special partners the shareholders; the liability of

the former being unlimited and there being no double liability in the case of the latter. The directors were not elected by the shareholders, but vacancies were filled by the remaining directors.

6. Banks of B. N. A. and B. C.—The provisions contained in sections two, seven, thirty-seven, forty-seven to eighty-eight (both inclusive), and ninety-seven to one hundred and four (both inclusive), apply to the Bank of British North America and the Bank of British Columbia respectively; and the provisions contained in the other sections of this Act do not apply to the said banks.

These two banks were established under Imperial charters, the former in 1836, and the latter in 1862, both with their head office in London, England. Under the provisions of the amending Acts of 1900, 63-64 Victoria chapters 26 and 27, the assets of the Bank of British Columbia have been purchased by the Canadian Bank of Commerce, the consideration being \$2,000,000 of the stock of the purchasing bank, which was increased from \$6,000,000 to \$8,000,000 for this purpose, besides a cash payment of \$312,000. The purchase took effect on the 2nd of January, 1901.

A reference to the sections above mentioned will show that the provisions of the Bank Act which are applicable to the Bank of British North America are those relating to that portion of its business transacted in Canada, and which are specially intended for the protection of the public. The sections which do not apply to it, are chiefly those relating to the operations at the head office, such as the incorporation, organization, shares, calls, double liability and insolvency. As to such matters it is regulated by the terms of its Imperial charter.

7. Chief offices of these banks.—For the purposes of the several sections of this Act made applicable to the Bank of British North America and the Bank of British Columbia, the chief office of the Bank of British North America shall be the office of the bank at Montreal, in the Province of Quebec, and the chief office of the Bank of British Columbia shall be the office of the bank at Victoria, in the Province of British Columbia.

As already mentioned, the assets of the Bank of British Columbia having been purchased by the Canadian Bank of Commerce, it has ceased to exist as a separate institution.

8. **Merchants Bank, P.E.I.**—The provisions of this Act may be extended to the Merchants' Bank of Prince Edward Island by the Treasury Board, upon the application of the directors of the said bank, before the expiration of the present charter of the said bank; and upon publication in the *Canada Gazette* of the resolution of the directors applying hereunder, and of the minute of the Treasury Board thereon allowing such application, the provisions of this Act shall, from the time named in such minute, or if there is no time named therein, from the date of the publication thereof in the *Canada Gazette*, apply to the said bank; and its charter and Act of incorporation, and any Acts in amendment thereof, shall thereupon be extended for the same time and to the extent as if the name of the said bank had been included in schedule A to this Act.

The provisions of the Bank Act were extended to this bank on the 1st of March, 1892. Its name now appears in schedule A.

INCORPORATION AND ORGANIZATION OF BANKS.

9. The capital stock of every bank hereafter incorporated, the name of the bank, the place where its chief office is to be situate, and the name of the provisional directors shall be declared in the Act of incorporation of every such bank:
2. An Act of incorporation of a bank in the form set forth in schedule B to this Act shall be construed to confer upon the bank thereby incorporated all the powers, privileges and immunities, and to subject it to all the liabilities and provisions set forth in this Act. R. S. C. chap. 120, sec. 5, in part.

No new bank was incorporated between 1890 and 1901. At the session of 1901 a charter was granted to the Sovereign Bank of Canada.

Schedule B of the Act of 1890 was amended by section 45 of the Act of 1900, so that any new charters should remain in force until July 1st, 1911.

- 10. Capital stock and shares.**—The capital stock of any bank hereafter incorporated shall be not less than five hundred thousand dollars, and shall be divided into shares of one hundred dollars each. R. S. C. chap. 120, sec. 6, part.

Of the thirty-five banks now doing business under the Act, five of them have a subscribed capital under \$500,000. The above minimum capital has been required for new banks since 1871. The rule as to shares being \$100 each was first enacted in 1890. Previous to that time the amount was named in each charter. In about half the banks under the Act the shares are \$100 each; those of the Bank of British North America are £50 stg., of the Bank of Montreal \$200, while the others are \$75, \$50, \$40, \$25 and \$20 each.

- 11. Provisional directors.**—The number of provisional directors shall be not less than five nor more than ten, and they shall hold office until directors are elected by the subscribers to the stock, as hereinafter provided.

This provision was not in former Bank Acts, but the provisional directors were named in the several special Acts. The election of directors by the subscribers is provided for in section 13.

- 12. Opening of stock books.**—For the purpose of organizing the bank, the provisional directors may cause stock books to be opened, after giving public notice thereof,—upon which stock books shall be recorded the subscriptions of such persons as desire to become shareholders in the bank; and such books shall be opened at the place where the chief office of the bank is to be situate, and elsewhere, in the discretion of the provisional directors, and may be kept open for such time as they deem necessary.

The provisional directors should meet and organize by the election of a provisional president or chairman. A

majority of the directors would form a quorum: *Howbeach Coal Co. v. Teague*, 5 H. & N. 151 (1860); *Re London & Southern Cos. F. L. Co.*, 31 Ch. D. 223 (1885); R. S. C. chap. 1, sec. 7 (42). The business specified should be done at regularly called and organized meetings: *D'Arcy v. Tamar, etc., Ry. Co.*, L. R. 2 Ex. 158 (1867).

Notice of the opening of the stock books should be given in one or more newspapers published at the place where the head office of the bank is situate, and in the *Canada Gazette*: sec. 102.

This section was not in any of the previous Bank Acts, but similar provisions were contained in the Acts incorporating the respective banks.

As pointed out in the note under the next section, there does not appear to be any provision in the Act for enforcing payment of these subscriptions by the provisional directors, or even any express provision for excluding subscribers in default from taking part in the organization of the bank. See *North Simcoe Ry. Co. & Toronto*, 36 U. C. Q. B. at p. 119 (1874), and *Michie v. Erie & Huron Ry. Co.* 26 U. C. C. P. at p. 574 (1876). Until this is remedied by legislation, it would be well to provide for it in the terms of subscription in the stock books.

The provisional directors should make an allotment of stock to the subscribers and give them notice of it: *Nasmith v. Manning*, 5 S. C. Can. 417 (1881); *In re Scottish Petroleum Co.*, 23 Ch. D. 413 (1883). This would be indispensable in case the subscription was in the form of an application, or the stock was over subscribed; but should be done in any case in order to bind the subscribers: *Lake Superior Nav. Co. v. Morrison*, 22 U. C. C. P. at p. 220 (1872); *European and N. A. Ry. Co. v. McLeod*, 16 N. B. 3 (1875); *Common v. Matthews*, Q. R. 8 Q. B. 138 (1898).

Parol evidence is inadmissible to contradict the unconditional terms of the subscription: *Hamilton v. Holmes*, 33 N. S. 102 (1900).

13. First meeting of subscribers.—So soon as a sum not less than five hundred thousand dollars of the capital stock of the bank has been *bona fide* subscribed, and a sum not less than two hundred and fifty thousand dollars thereof has been paid to the Minister of Finance and Receiver-General, the provisional directors may, by public notice, published, for at least four weeks, call a meeting of the subscribers to the said stock, to be held in the place named in the act of incorporation as the chief place of business of the bank, at such time and at such place therein as set forth in the said notice; at which meeting the subscribers shall determine the day upon which the annual general meeting of the bank is to be held, and shall elect such number of directors, duly qualified under this Act, not less than five nor more than ten, as they think necessary, who shall hold office until the annual general meeting in the year next succeeding their election; and upon the election of directors as aforesaid the functions of the provisional directors shall cease. R. S. C. chap. 120, sec. 6, in part.

It would appear that it is expected that the \$250,000 shall be paid voluntarily. No power is given to the provisional directors to sue. It is only to the directors elected by the shareholders that the Act gives power to make calls and to enforce payment by suit or forfeiture. Even the power of cancelling subscriptions for non-payment of ten per cent. within thirty days after subscribing is given to the directors only: sec. 30. The provisional directors should embody the terms in the heading of the stock books and prospectus.

For conflicting decisions as to the powers of provisional directors regarding contracts which they may make: see *Allen v. Ontario & R. R. Ry. Co.*, 29 O. R. 510 (1898); *O'Dell v. Boston & N. S. Coal Co.*, 29 N. S. 385 (1897); and *North Sydney Mining Co. v. Greener*, 31 N. S. 41 (1898).

The notice calling the meeting of subscribers should be inserted for at least four weeks in one or more newspapers published at the place where the head office of the bank is situate, and in the *Canada Gazette*: sec. 102.

The Act appears to be silent as to whether all subscribers, even those who may not have paid even the first ten per

cent., are entitled to vote. They are not called shareholders, and it is not stated that the subsequent provisions as to shareholders voting are applicable to this meeting. As suggested under the preceding section, it would be well to make it a condition of the subscription, that only those subscribers who pay the required portion of their stock shall be qualified to take part in this meeting, and that the provisions of section 25 shall apply. Sufficient care does not appear to have been taken to adapt the present and other new sections of the Act to section 18 and others taken from the former Bank Acts. For instance, the subscribers, at the meeting for organization provided for in this section, are to fix the day on which future annual meetings are to be held, and are to determine the number of directors, not less than five nor more than ten; while section 18 provides that these matters are to be regulated by by-laws to be passed by the shareholders. Nothing is said as to proxies for this first meeting, nor is any authority given to provide for them. Do any of the provisions of section 25 as to the manner of voting and the counting of votes apply? And if so, which of them? Can the subscribers at this first meeting pass the by-laws mentioned in section 18 as to the remuneration of the president or other directors, or as to the amount of discounts, etc.? Until these matters are settled by legislation it would be well to apply the rules laid down in section 25 so far as practicable.

Since the Act of 1871 the minimum amount of subscribed capital to enable a bank to commence business has been \$500,000. When the sum of \$100,000 was paid up it might obtain a certificate from the Treasury Board to enable it to issue notes and commence business. It was necessary that the amount paid up should be \$200,000 within two years thereafter. Now it is necessary that \$250,000 be not only paid in, but actually paid over to the Minister of Finance, before the holding of the meeting to elect directors.

No special number is required to form a quorum, but there must be at least two to form a "meeting": *Sharp v. Daves*, 2 Q. B. D. 26 (1876).

Although nothing is said in the Act about the appointment of scrutineers, the meeting may appoint scrutineers to take the votes and report to the chairman if it sees fit: *Wandsworth Co. v. Wright*, 22 L. T. N. S. 404 (1870).

- 14. Preliminary conditions.**—The bank shall not issue notes nor commence the business of banking until it has obtained from the Treasury Board a certificate permitting it to do so, and no application for such certificate shall be made until directors have been elected by the subscribers to the stock in the manner hereinbefore provided; and every director, provisional director or other person, issuing or authorizing the issue of the notes of such bank or transacting or authorizing the transaction of any business in connection with such bank, except such as is hereinbefore provided, before the obtaining of the certificate from the Treasury Board, shall be guilty of an offence against this Act. R. S. C. chap. 120, sec. 6, in part.

Any person convicted of a violation of this section is liable to a fine not exceeding \$1,000, or to imprisonment for a term not exceeding five years, or to both, in the discretion of the Court before which the conviction is had: sec. 101.

- 15. When certificate may be granted.**—No certificate shall be given by the Treasury Board until it has been shown to the satisfaction of the Board, by affidavit or otherwise, that all the requirements of this Act and of the special Act of incorporation of the bank, as to the payment required to be made to the Minister of Finance and Receiver-General, the election of directors, deposit for security for note issue, or otherwise, have been complied with, and that the sum so paid was then held by the Minister of Finance and Receiver-General; and no certificate as aforesaid shall be given except within one year from the passing of the Act of incorporation of the bank applying for the said certificate.

- 16. If certificate is not granted.**—In the event of the bank not obtaining a certificate from the Treasury Board within one year from the time of the passing of its Act of incorporation, all the rights, powers

and privileges conferred on such bank by its Act of incorporation shall thereupon cease and determine and be of no force and effect whatever.

This limit of one year for organization was not in previous Bank Acts. It is no doubt intended to prevent the taking out of charters for speculative purposes.

- 17. Disposal of deposit.**—Upon the issue of the certificate in manner hereinbefore provided, the Minister of Finance and Receiver-General shall forthwith pay to the bank the amount of money so deposited with him as aforesaid, without interest, after deducting therefrom the amount required to be deposited under section fifty-four of this Act; and in case no certificate is issued by the Treasury Board within the time limited for the issue thereof, the amount so deposited shall be returned to the person depositing the same; but in no case shall the Minister of Finance and Receiver-General be under any obligation to see to the proper application of the same in any way.

The Minister of Finance is to retain the sum of \$5,000 until the annual adjustment takes place in the following year: sec. 54, sub-sec. 3.

INTERNAL REGULATIONS.

- 18. By-laws.**—The shareholders of the bank (or, in the case of La Banque du Peuple, the principal partners or members of the corporation thereof,) may regulate, by by-law, the following matters incident to the management and administration of the affairs of the bank, that is to say: The day upon which the annual general meeting of the shareholders for the election of directors shall be held; the record to be kept of proxies, and the time, not exceeding thirty days, within which proxies must be produced and recorded prior to a meeting in order to entitle the holder to vote thereon; the number of the directors, which shall not be less than five and not more than ten, and the quorum thereof, which shall not be less than three; their qualification, subject to the provisions hereinafter made; the method of filling vacancies in the board of directors whenever the same occur during each year, and the time and proceedings

for the election of directors, in case of a failure of any election on the day appointed for it; the remuneration of the president, vice-president and other directors; and the amount of discounts or loans which may be made to directors, either jointly or severally, or to any one firm or person, or to any shareholder, or to corporations: R. S. C. chap. 120, secs. 9, 14 and 16.

The shareholders may pass general by-laws or regulations for the internal government of the bank on the subjects mentioned in this section. The details of the management and the carrying out of these regulations are entrusted to the Board of Directors.

These by-laws may be passed at the annual general meeting or at a special meeting called for the purpose. When the shareholders meet they should organize by electing one of their number as chairman, and by appointing a secretary, who need not be a shareholder. Proper minutes of all these meetings should be taken and recorded.

Several of the matters named in this section, which may now be regulated by by-law, were formerly embodied in the respective charters of the banks.

Annual Meeting.—Until 1871 the general Bank Acts did not authorize the shareholders to fix the date of the annual meeting. The day was formerly named in the several Acts of incorporation. In the case of a new bank, the day should be fixed at the first meeting of subscribers: sec. 13. The place of meeting is the head office; the directors fix the hour. Public notice should be given for at least four weeks in a newspaper published at the place where the head office is situate: sec. 19, sub-sec. 4. The by-laws should provide for the case of failure to hold the annual meeting on the day appointed, or failure to elect directors at it. Otherwise a special general meeting might be called in accordance with section 24. At this annual meeting the directors are elected: secs. 19 and 20; and a detailed annual statement of the affairs of the bank laid before the shareholders: sec. 45.

There is at common law a right of adjournment of the annual meeting: *Reg. v. Wimbledon Local Board*, 8 Q. B. D. 459 (1882). The notice need not state the business to be transacted at the adjourned meeting: *Scadding v. Lorant*, 3 H. L. C. 418 (1851).

The president presides *ex officio* at meetings of the board of directors; but at the annual meeting and other meetings of shareholders, they have a right to elect the presiding officer. Usually the president is voted to the chair, reads the annual report and moves its adoption. The meeting appoints its own secretary.

Proxies.—The by-law may require proxies to have been produced thirty or any less number of days before a meeting, but not more than thirty days. In the absence of a by-law they might be produced up to the time of the meeting, or even up to the time of voting. Only proxies that comply with all the provisions of the Act should be recorded. Thus the proxy must not be two years old; both the shareholder giving the proxy and the one to whom it is given must have held their stock for at least thirty days; neither of them can be a manager, cashier, clerk or other subordinate officer of the bank; and neither must be in arrear for any call on the stock being voted on or qualifying: sec. 25. When a regulation was passed requiring proxy papers to be attested, this was held to be imperative, and proxy papers not so attested were rejected: *Harben v. Phillips*, 23 Ch. D. 14 (1883). A corporation may give a proxy: *Indian Zoedone Co.*, 26 Ch. D. 70 (1884). A proxy paper executed with the name of the proxy left blank may be subsequently filled up. *Ex parte Lancaster*, 5 Ch. D. 911 (1877). So also as to the date of a meeting at which it is to be used: *Ernest v. Loma Mines*, [1897] 1 Ch. 1.

Directors.—The provision that the number shall not be less than five nor more than ten, and as to the quorum is new. If the number of directors is reduced below five from any cause, the remaining directors cannot do business until there are at least that number: *Toronto Brewing Co. v.*

Blake, 2 O. R. 175 (1882); *Bottomley's Case*, 16 Ch. D. 681 (1880).

In the absence of a by-law a majority would be a quorum: *Howbeach Coal Co. v. Teague*, 5 H. & N. 151 (1860); *Re London, etc., Land Co.*, 31 Ch. D. 223 (1885); R. S. C. chap. 1, sec. 7 (42). If, however, without any by-law on the subject, any three or more directors have usually conducted business at meetings of the board, such number would be held to be a quorum: *English and Irish Rolling Stock Co., Lyon's Case*, 35 Beav. 646 (1866); *Lyster's Case*, L. R. 4 Eq. 233 (1867). The stock qualification in section 19 may be increased but cannot be diminished. The president, vice-president, or a director may be removed by the shareholders for just cause: sec. 24, sub-sec. 2.

Remuneration.—No president, vice-president, or other director can receive any sum for his services except under a by-law passed by the shareholders.

Discounts.—The shareholders may pass a by-law fixing the maximum amount that may be lent to directors, or to any firm or person, or to any shareholder, or to corporations. The aggregate amount of loans to directors, and firms of which they are partners, must be given in each monthly statement sent to the Minister of Finance: sec. 85, and schedule D.

Statements.—By section 45, sub-section 2, introduced by the amending Act of 1900, the shareholders may by by-law require the directors to furnish statements of the affairs of the bank in addition to those required by the first sub-section.

By-laws.—No particular formality is required for by-laws; but as they are usually intended for a permanency, and not for a temporary use, they should be drawn up with care in statutory form. A by-law should be consistent with the statute under which it is framed and with the general law. It should also be certain and free from ambiguity, general in its application, reasonable and positive in its terms.

The shareholders may pass these by-laws at an annual meeting, or at a special meeting called for the purpose. A simple majority of the shares present and voting is sufficient. By-laws should be attested by the presiding officer and by the seal of the bank. If the meeting is not unanimous, the voting on a by-law must be by ballot, and in accordance with the other provisions of section 25.

The by-laws are binding upon the shareholders, officers and employees. Strangers dealing with the bank are justified in assuming that the by-laws were regularly passed: *Royal Bank of India's Case*, L. R. 4 Ch. 252 (1869).

2. **Guarantee and pension funds.**—The shareholders may authorize the directors to establish guarantee and pension funds for the officers and employees of the bank and their families, and to contribute thereto out of the funds of the bank:

This provision is new. The old Act, section 17, validated by-laws for establishing a guarantee fund for the employees of the bank, but did not in express terms authorize the voting of money of the bank to the fund. This is repeated in section 22 of the present Act.

3. **Certain by-laws continued.**—Until it is otherwise prescribed by by-law under this section, the by-laws of the bank on any matter which may be regulated by by-law under this section shall remain in force, except as to any provision fixing the qualification of directors at an amount less than that prescribed by this Act; and no person shall be elected or continue to be a director unless he holds stock paid up to the amount required by this Act, or such greater amount as is required by any by-law in that behalf: R. S. C. c. 120, sec. 9, sub-sec. 4.

The minimum qualification of directors is fixed by section 19, sub-section 2. The shareholders may raise the qualification, but they cannot lower it. When a director ceases to have the necessary qualification his place at once thereby becomes vacant. The other directors, on becoming aware of the fact, should pass a resolution declaring the place vacant.

4. The foregoing provisions of this section, touching directors, shall not apply to La Banque du Peuple, which shall in these matters be governed by the provisions of its charter.

La Banque du Peuple having been wound up, as already mentioned, this and the other special provisions relating to that bank are now obsolete.

19. The stock, property, affairs and concerns of the bank shall be managed by a board of directors, who shall be elected annually in manner hereinafter provided, and shall be eligible for re-election: R. S. C. c. 120, s. 9, s.-s. 2, part; *ibid.* s. 12, part.

The board is to be composed of such number of directors, not less than five nor more than ten, as the shareholders may have determined: secs. 13 and 18. For the manner in which the shareholders may control the directors, see sections 18, 20, and 24. Among the specified duties and powers of directors are the following: To make by-laws: sec. 22; to appoint officers, clerks, etc., and to require them to give bonds: sec. 23; to call special meetings of the shareholders: sec. 24; to allot stock: sec. 27; to regulate transfers: sec. 29; to make calls: sec. 31; to make annual statements: sec. 45; to declare dividends: sec. 47; to issue notes: sec. 51; to open branches of the bank: sec. 64; to make monthly returns to the Minister of Finance: sec. 85.

Such matters as the Act does not require to be done by by-laws may be done by resolution. By-laws should have the corporate seal affixed; as also such deeds and documents as require a seal by the law of the Dominion or of the Province when they are executed, or of the place where they are to be used. See *Bank of Upper Canada v. Widmer*, 2 U. C. O. S. 222 B. (1832).

No director should vote on the question of a loan to himself, or on any other matter in which he has a pecuniary interest. When acting as a director he is in the position of a quasi-trustee for the shareholders, and should not have any adverse personal interest. He is bound to use diligence in the performance of his duties: *Re Forest of*

Dean Coal Co., 10 Ch. D. 450 (1878); *Charitable Corporation v. Sulton*, 2 Atk. 405 (1742).

The business of the board should be done at regularly constituted meetings, attended by at least a quorum, as fixed by by-law. If all the directors are present notice is immaterial; if they are not, all should have had notice. The decisions arrived at should be in the form of resolutions. The assent even of a majority of the directors not given at such a meeting will not bind the bank: *D'Arcy v. Tamar Ry. Co.*, L. R. 2 Ex. 158 (1867); *O'Dell v. Boston & N. S. Coal Co.*, 29 N. S. 385 (1897).

The acts of *de facto* directors in dealing with third persons within the powers conferred on them by the Act are valid, and will bind the bank, even though they may have been illegally or irregularly elected: *In re County Life Assurance Co.*, L. R. 5 Ch. 288 (1870); *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156 (1888); *Royal British Bank v. Turquand*, 6 E. & B. 327 (1856); *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869 (1875); *Baird v. Bank of Washington*, 11 Seargeant & Rawle (Pa.), 411 (1824).

The above rule is followed in the case of outsiders partly on the ground that if shareholders allow certain persons to occupy before the public the position of directors, the bank should suffer rather than those who have been dealing with it in good faith.

In like manner, third parties in good faith are not affected by mere irregularities on the part of the directors or officers of a bank. Where the quorum of directors was three, and only two were present and authorized the secretary to affix the seal to a mortgage deed, it was held not necessary for the mortgagees to enquire whether the secretary was duly authorized, and that it must be taken that the mortgage was duly executed: *County of Gloucester Bank v. Rudry Merthyr Co.*, [1895] 1 Ch. 325. See also *In re Bank of Syria*, [1901] 1 Ch. 115.

It is not incumbent on a person lending money to a corporation to ascertain that all the proceedings of the

company and its shareholders, *inter se*, have been strictly regular: *Colonial Bank v. Willan*, L. R. 5 P. C. 417 (1874). Where a person on reading a deed of settlement would find, not a prohibition from borrowing, but a permission to do so on the authority of a resolution of the shareholders, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done: *Royal British Bank v. Turquand*, 6 E. & B. 327 (1856). But where there is a prohibition in the Act to incur certain expenditure except on a two-thirds vote of the shareholders enquiry should be made whether this special provision were observed: *Commercial Bank v. Great Western Railway Company*, 3 Moore N. S. 295 (1865).

A bank is liable also for the torts of its directors committed by them when acting within the scope of their authority, even in the case of fraud and forgery; but the directors in such a case must be acting on behalf of the bank, and not merely to further their private ends: *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 265 (1867); *Weir v. Bell*, 3 Ex. D. 238 (1878); *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103 (1884); *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 717 (1887).

A bank not otherwise liable for the acts of its directors or officers may become so by ratification; but if the act is *ultra vires* the bank, it cannot be ratified even with the assent of the shareholders: *Ashbury Ry. Co. v. Riche*, L. R. 7 H. L. at p. 681 (1875); *Irvine v. Union Bank of Australia*, 2 App. Cas. 366 (1877).

For the qualification of directors, see the next two sub-sections; for the mode of election, see sub-sections 4, 5, 6, and 7; also sections 18 and 25. A director is eligible for re-election only in case he continues to be in all respects duly qualified.

The board may delegate to a committee of its members or to officers of the bank certain matters connected with the business, and may generally delegate the execution of its decisions: *In re Taurine Co.*, 25 Ch. D. 118 (1883).

2. **Qualification.**—Each director shall hold capital stock of the bank as follows:—When the paid-up capital stock is one million dollars or less, each director shall hold stock on which not less than three thousand dollars has been paid up; when the paid-up capital stock is over one million dollars and does not exceed three million dollars, each director shall hold stock on which not less than four thousand dollars has been paid up; and when the paid-up capital stock exceeds three million dollars, each director shall hold stock on which not less than five thousand dollars has been paid up:

The only change introduced by this sub-section is that the respective amounts to be held by directors now require to be paid up; formerly it was sufficient to hold an equal amount of stock if only partly paid up.

The Companies' Acts require a director to own the required number of shares "absolutely in his own right." These words would probably be construed to mean that he must be the beneficial as well as the legal owner. In England where a director was required to hold the shares "in his own right," it was held to be sufficient for him to have the legal, without the beneficial ownership: *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610 (1878). This construction was questioned by Cotton, L.J., but upheld by Lindley, L.J., in *Bainbridge v. Smith*, 41 Ch. D. 462 (1889); and was followed in *Cooper v. Griffin*, [1892] 1 Q. B. 751, and in *Howard v. Sadler*, [1893] 1 Q. B. 1. It would therefore be sufficient if he remained the registered owner of the required number of shares after having pledged or otherwise disposed of them.

It will be observed that the Bank Act does not use even the expression, "in his own right;" it simply requires the director to hold stock on which the required amount has been paid. It would be sufficient if he is the registered owner in the books of the bank of the necessary amount of stock. The bank has no right to look beyond its own register.

Shares transferred to the name of a director so as to give him the necessary qualification, and of which the transferrers remained the beneficial owners, cannot be charged for payment of a judgment debt incurred by the director: *Cooper v. Griffin*, [1892] 1 Q. B. 740.

3. A majority of the directors shall be natural-born or naturalized subjects of Her Majesty:

Under R. S. C. chap. 120, sec. 12, it was necessary that all the directors should be British subjects. In the case of joint stock companies incorporated by special Act, a majority of the directors must be not only British subjects, but must also be resident in Canada: R. S. C. chap. 118, sec. 9. In the case of joint stock companies incorporated by letters patent a majority of the directors must be residents of Canada, but there is no requirement as to their nationality: R. S. C. chap. 119, sec. 30.

4. **Election of directors.**—The directors shall be elected by the shareholders on such day in each year as is appointed by the charter or by any by-law of the bank, and such election shall take place at the head office of the bank at such time of the day as the directors appoint; and public notice thereof shall be given by the directors, by publishing the same for at least four weeks previous to the time of holding such election, in a newspaper published at the place where the said head office is situate: R. S. C. chap. 120, sec. 12, part.

The notice of the annual meeting should be published in the *Canada Gazette* as well as in a local newspaper: sec. 102. The shareholders may fix the day by by-law, the directors name the hour. The shareholders elect one of their number as chairman and appoint a secretary. As a rule the president is elected chairman of the meeting and moves the adoption of the annual report. The shareholders appoint scrutineers to receive and count the ballots. All voting at shareholders' meetings is by ballot. Section 25 declares what shareholders are entitled to vote.

5. **Directors elected.**—The persons, to the number authorized to be elected, who gave the greatest number of votes at any election, shall be directors: R. S. C. chap. 120, sec. 12, sub-sec. 3.

It is not necessary that a director should have a majority of all the votes cast. The number, as fixed by the shareholders, not less than five nor more than ten, who stand highest on the list are elected.

The courts will set aside an election that has been carried by illegal or improper means: *Davidson v. Grange*, 4 Grant 377 (1854); *Re Moore and the Port Bruce Harbor Co.*, 14 U. C. Q. B. 365 (1856); *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175 (1882); *Gilmour v. Hall*, M. L. R. 2 Q. B. 374 (1886). In Quebec the proceeding would now be by *quo warranto* under Art. 987 of the new Code of Procedure.

On a proceeding to test the election of a bank director, it was held that the polling of illegal votes in his favor would not of itself annul his election unless it were shown that some other candidate polled more legal votes: *Gibb v. Poston*, 16 L. C. R. 257 (1866).

In the Province of Quebec a Judge in vacation has power to enquire into the validity of the election of a bank director, as the bank is a public corporation: *Henry v. Simard*, 16 L. C. R. 273 (1866).

6. **A tie—election of president and vice-president.**—If it happens at any election that two or more persons have an equal number of votes and the election or non-election of one or more of such persons as a director or directors depends on such equality, then the directors who have a greater number, or the majority of them, shall determine which of the said persons so having an equal number of votes shall be the director or directors, so as to complete the full number; and the said directors, as soon as may be, after the said election, shall proceed to elect, by ballot, two of their number to be president and vice-president respectively:

The chairman of the shareholders' meeting has no casting vote in case of a tie in the election of directors: sec. 25, sub-sec. 2. It is decided by those directors who are clearly elected.

The president of a bank occupies a very important and responsible position, and yet it is surprising how little is said about him or his office in the Act. The only duties specially assigned to him are: (1) presiding at meetings of the board: sec. 21; (2) executing transfers of forfeited shares: sec. 33; and (3) signing returns to the Government: secs. 85, 86 and 88. The only privilege given him beyond his fellow directors is that of giving a second or casting vote at board meetings in case of a tie: sec. 21. In case of his absence the vice-president takes his place. In practice, the president is usually expected to give more time and attention to the bank than other directors and usually receives additional remuneration therefor; but his powers and duties, other than those above specified, are only such as are expressly or impliedly given or assigned to him by the shareholders or the board by by-law or otherwise.

Where it is alleged that a cheque was given for an illegal purpose, the personal knowledge of the president of the bank of the object for which it was given is not the knowledge of the bank, when the president is not the officer who acts in the matter on behalf of the bank: *Bank of Montreal v. Rankin*, 4 L. N. 302 (1881).

7. **Filling vacancies.**—If a vacancy occurs in the board of directors, such vacancy shall be filled in the manner provided by the by-laws; but the non-filling of the vacancy shall not vitiate the acts of a quorum of the remaining directors; and if the vacancy so created is in the office of the president or vice-president, the directors shall, from among themselves, elect a president or vice-president, who shall continue in office for the remainder of the year.

If the shareholders have not passed a by-law providing for the filling of a vacancy it cannot be filled except at a

special meeting of shareholders. So long as a quorum remains, and this quorum is not less than five, the minimum fixed by section 11, the remaining directors may do business: *Re Scottish Petroleum Co.*, 23 Ch. D. 413 (1883). If the by-law provides that the remaining directors are to fill vacancies, and the number of directors falls below the quorum, a special meeting of shareholders would be necessary to fill the vacancies: *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350 (1885).

Where no by-law on the subject had been passed the directors undertook to fill a vacancy. The quorum of the board was three. A resolution, seconded by the new director at a meeting at which three others were present was upheld, although his appointment was a nullity: *Bank of Liverpool v. Bigelow*, 12 N. S. (3 R. & C.) 236 (1878).

20. Failure of election.—If an election of directors is not made on the day appointed for that purpose, such election of directors may take place on any other day according to the by-laws made by the shareholders in that behalf; and the directors then in office shall remain in office until a new election is made: R. S. C. chap. 120, sec. 15.

If no such by-law has been made, it would be necessary to call a special meeting of the shareholders under section 24, for the election of directors.

21. Presiding officer—casting vote.—At all meetings of the directors, the president, or in his absence the vice-president, or in the absence of both of them, one of the directors present, chosen to act *pro tempore*, shall preside; and the president, vice-president or president *pro tempore* so presiding shall vote as a director, and if there is an equal division on any question shall also have a casting vote. R. S. C. chap. 120, sec. 16.

While the president of a bank usually takes an active part in the management of its affairs, the special powers given to him and the duties specially assigned to him by the Act, beyond those assigned to the directors generally, are very few. Besides the duty of presiding at the meetings

of the board, he is one of the officers named to execute the transfer of forfeited shares which have been sold: sec. 33; he should sign the monthly returns to the Government: sec. 85; special returns when asked for: sec. 86; and the annual returns of sums lying more than five years unclaimed: sec. 88.

The by-laws contemplated by the next section will almost invariably assign to him important duties, especially as to his becoming a party to important contracts on the part of the bank, which may not come within the scope of the duties assigned to the cashier or manager.

- The directors may frame by-laws or rules regulating the transaction of business at meetings of the board; in default of these, the president or presiding director would be governed by the usage of the board, or the well-established rules common to such deliberative bodies. They may make any regulations they choose, except that they cannot override any provision of the Act, or any by-law passed by the shareholders under section 18.

All the business of the board should be transacted at a regularly called meeting attended by a quorum of the directors. The assent of the directors individually elsewhere than at such a meeting will not bind the bank. Full and correct minutes of each meeting should be kept and recorded. Such minutes are usually read and confirmed at the beginning of the next succeeding regular meeting.

22. Powers of directors.—The directors may make by-laws and regulations (not repugnant to the provisions of this Act or the laws of Canada) touching the management and disposition of the stock, property, affairs and concerns of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein, and all such other matters as appertain to the business of a bank: Provided always, that all by-laws of the bank heretofore lawfully made and now in force, in regard to any matter respecting which the directors may make by-laws under this section (including any by-laws for establishing guarantee and pension funds for the employees of the

bank), shall remain in force until they are repealed or altered by others made under this Act. R. S. C. chap. 120, sec. 17.

Under the head of "officers" in this section would be comprised not only those usually designated by that name, but also the president, vice-president, and a managing director, if the bank should have such an officer. These by-laws do not require to be approved by the shareholders.

Such by-laws, while binding upon the shareholders and officers of the bank, are not binding upon third parties unless they are aware of them: *In re Asiatic Banking Corporation*, L. R. 4 Ch. 252 (1869).

23. Appointment of officers.—The directors may appoint as many officers, clerks and servants for carrying on the business of the bank, and with such salaries and allowances, as they consider necessary, and they may also appoint a director or directors for any branch of the bank: R. S. C. chap. 120, sec. 18, sub-sec. 1.

The director or directors appointed for any branch of the bank would be included in the number fixed by by-law passed by the shareholders, and with the other directors should not exceed the maximum of ten. The object would usually be to assign a director, who may not reside where the head office of the bank is situate, to the branch in his own locality to exercise special supervision over it.

Officers and clerks have power to bind the bank in so far as any act done by them is within the scope of the usual duties of such an officer. Parties dealing with them in good faith are not affected by any irregularity in their appointment, or bound by any private directions given to them or special limitations imposed upon them by by-law or otherwise.

The term "officers" in this section would not include the president or vice-president, whose election is provided for in section 19. It would include the manager, cashier, and subordinate officers of the bank. The duties of the manager or cashier and other officers should be defined by

a by-law passed under section 22. As to some of them the name will indicate the duties and scope of their authority. Third parties dealing with them in good faith may assume that they have such powers as are usually possessed by such officers respectively: *Smith v. Hull Glass Co.*, 11 C. B. 897 (1852). The following may be cited as illustrations on this point:

ILLUSTRATIONS.

1. The manager of a bank has not, as such, authority to sell land belonging to the bank, and it is doubtful if a verbal authorization by the directors is sufficient: *Dominion Bank v. Knowlton*, 25 Grant 125 (1877).

2. Where a note was made payable to "The Canadian Bank of Commerce or order" it was endorsed "D. H. Charles, manager." It was urged that the endorsement should have been by and in the name of the bank, under the corporate seal, or at least with the name of the bank added to the manager's name, but the Court did not find it necessary to determine the point: *Small v. Rid-del*, 31 U. C. C. P. 373 (1880).

3. A bank sold lumber held by it as security for advances, and the purchaser required a guarantee which the directors resolved to give after examination by a culler. The manager, however, gave a written guarantee in the name of the bank without employing a culler. The purchaser being in good faith, the bank was held liable on the guarantee: *Dobell v. Ontario Bank*, 3 O. R. 299 (1882).

4. A bank manager is not acting beyond the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specific event: *Grieve v. Molsons Bank*, 8 O. R. 162 (1885).

5. Where a deed of composition was executed by a local manager in the name of the bank under an ordinary seal, it was held not to be binding on the bank, not being under

the corporate seal, nor under a signature or sign manual whereby it executed documents: *Bank of Commerce v. Jenkins*, 16 O. R. 215 (1888).

6. The manager of a bank may deal in the ordinary and proper course of banking business with trading corporations, even though he is interested as a shareholder and director in them, and this is not necessarily a violation of the rule that an agent cannot be allowed to place his duty in conflict with his interests: *Bank of Upper Canada v. Bradshaw*, L. R. 1 P. C. 479; 17 L. C. R. 273 (1867).

7. Where the Bank of Montreal, by its manager, accepted cheques drawn on it by the City Bank, and the latter deposited them for value in the Banque Nationale, it was held that the Bank of Montreal could not refuse its acceptance thus made, and was bound to guarantee and protect the City Bank from all losses thereunder: *Banque Nationale v. City Bank*, 17 L. C. J. 197 (1873).

8. The president and manager of a bank has not, as such, authority to give to a creditor of the bank a considerable amount of the notes discounted by the bank to guarantee a debt existing before the pledge; a special resolution of the board would be necessary: *Exchange Bank v. C. & D. Savings Bank*, 14 R. L. 8 (1885).

9. Where the cashier of a bank borrowed money from a savings bank in his own name, but on the representation that it was for his bank, and the money was paid to him personally and not as cashier, but subsequently changes were made in the books, charging the loan to the bank, the bank having stopped payment, and the new board elected after the suspension not having repudiated the entries for about a year, it was held by the Court of Appeal for Quebec that it was ratified by acquiescence: *City and District Savings Bank v. Jacques Cartier Bank*, 30 L. C. J. 106 (1886). This was reversed by the Privy Council on the ground that the new board had not full knowledge of the facts, and that acquiescence and ratification would not apply to a debt

which the bank never owed: *Banque Jacques Cartier v. C. & D. Savings Bank*, 13 App. Cas. 111 (1887).

10. Where the president and manager of a bank had accepted cheques of a customer and made them payable at a future day, and these were discounted by another bank and paid at maturity by the first named bank, the latter was held liable for cheques subsequently accepted and discounted in the same way, payment having been refused on the ground that the president and manager had exceeded his powers: *Exchange Bank v. People's Bank*, (S. C. Can.) 10 L. N. 362; 7 C. L. T. 387 (1887).

11. A bank which makes a loan and accepts as collateral certain shares of its own stock, which it procures to be transferred to its manager, is liable to the borrower for the return of this stock when the latter has paid the debt, although the transfer was illegal: *Exchange Bank v. Fletcher*, 19 R. L. 377 (1890).

12. Directors cannot divest themselves of their personal responsibility. While they are at liberty to employ such assistants as may be required to carry on the business of the bank, they are nevertheless responsible for the fault and misconduct of the employees, unless the injurious acts complained of are such as could not have been prevented by the exercise of reasonable diligence on their part: *McDonald v. Rankin*, M. L. R. 7 S. C. 44 (1890).

13. Where a cashier whose duty it was to obtain the acceptance of bills of exchange, in which the bank was interested, fraudulently, but without the knowledge of the president or directors, by a material false representation, induced the drawee to accept such a bill, the bank was held liable: *Mackay v. Commercial Bank*, L. R. 5 P. C. 394 (1874).

14. It is no part of the business of the agent of a bank to start a criminal prosecution, and when he does so without special authority the bank is not liable: *Thompson v. Bank of Nova Scotia*, 13 C. L. T. 311 (1893).

15. The local manager of a bank having received a draft, induced the drawee to accept it by falsely representing that certain goods of his own were held by the bank as security for the draft. Held, that the bank was not bound by such representation; that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction, and the duty of the manager to make known to the bank: *Richards v. Bank of Nova Scotia*, 26 S. C. R. 381 (1896).

16. Where an acceptance was indorsed to a bank, and the cashier sued on it in his own name, and the acceptor paid the amount to the cashier, it was held to be a fair inference that this was payment to the bank: *Seeley v. Cox*, 28 N. S. 210 (1896). Affirmed by the Supreme Court of Canada, May 6th, 1896.

17. An officer of a bank occupies a fiduciary position, and any secret profit made by him in connection with the business of the bank, belongs to the bank: *General Exchange Bank v. Horner*, L. R. 9 Eq. 480 (1870).

18. If an officer exceeds his authority, the bank may be bound if the act is within the scope of his employment, and the other party is not aware that he is exceeding his authority: *Bayley v. Manchester, etc., Ry. Co.*, L. R. 8 C. P. 148 (1873).

The powers and duties of a cashier in the United States have been laid down as follows:

He is the chief executive officer through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Subordinate officers may be appointed, but they are under his direction. They may be clothed with power to certify cheques, but this would not affect his right to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation is unknown: *Merchants' Bank v. State Bank*, 10 Wallace (U. S.) at p. 650 (1870).

The ordinary duties of a cashier do not comprehend the making of a contract, which involves the payment of money, without an express authority from the directors, unless it be such as relates to the customary transactions of the bank: *Morse v. Mass. National Bank*, 1 Holmes C. C. (U. S.) 209 (1873); *U. S. v. Bank of Columbus*, 21 Howard (U. S.) 364 (1858).

He may indorse, negotiate and transfer all negotiable paper on behalf of the bank: *Wild v. Bank of Passamaquoddy*, 3 Mason C. C. (U. S.) 505 (1825); but without special authority he has not a right to dispose of non-negotiable paper, or other property the dealing in which is not in the ordinary course of banking: *Barrick v. Austin*, 21 Barbour (N. Y.) 241 (1855).

If the directors, through inattention or otherwise, allow the cashier to pursue a line of conduct for a considerable period without objection, the bank would be bound in favor of parties dealing with him in good faith: *Caldwell v. National Bank*, 64 Barbour (N. Y.) 333 (1869).

2. **Security to be given.**—Before permitting any cashier, officer, clerk or servant of the bank to enter upon the duties of his office, the directors shall require him to give bond, guarantee, or other security to the satisfaction of the directors, for the due and faithful performance of his duties. R. S. C. c. 120, s. 18, s.-s. 2.

The taking of security "for the due and faithful performance of his duties" from each of these officers is compulsory. Directors who neglect this duty might be held personally responsible in case of loss.

A contract of guarantee, by the Statute of Frauds and by Article 1233 of the Civil Code of Quebec, must be in writing. The employment of the person guaranteed is a sufficient consideration for the contract. The relations and liability of the respective parties towards each other will be determined by the laws of the respective provinces on the subject of suretyship, which, however, do not materially differ.

Formerly private bonds were the rule; now the bonds of incorporated guarantee companies are generally given or required. These usually contain special stipulations as to employment, notice of irregularities, etc., which should be carefully examined on behalf of the bank, to see that they fully comply with the requirements of the Act. It is to be borne in mind that a surety's liability is not to be extended beyond the terms of his engagement. As a bond in the terms of the Act would be held to guarantee not only the honesty of the employee, but also his competency for the position, any material change in his position or duties which increases the risk would discharge the surety, unless the contract makes provision for it. Where the agreement between the bank and the employee is made a part of the contract with the surety, a change, even if not material, would bring about the same result. In view of the law being so favorable to the release of sureties, banks cannot be too careful as to the bonds they accept. The following cases will aid in illustrating the law on the subject:

ILLUSTRATIONS.

1. A bond given in favor of an agent of a bank will not cover losses occurring through his fault after his appointment as cashier: *Bank of Upper Canada v. Covert*, 5 U. C. O. S. 541 (1836).

2. Where the bond said nothing about the salary of the employee, the sureties cannot set up as a defence a change in the mode of his remuneration: *Bank of Toronto v. Wilmot*, 19 U. C. Q. B. 73 (1859).

3. Where a bond was given for faithful service "as clerk, or in any other capacity whatsoever," a plea that the clerk was transferred to the position of teller, whereby the risk was increased, is bad: *Royal Canadian Bank v. Yates*, 19 U. C. C. P. 439 (1869).

4. The sureties of an absconding bank cashier are not relieved from liability by showing that the directors employed him in transacting what was not properly banking

business, in the course of which he appropriated the bank funds to his own use; the claim against the sureties being for the money so appropriated by him, and not for losses occasioned by such illegal transactions. Nor are the sureties discharged by the negligence of the directors in not inspecting the books and detecting such misappropriation, unless it amounts to connivance, or such gross negligence as to warrant the inference of fraud: *Springer v. The Exchange Bank*, 14 S. C. Can. 716 (1887).

5. Where a teller was engaged at a salary of £300 per annum, and by the same deed defendants became his sureties, a subsequent reduction of his salary without the consent of the sureties freed them from liability for losses occurring after such reduction: *City Bank v. Brown*, 2 L. C. R. 246 (1852).

6. The allowing by a bank manager of overdrafts, without security, is infidelity and an irregularity within the meaning of a bond guaranteeing the bank against loss by want of integrity, honesty and fidelity, or by negligence, default or irregularity on his part: *Bank of Toronto v. European Assurance Society*, 14 L. C. J. 186 (1870). Affirmed by the Privy Council, 7 R. L. 57 (1875).

7. An employee left a large sum of money in open bags in his room while he went to lunch. In his absence the room was broken into and the money stolen. The company that had guaranteed that he should diligently and faithfully discharge his duties was held liable: *Citizens Ins. Co. v. G. T. R. Co.*, 3 L. N. 312 (1880).

8. A package of bank notes was found to contain \$6,300 less than the amount which the teller had endorsed on it. The fraud had been going on for years, but was skilfully covered up by false entries, so that it had escaped detection during the regular inspections. The company which had guaranteed his fidelity was held liable, but only for \$1,400, the amount taken subsequent to their guarantee: *Banque Nationale v. Lesperance*, 4 L. N. 147 (1881).

9. A bond given in favor of a cashier, for the faithful performance of his duties "as an employee of the bank" does not cover defalcations after he was made managing director and president: *Exchange Bank v. Gault*, 30 L. C. J. 259 (1886).

10. A bank cashier took to his residence bank notes to sign. He brought them back to the bank, and there substituted \$5 notes for \$10 notes. It was held that as the taking of the notes to his house had not contributed to the defalcation, there was no negligence on the part of the bank to avoid the policy, and his act came under the clause guaranteeing against loss caused by "fraud and dishonesty amounting to embezzlement." He also induced the ledger-keeper to certify his cheques for a large sum, although he had no funds, and some of these were paid. This was also held to come under the same clause. The bank gave notice to the guarantee company the day after his fraud was discovered. This was held to be in reasonable time, and the fact that after his absconding the bank followed him and recovered a large part of the money, did not relieve the guarantee company, as there remained a loss exceeding the amount of the policy: *London Guarantee Co. v. Hochelaga Bank*, Q. R. 3 Q. B. 25 (1893).

11. A bond given for the good conduct of an employee, "a clerk," does not cover defaults after he became manager, it being shewn conclusively that he ceased to be clerk when he became manager: *Anderson v. Thornton*, 3 Q. B. 271 (1842).

12. Moneys received by an agent not in pursuance of the particular agency disclosed to the surety in the bond, are not covered by a general clause as to handing over moneys received: *Napier v. Bruce*, 8 Cl. & F. 470 (1842).

13. Where a bank without the consent of the surety made a new arrangement with a clerk increasing his salary, and also increasing his liability, the surety was held to have been relieved: *Bonar v. Macdonald*, 3 H. L. Cas. 226 (1850).

14. Where the mode of payment of the employee is recited in the bond, and this is changed, it may operate to discharge the surety: *London & N. W. Ry. Co. v. Whinray*, 10 Exch. 77 (1854).

15. A surety guaranteeing the honesty of an employee is not relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. Mere passive inactivity is not enough; there must be some positive act done to the prejudice of the surety, or such degree of negligence as to imply connivance and to amount to fraud: *Black v. Ottoman Bank*, 8 Jur. N. S. (P. C.) 801 (1862).

16. If the insured should be guilty of dishonesty and the bank retain him in its service without the knowledge or consent of the surety, express or implied, it will have no recourse against the surety for any subsequent loss: *Phillips v. Foxall*, L. R. 7 Q. B. 666 (1872); *Sanderson v. Aston*, L. R. 8 Ex. 73 (1873).

17. A bond well and truly to execute the duties of cashier or teller of a bank, includes not only honesty, but reasonable skill and diligence. If, therefore, he performs those duties negligently and unskilfully, or if he violates them from want of capacity and care, the condition of the bond is broken: *Barrington v. Bank of Washington*, 14 Sergeant & Rawle (Pa.) 405 (1826); *American Bank v. Adams*, 12 Pickering (Mass.) 303 (1832); *Minor v. Mechanics' Bank*, 1 Peters 46 (1828).

18. Where the bond was given in favor of an assistant bookkeeper in a bank, that he should faithfully discharge the trust reposed in him as such assistant bookkeeper, and while keeping a journal which until after the bond was given had been kept by the teller, he embezzled money and made fraudulent entries in this journal to conceal his crime, it was held that the sureties were not relieved: *Rochester City Bank v. Elwood*, 21 N. Y. 88 (1860). See also *Detroit Savings Bank v. Ziegler*, 49 Mich. 157 (1882).

Several of the banks have latterly established guarantee funds of their own.

- 24. Special general meetings.**—The directors of the bank, or any four of them,—or any number not less than twenty-five of the shareholders of the bank, who are together proprietors of at least one-tenth of the paid-up capital stock of the bank, by themselves or by their proxies,—may, at any time, call a special general meeting of the shareholders, to be held at their usual place of meeting, upon giving six weeks' previous public notice, specifying in such notice the object of such meeting: R. S. C. chap. 120, sec. 11, sub-sec. 1.

The public notice of such special meeting should be published for six weeks in one or more newspapers published at the place where the head office of the bank is situate, and also in the *Canada Gazette*: sec. 102. No business can come before the meeting except that specified in the notice. The proxies should be less than two years old, as in the next section.

Notices of special meetings are not to be construed with excessive strictness, provided they give the shareholders fair notice of what is proposed to be done: *Wright's Case*, L. R. 12 Eq. 335*n* (1871). Notice of a meeting for "special business" is not sufficient for such a meeting: *Wills v. Murray*, 4 Ex. 843 (1850).

- 2. Removal of president, etc.**—If the object of any such special general meeting is to consider the proposed removal of the president or vice-president, or of a director of the bank, for maladministration of other specified and apparently just cause, and if a majority of the votes of the shareholders at such meeting is given for such removal, a director to replace him shall be elected or appointed in the manner provided by the by-laws of the bank, or if there are no by-laws providing therefor, then by the shareholders at such meeting; and if it is the president or vice-president who is removed, his office shall be filled by the directors in the manner provided in case of a vacancy occurring in the office of president or vice-president. R. S. C. chap. 120, sec. 11, sub-sec. 2.

In the absence of such special power as is contained in this section, the shareholders would have no right to remove the president, vice-president or a director; but they would hold office for the year for which they were elected, unless removed by the Court.

The cause of complaint should be specified in the notice. If the proceeding be *bona fide* the Courts will not interfere with the discretion of the shareholders. The voting on the question of removal must be by ballot: sec. 25. When a vacancy has been created by such a vote the vacant place on the board will be filled in the manner provided by the by-laws of the bank. If there be no by-law on the subject the shareholders will fill the place on the board by a ballot vote at such meeting. In such a case this should be mentioned in the notice. If it should be the president or vice-president that was thus removed, the board, as thus filled up, would elect a successor in the manner provided by section 19, sub-sections 6 and 7.

25. Votes on shares—ballot.—Every shareholder shall, on all occasions on which the votes of the shareholders are taken, have one vote for each share held by him for at least thirty days before the time of meeting; and in all cases when the votes of the shareholders are taken, the voting shall be by ballot: R. S. C. chap. 120, sec. 10, in part.

“One vote for each share.” If some shares are fully paid up and others only partly, the latter have equal voting right with the former: *Purdom v. Ontario Loan and Debiture Co.*, 22 O. R. 597 (1892).

No shares which have been transferred within the thirty days preceding the meeting can be voted upon by either party.

The meeting may appoint scrutineers, although the Act is silent on the point: *Wandsworth Co. v. Wright*, 22 L. T. N. S. 404 (1870).

A candidate for the office of director should not be a scrutineer on a vote for the election of directors: *Dickson v. McMurray*, 28 Grant 533 (1881).

A shareholder may vote although not present when the poll was demanded: *Campbell v. Maund*, 5 A. & E. 865 (1836).

The poll should be kept open until all the votes present are recorded: *Reg. v. Wimbledon*, 8 Q. B. D. 459 (1882); *Reg. v. St. Pancras*, 11 A. & E. 15 (1839); *Reg. v. Lambeth*, 8. A. & E. 356 (1838).

2. **Majority to determine.**—All questions proposed for the consideration of the shareholders shall be determined by the majority of the votes of the shareholders present in person or represented by proxy; and the chairman elected to preside at any such meeting of the shareholders shall vote as a shareholder only, unless there is a tie,—in which case, except as to the election of a director, he shall have a casting vote: R. S. C. chap. 120, sec. 10, in part.

At all meetings of shareholders they have the right to elect any one of their number as chairman. The secretary does not need to be a shareholder. In many bodies certain questions require a two-thirds or three-fourths vote; but at meetings of bank shareholders a bare majority of the shares present and voting is sufficient in nearly all cases. A by-law to reduce the stock requires a majority of the whole stock: sec. 27. A shareholder is not disqualified because he has a personal pecuniary interest in the question: *N. W. Transportation Co. v. Beatty*, L. R. 12 A. C. 589 (1887).

3. **Joint holders of shares.**—If two or more persons are joint holders of shares, any one of such joint holders may be empowered, by letter of attorney from the other joint holder or holders, or a majority of them, to represent the said shares, and vote accordingly: R. S. C. chap. 120, sec. 10, in part.

Joint holders of shares, such as executors, trustees, a firm, or the like, may either all join in a proxy to another shareholder, or one of them may be authorized by the others, or a majority of them, to act. "When an act or thing is required to be done by more than two persons, a majority of them may do it": Interpretation Act, R. S. C. chap. 1, sec. 7 (42). They might also all attend and act jointly.

4. **Proxies.**—Shareholders may vote by proxy, but no person other than a shareholder eligible to vote shall be permitted to vote or act as such proxy, and no manager, cashier, clerk or other subordinate officer of the bank shall vote either in person or by proxy, or hold a proxy for that purpose: R. S. C. chap. 120, sec. 10, in part.

The word "manager" in this clause would probably not be held to apply to a managing director in a bank which has such an officer. In the Bank Act of 1843 the expression was the "cashier or other officer," and it was held that the president was not an officer within the meaning of that clause: *Reg. v. Bank of Upper Canada*, 2 U. C. Q. B. 338 (1848).

5. **Renewal of proxies.**—No appointment of a proxy to vote at any meeting of the shareholders of the bank shall be valid for that purpose unless it has been made or renewed in writing within the two years next preceding the time of such meeting: R. S. C. chap. 120, sec. 14.

Under the former Act a proxy was good for three years.

6. **Calls payable before voting.**—No shareholder shall vote, either in person or by proxy, on any question proposed for the consideration of the shareholders of the bank at any meeting of such shareholders, or in any case in which the votes of the shareholders of the bank are taken, unless he has paid all calls made by the directors which are then due and payable. R. S. C. chap. 120, sec. 13.

CAPITAL STOCK.

26. **Increase of capital.**—The capital stock of the bank may be increased from time to time, by such percentage or by such amount, as is determined upon by by-law passed by the shareholders, at the annual general meeting, or at any special general meeting called for the purpose: Provided always, that no such by-law shall come into operation, or be of any force or effect, unless and until a certificate approving thereof has been issued by the Treasury Board:

Before the present Act the capital could only be increased by a special Act of Parliament. The by-law for such increase may be passed at the annual general meeting without previous notice; but, if done without due notice, dissatisfied shareholders can oppose it before the Treasury Board.

2. **Conditions of application.**—No such certificate shall be issued by the Treasury Board unless application therefor is made within three months from the time of the passing of such by-law, nor unless it appears to the satisfaction of the Treasury Board that a copy of such by-law, together with notice of intention to apply for such certificate, has been published for at least four weeks in the Canada Gazette, and in one or more newspapers published in the place where the chief office or place of business of the bank is situate; nothing herein contained, however, shall be construed to prevent the Treasury Board from refusing to issue such certificate if it thinks best so to do.

Any dissatisfied shareholders would in this way have an opportunity of laying their grounds of objection before the Treasury Board.

The last clause was no doubt inserted to prevent the recurrence of such a case as that of *The Massey Manufacturing Co.*, 13 Ont. A. R. 446 (1886), where it was held that under the Ontario Letters Patent Act the Provincial Secretary was obliged to issue the notice of an increase of capital, when the conditions were complied with, and that he could exercise no discretion in the matter.

27. **Allotment of stock.**—Any of the original unsubscribed capital stock, or of the increased stock of the bank, shall, when the directors so determine, be allotted to the then shareholders of the bank *pro rata*, and at such rate as is fixed by the directors, but no fraction of a share shall be so allotted; provided that in no case shall a rate be fixed by the directors, which will make the premium (if any) paid or payable on such stock so allotted exceed the percentage which the reserve fund of the bank then bears to the paid-up capital stock thereof; and any of such allotted stock which is not taken up by the shareholder to

whom such allotment has been made, within six months from the time when notice of the allotment was mailed to his address, or which he declines to accept, may be offered for subscription to the public, in such manner and on such terms as the directors prescribe.

It will be seen that when offering this stock to the shareholders a maximum premium is prescribed. When offered to the public the directors have full power to fix the rate. They cannot, however, offer it below par. If they should do so the purchasers would be liable to be called upon to pay the difference between the amount paid by them and the par value of their shares: *Oregum Gold Mining Co. v. Roper*, [1892] A. C. 125; *Ex parte Welton*, [1895] 1 Ch. 255. If, however, the stock had passed into the hands of a *bona fide* purchaser for value without notice of the irregularity, he would not be liable to pay such difference: *McCraken v. McIntyre*, 1 S. C. Can. 479 (1877); *Burkinshaw v. Nicolls*, L. R. 3 A. C. 1004 (1878); *Parbury's Case*, [1896] 1 Ch. 100; *Bloomenthal v. Ford*, [1897] A. C. 156.

28. Reduction of capital.—The capital stock of the bank may be reduced by by-law passed by the shareholders at the annual general meeting, or at a special general meeting called for the purpose; but no such by-law shall come into operation or be of force or effect until a certificate approving thereof has been issued by the Treasury Board:

Before the present Act a special Act of Parliament was required for reducing the stock, as well as for increasing it.

2. Conditions of application.—No such certificate shall be issued by the Treasury Board unless application therefor is made within three months from the time of the passing of the by-law, nor unless it appears to the satisfaction of the Board that the shareholders voting for such by-law represent a majority in value of all the shares then issued by the bank, and that a copy of the by-law, together with notice of intention to apply to the Treasury Board for the issue of a certificate approving thereof, has been published for at least four weeks in the *Canada Gazette*, and in one

or more newspapers published in the place where the chief office or place of business of the bank is situate; nothing herein contained, however, shall be construed to prevent the Treasury Board from refusing to issue such certificate if it thinks best so to do:

As to the last clause, see the note on section 26, sub-section 2. This is one of the few things in the Act which require a special majority. The affirmative vote at the meeting where the by-law is considered must be more than half the total shares of the bank.

Sub-section 6 provides that in no case shall the capital of the bank be reduced below \$250,000.

3. **Statements to be submitted.**—In addition to evidence of the passing of the by-law and the publication thereof in the manner above provided, statements showing the amount of stock issued and the number of shareholders, with the amount of stock held by each, represented at such meeting, and the number of shareholders, with the amount of stock held by each, who voted for such by-law, and also full statements of the assets and liabilities of the bank, together with a statement of the reasons and causes why such reduction is sought, shall be laid before the Treasury Board at the time of the application for the issue of a certificate approving such by-law:
4. **Liability not affected.**—The passing of such by-law, and any reduction of the capital stock of the bank thereunder, shall not, in any way, diminish or interfere with the liability of the shareholders of the bank to the creditors thereof at the time of the issue of the certificate approving such by-law:
5. **Conditions regarding reduction.**—If, in any case, legislation is sought to sanction any reduction of the capital stock of any bank, a copy of the by-law or resolution passed by the shareholders in regard thereto, together with statements similar to those above provided to be laid before the Treasury Board, shall be filed with the Minister of Finance and Receiver-General, at least one month prior to the introduction into Parliament of the Bill relating to such reduction:

6. **Minimum reduction.** — The capital shall not be reduced below the amount of two hundred and fifty thousand dollars of paid-up stock.

SHARES AND CALLS.

29. **Shares and their transfer.**—The shares of the capital stock of the bank shall be personal estate, and shall be assignable and transferable at the chief place of business of the bank, or at such of its branches, or at such place or places in the United Kingdom, or in any of the British colonies or possessions, and according to such form, and subject to such rules and regulations, as the directors prescribe; and books of subscription may be opened, and the dividends accruing on any shares of such stock may be made payable at any of the places aforesaid; and the directors may appoint such agents in the United Kingdom, or in any of the British colonies or possessions, for the purposes of this section, as they deem necessary. R. S. C. chap. 120, secs. 19 & 29, in part.

Shares in a bank would be personal estate without any declaration to that effect in the Act: *Humble v. Mitchell*, 11 A. & E. 205 (1839); C. C. Art. 387. They would not be included in the expression "goods, wares, and merchandise": *Knight v. Barber*, 16 M. & W. 66 (1846); *Humble v. Mitchell*, *supra*. They are not "securities," and would not pass under a bequest of bonds, moneys, and securities: *Ogle v. Knipe*, L. R. 8 Eq. 434 (1869); *Collins v. Collins*, L. R. 12 Eq. 455 (1871); *Hudleston v. Gouldsbury*, 10 Beav. 547 (1847). They are property, and are, properly speaking, choses in action: *Colonial Bank v. Whinney*, 11 A. C. 426 (1886); *Atty.-Gen. v. Montefiore*, 21 Q. B. D. 461 (1888). In the *Bank of Montreal v. Simpson*, 6 L. C. J. 1, and 14 Moore P. C. 417 (1861), it was held that bank shares under the old French law were an *immeuble fictif*, and a tutor could not sell them without observing the formalities for the sale of immovables by him. Under Art. 387 C. C. they are now movables.

As to the transfer of shares, see section 35 and the notes thereon.

Where a bank had its head office in Ontario, a sale by a bailiff of certain shares at the branch office in Montreal, under an execution from the Superior Court there, was upheld, although it did not appear that the directors had established a share register at that branch, and the proper officers were directed to execute a transfer to the purchaser at the head office: *In re Bank of Ontario*, 44 U. C. Q. B. 247 (1879).

- 30. Payment of shares.**—The shares of the capital stock shall be paid in by such instalments and at such times and places as the directors appoint: Provided always, that the directors may cancel any subscription for any share unless a sum equal to ten per cent. at least on the amount subscribed for is actually paid at the time of, or within thirty days after the time of subscribing; but such cancellation shall not relieve the subscriber from his liability to creditors in the event of insolvency as hereinafter provided. R. S. C. chap. 120, sec. 20, in part.

See the next section as to the amount of calls, the necessary interval between them, and the mode of payment.

The Act contemplates that all shares shall be paid in full, or that a liability shall remain for the amount unpaid. No authority is given to issue shares at a discount; but any not originally subscribed for may be issued at a premium by the directors after organization, or in case of the increase of the capital stock: sec. 27. If issued at a discount or as fully paid up when not actually paid, a shareholder would be liable to creditors, or to a liquidator in case of winding up, for the amount unpaid. A person, who would afterwards accept a transfer of such stock in good faith and in ignorance of the irregularity would not be liable: *McCraken v. McIntyre*, 1 S. C. Can. 479 (1877); *Neelon v. Thorold*, 22 S. C. Can. 390 (1893); *N. W. Electric v. Walsh*, 29 S. C. Can. at p. 50 (1898); *In re The Ontario Express Co.*, 21 Ont. A. R. 646 (1894).

Where a person lent money to a company and was to receive fully paid up shares, which he accepted in good faith, believing them to be paid up, the liquidator was held to be

estopped, and his name was removed from the list of contributors: *Bloomenthal v. Ford*, [1897] A. C. 156.

The right given to the directors to cancel subscriptions to stock would apply not only to stock offered by themselves, but also to original subscriptions of stock during the term of office of the provisional directors. Under the former Act no share was lawfully subscribed unless at least ten per cent. was paid within thirty days.

The last clause of the section is new, and no doubt was added in view of the objection that was raised in the matter of the *Central Bank of Canada, Baines' Case*, 16 Ont. A. R. 237 (1889), that a shareholder was not obliged to pay the double liability because the ten per cent. was not paid within the thirty days. The Court of Appeal affirmed the judgment of the Chancellor, holding the shareholder liable on the ground that the subsequent payment for the stock was equivalent to a new subscription, and that the shareholder, by his subsequent payment, etc., was estopped from denying that he was a shareholder. This was subsequently affirmed in *Nasmith's Case* in the same matter: 18 Ont. A. R. 209 (1891).

It is worthy of notice that the Act does not say that the calls shall bear interest when not paid at the time fixed. The Companies' Acts, R. S. C. chaps. 118 and 119, provide that calls shall bear interest from the day appointed for payment. Is the omission of all reference to interest in the Bank Act intentional? And if so, is the penalty of ten per cent. on the amount of the shares on which the unpaid call has been made intended as a substitute for interest? The effect of the omission will probably be to leave the question of interest to be determined by the law of the respective provinces. In *Hughes v. La Compagnie de Villas*, M. L. R. 5 S. C. 129 (1889), it was held that the Quebec statute relating to building societies did not authorize interest on calls not paid when due.

31. Calls on shares.—The directors may make such calls of money from the several shareholders for the time

being, upon the shares subscribed for by them respectively, as they find necessary:

2. Such calls shall be made at intervals of not less than thirty days, and upon notice to be given at least thirty days prior to the day on which such call shall be payable; and no such call shall exceed ten per cent. of each share subscribed. R. S. C. chap. 120, sec. 21.

The calls are to be "of money." The corresponding expression in the English and Canadian Companies' Acts is that they are to be paid "in cash." In construing this latter term the Courts have upheld honest transactions in which no cash has passed; they have treated payment in cash as equivalent to payment within the meaning of a plea of payment as distinguished from set-off, or accord and satisfaction; *Fothergill's Case*, L. R. 8 Ch. 270 (1873); *Spargo's Case*, *ibid.* 407 (1873). The latter case was approved and followed by the Privy Council in *Larocque v. Beauchemin*, [1897] A. C. 358, an appeal from the Province of Quebec, where the statute required payment to be made "in cash." In a case in the House of Lords, *Ooregum Gold Mining Co. v. Roper*, [1892] A. C., Lord Watson says, at p. 136:—"It has been decided that under the Act of 1862 shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature, where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may overestimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined."

For illustrations of colourable transactions where shareholders were held liable, see *Union Bank v. Morris*, and *Union Bank v. Code*, 27 Ont. A. R. 396 (1900); *Welton v. Saffery*, [1897] A. C. at p. 329; *North Sydney Co. v. Higgins*, [1899] A. C. at p. 272.

A statement of an account in which there would be a balance payable to the shareholder in cash would be sufficient: *Coates' Case*, L. R. 17 Eq. 169 (1873); *Adamson's Case*, L. R. 18 Eq. 670 (1874); *Barrow-in-Furness Co.*, 14 Ch. D. 400 (1880). But where the original subscription is based upon an agreement that the stock shall be paid for in property or services, such an agreement is not binding: *National Insurance Co. v. Hatton*, 24 L. C. J. 26 (1879); *Compagnie de Navigation v. Christin*, 4 L. N. 162 (1880); *Smart v. Bowmanville Machine Co.*, 25 U. C. C. P. 503 (1875); *Pagin and Gill's Case*, 6 Ch. D. 681 (1877); *Burkinshaw v. Nicolls*, 3 A. C. 1004 (1878); *White's Case*, 12 Ch. D. 511 (1879); *Barrow's Case*, 14 Ch. D. 432 (1880).

A call can be made only at a meeting of directors duly called at which a quorum is present: *Bank of Liverpool v. Bigelow*, 12 N. S. (3 R. & C.) 236 (1878); *Ontario Marine Insurance Co. v. Ireland*, 5 U. C. C. P. 139 (1855). It may be made by by-law or resolution. It must fix the time and place for payment: *In re Cawley Co.*, 42 Ch. D. at p. 236 (1889); *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 694 (1877). It is made in point of time when the by-law or resolution is passed, and not when notice of it is given to the shareholder: *Reg. v. Londonderry Ry. Co.*, 13 Q. B. 998 (1849); R. S. C. chap. 19, sec. 39. Where directors passed a resolution for a call but left the date of payment in blank, and some time afterwards a resolution was passed fixing the date of payment, it was held that no proper call was made until the date of the second resolution: *In re Cawley Co.*, 42 Ch. D. 209 (1889).

Only one call should be made in a single by-law or resolution. There should be an interval of not less than thirty days, not only between the dates of payment of successive calls, but also between the actual making of them: *Robertson*

v. *Banque d'Hochelaga*, 4 L. N. 314 (1881); *Gilman v. Court*, 13 R. L. 619 (1882); *Exchange Bank v. Darling*, 16 R. L. 649 (1884); *Exchange Bank v. Campbell*, 17 R. L. 246 (1885); *Bank of Nova Scotia v. Forbes*, 16 N. S. (4 R. & G.) 295 (1883); *St. John Bridge Co. v. Woodward*, 3 N. B. (1 Kerr) 29 (1840).

“Not less than thirty days” and “at least thirty days” mean thirty clear days, that is, exclusive of both the first and last days: *Reg. v. Salop*, 8 A. & E. 173 (1838); *Mitchell v. Forster*, 12 A. & E. 472 (1840); *Young v. Higgon*, 6 M. & W. 49 (1840).

Shareholders are entitled to thirty clear days' notice before the day fixed for payment of a call. The Act does not say how this notice shall be given. Public notices are to be given by advertisement in one or more newspapers published at the head office, and in the *Canada Gazette*: sec. 102. It would be prudent in the case of calls, besides the above public notice, to send a notice to each shareholder by registered letter: *Union Fire Ins. Co. v. Fitzsimmons*, 32 U. C. C. P. 602 (1882); *Ross v. Converse*, 27 L. C. J. 143 (1883).

In the case of insolvency of a bank, the directors may make any number of calls by one resolution: sec. 92, sub-sec. 2.

32. Recovery of calls.—The directors may, in case of the non-payment of any call, in the corporate name of the bank, sue for, recover, collect and get in all such calls, or may cause and declare such shares to be forfeited to the bank. R. S. C. chap. 120, sec. 22, in part.

The shareholder who does not pay a call when due incurs a penalty of ten per cent. of the amount of the shares in default: sec. 33. This is not limited to the case of forfeiture provided for by the next section, and it would appear that the penalty may be sued for and recovered along with the call. In view of the imposition of this penalty,

it is doubtful if interest can be recovered on the calls. The Companies' Act, R. S. C. chap. 119, provides for interest but no penalty: secs. 39 and 42.

Instead of suing, the directors have the option of declaring the stock forfeited. If, however, the bank has threatened to sue, it cannot forfeit the stock without a notice to the shareholder that it intends to do so: *Robertson v. Banque d'Hochelega*, 4 L. N. 314 (1881).

Forfeiture being a penal provision, its operation will be kept strictly within the limits prescribed by the Act, and what in ordinary cases might be considered trifling irregularities may suffice to have it declared invalid and set aside: *Clarke v. Hart*, 6 H. L. C. 633 (1858); *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687 (1877); *In re New Chile Gold Mining Co.*, 45 Ch. D. 598 (1890).

The procedure for carrying out such forfeiture is laid down in the next section.

33. Forfeiture of shares.—If any shareholder refuses or neglects to pay any instalment upon his shares of the capital stock at the time appointed therefor, such shareholder shall incur a penalty to the use of the bank of a sum of money equal to ten per cent. on the amount of such shares; and if the directors declare any shares to be forfeited to the bank they shall, within six months thereafter, without any previous formality other than thirty days' public notice of their intention so to do, sell at public auction the said shares, or so many of the said shares as shall, after deducting the reasonable expenses of the sale, yield a sum of money sufficient to pay the unpaid instalments due on the remainder of the said shares and the amount of penalties incurred upon the whole; and the president or vice-president, manager or cashier of the bank shall execute the transfer to the purchaser of the shares so sold; and such transfer shall be as valid and effectual in law as if it had been executed by the original holder of the shares thereby transferred; but the directors, or the shareholders at a general meeting, may, notwithstanding anything in this section contained, remit, either in

whole or in part, and conditionally or unconditionally, any forfeiture or penalty incurred by the non-payment of instalments as aforesaid, or the bank may enforce the payment of any call or calls by suit, instead of declaring the shares forfeited. R. S. C. chap. 120, sec. 23.

To render a shareholder liable to the penalty of ten per cent., or to the forfeiture of his shares, the Act must have been strictly complied with. While the acts of directors *de facto* in dealing with outsiders would be valid and would bind the bank in favor of parties acting in good faith, yet irregularity in the election of directors or violation of the by-laws might be set up by shareholders as an answer to a call or forfeiture: *Garden Gully Co. v. McLister*, 1 A. C. 39 (1875).

The business of a company was to be conducted by not less than five nor more than seven directors, and power was given to fix a quorum. A quorum of four was fixed, but this was done irregularly; these four made a call and afterwards declared the stock forfeited for non-payment. It was held that the call and forfeiture were invalid: *In re Alma Spinning Co., Bottomley's Case*, 16 Ch. D. 681 (1881).

Where the bank notified a shareholder that in default of payment they would sue, it was held that they had no right to forfeit his stock without further notice: *Robertson v. Banque d'Hochelega*, 4 L. N. 314 (1881).

The secretary sent a notice that unless a call was paid with interest from the day it was made it would be forfeited. Interest actually only ran from the date of payment. The forfeiture was consequently set aside: *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687 (1877).

When the rules required a notice after default in payment, and this was not given, the forfeiture was declared invalid: *In re New Chile Co.*, 45 Ch. D. 598 (1890).

34. Recovery by suit.—In any action brought to recover any money due on any such call it shall not be necessary to set forth the special matter in the declaration or statement of claim, but it shall be sufficient

to allege that the defendant is holder of one share or more, as the case may be, in the capital stock of the bank, and is indebted to the bank for a call or calls upon such share or shares, in the sum to which the call or calls amount, as the case may be, stating the amount and number of such calls, whereby an action has accrued to the bank to recover the same from such defendant by virtue of this Act; and it shall not be necessary to prove the appointment of the directors. R. S. C. chap. 120, sec. 22, sub-sec. 2.

TRANSFER AND TRANSMISSION OF SHARES.

- 35. Conditions of transfer.**—No assignment or transfer of the shares of the capital stock of the bank shall be valid unless it is made and registered and accepted by the person to whom the transfer is made, in a book or books kept for that purpose, nor unless the person making the same has, if required by the bank, previously discharged all his debts or liabilities to the bank which exceed in amount the remaining stock, if any, belonging to such person, valued at the then current rate; and no fractional part of a share, or less than a whole share, shall be assignable or transferable R. S. C. chap. 120, sec. 29, in part.

The directors have the right to prescribe the form for the transfer and acceptance of stock. They may keep stock registers for such transfers not only at the head office of the bank, but at any other place in the British Empire: sec. 29.

The parties to such transfers must be persons capable of contracting. These transfers may be set aside on the same grounds as other contracts, as infancy, incapacity, fraud, etc. Thus, when a father executed a transfer of certain shares in a bank to his minor son, and purported to accept the transfer on behalf of his son, and the bank acted upon the transfer and paid him dividends, it was held that the transfer was void for want of legal acceptance: *Walsh v. Union Bank*, 5 Q. L. R. 289 (1879). Where a father subscribed for stock in the name of his infant daughter, and nine months after coming of age she took

steps to have her name removed from the list of contributors, it was held that she was entitled to this relief: *Re Central Bank and Hogg*, 19 O. R. 7 (1890).

The Ontario Letters Patent Act contained a provision as to the registration of transfers nearly in the same terms as this section. A company incorporated under it had issued a certificate to a registered owner with an indorsement that the shares were transferable only on the surrender of the certificate. He sold the shares and made over the certificate to the purchaser. He sold them to another purchaser who bought in good faith and had the transfer duly made in the books of the company. It was held that the first purchaser had lost his claim on the stock by not having his transfer registered, and that the company could waive the production of the certificate: *Smith v. Walkerville Iron Co.*, 23 Ont. A. R. 95 (1896). *Williams v. Colonial Bank*, 38 Ch. D. 388 (1888), was relied upon as an authority.

On account of the double liability which attaches to bank stock, transferees often seek to escape responsibility, in case of insolvency, by claiming that the transfers to them or their predecessors are invalid for want of compliance with this section. In the case of the Central Bank, where the seller signed a transfer in blank, subject, by a marginal note, to the order of a broker, and the purchaser designated by the broker signed the acceptance, it was held to be a sufficient compliance with the Act: *Re Central Bank*, 16 Ont. A. R. 237 (1889). In the same matter, where a purchaser did not sign the acceptance, but dealt with the shares by selling and signing the transfer of them to another person, it was held that the latter was estopped from setting up the irregularity, and was properly placed on the list of contributors: *Re Central Bank, Nasmith's Case*, 16 O. R. 293 (1888); affirmed in appeal, 18 Ont. A. R. 209 (1891). Also that after a winding-up order has been made, it is too late for a shareholder who has accepted the transfer of certain shares to set up irregularities in previous transfers of these shares: *Re Central Bank, Home Savings and Loan Co.'s Case*, 18 Ont. A. R. 489 (1891).

Where there was no valid transfer of the shares under the Act, but defendant had paid calls, given a receipt for a dividend and combined with others in appointing a proxy, he was held to be a shareholder and liable for calls: *Bank of Liverpool v. Bigelow*, 12 N. S. (3 R. & C.) 236 (1878).

If a transfer be made in blank the transferee has implied power to fill up the blanks: *In re Tahiti Cotton Co.*, L. R. 17 Eq. 273 (1873).

"Debts or liabilities to the bank" would include not only all sums actually due and payable, and those maturing but not due, when the shareholder is the principal debtor, but also all sums for which he would be liable only secondarily or conditionally as endorser, surety or the like. It would also include stock not yet called up, so that the bank might refuse to register a transfer of stock not fully called and paid up, if it was not satisfied to accept the purchaser for the amount. Under the Act of 1871, it was only debts due to the bank that the shareholder could be obliged to pay, if so required, in order to have his transfer allowed. Under that Act it was held that the bank was obliged to allow a transfer of partly paid-up stock: *Smith v. Bank of Nova Scotia*, 8 S. C. Can. 558 (1883). A bank has a lien on the stock held in it by a member of a firm for a debt due to it by such firm: *In re Chinic*, 14 Q. L. R. 289 (1888).

When a bank gives a statement to an intending purchaser of the amount of its lien on certain shares, but before the transfer of the stock other liabilities accrue, it may hold the stock until the latter are paid: *Cook v. Royal Canadian Bank*, 20 Grant 1 (1873).

See section 65 as to a like claim on dividends and as to the mode of realizing the lien on such stock.

In *Smith v. Bank of Nova Scotia*, 8 S. C. Can. 558 (1883), it was held that a resolution adopted at a meeting of shareholders, authorizing a loan on behalf of the bank and agreeing to hold their stock until this loan was fully paid, did not bind a shareholder who was not at the meeting although he joined in a bond as surety for the loan, and the

bank had no right to refuse to transfer his stock. In *Barss v. Bank of Nova Scotia*, 18 N. S. (6 R. & G.) 254 (1885), a shareholder who was present at the meeting in question was held entitled to have the transfer of his stock registered.

If a bank should, without good cause, refuse to allow a transfer to be registered, it would be liable for the damages sustained by such refusal. The bank is entitled to a reasonable time to decide: *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618.

36. List to be kept.—A list of all transfers of shares registered each day in the books of the bank, showing the parties to such transfers and the number of shares transferred in each case, shall be made up at the end of each day and kept at the chief place of business of the bank, for the inspection of its shareholders. R. S. C. chap. 120, sec. 30.

37. Transferrer must be registered owner.—All sales or transfers of shares, and all contracts and agreements in respect thereof, hereafter made or purporting to be made, shall be null and void (saving however, as to a purchaser not having knowledge of the defect, his rights and remedies under the contract of sale), unless the person making such sale or transfer, or in whose name or on whose behalf the same is made, is at the time thereof the registered owner in the books of the bank of the share or shares so sold or transferred, or intended or purported so to be, or has the registered owner's assent to the sale; and the distinguishing number or numbers of such share or shares, if any, shall be designated in the contract or agreement of sale or transfer; and any person, whether principal, broker or agent, who violates the provisions of this section by wilfully selling or transferring, or attempting to sell or transfer, any share or shares by a false number, or of which the principal is not, at the time of such sale or attempted sale, the registered owner, or acting with the registered owner's assent to the sale, shall be guilty of an offence against this Act.

This section was not in the former Bank Act, and was designed to prevent gambling in bank shares, or engaging

in transactions which are really betting on the rise or fall of the stock in the market. It applies to the Bank of British North America as well as to the other banks; but the other sections, from 8 to 46 inclusive, do not apply to it: section 6.

When the transferrer has as many shares as are mentioned or more, but the numbers do not correspond, the transfer is not necessarily void; the figures might afterwards be rectified: *In re International Contract Co.*, L. R. 7 Ch. 485 (1872).

The penalty for an offence against this section is found in section 101, and is a fine not exceeding \$1,000, or imprisonment for a term not exceeding five years, or both.

38. Sale under execution.—When any share of the capital stock has been sold under a writ of execution, the officer by whom the writ was executed shall, within thirty days after the sale, leave with the bank an attested copy of the writ, with the certificate of such officer indorsed thereon, certifying to whom the sale has been made; and thereupon (but not until after all debts and liabilities of the holder of the share to the bank, and all liens existing in favor of the bank thereon, have been discharged, as herein provided), the president, vice-president, manager or cashier of the bank shall execute the transfer of the share so sold to the purchaser; and such transfer shall be, to all intents and purposes, as valid and effectual in law as if it had been executed by the holder of the said share. R. S. C. chap. 120, sec. 31.

The Act of 1871 named the sheriff as the officer who might sell bank stock under a writ of execution. *In re Bank of Ontario*, 44 U. C. Q. B. 247 (1879), a sale by a bailiff in Montreal was held to have the same effect as a sale by the sheriff, and the sale was valid although the bank had its head office in Ontario, and only a branch office with no stock register in Montreal.

In the Province of Quebec bank shares cannot be seized by means of *saisie arret* (garnishment), but should be seized

conformably to Art. 566 of the Code of Procedure (Art. 642 of the new Code): *Hudon v. Banque du Peuple*, 7 R. L. 229 (1875).

39. Transmission of shares.—If the interest in any share in the capital stock becomes transmitted in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors of the bank require; and every such declaration shall distinctly state the manner in which and the person to whom such shares have been transmitted, and shall be made and signed by such person; and the person making and signing such declaration shall acknowledge the same before a judge of a court of record, or before the mayor, provost or chief magistrate of a city, town, borough or other place, or before a notary public, where the same is made and signed; and every declaration so signed and acknowledged shall be left with the cashier, manager or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under such transmission in the register of shareholders; and until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to participate in the profits of the bank, or to vote in respect of any such share of the capital stock: Provided always, that every such declaration and instrument as, by this and the next following section of this Act, are required to perfect the transmission of a share in the bank which is made in any country other than Canada, or any other British Colony, or the United Kingdom, shall be further authenticated by the clerk of a court of record and under the seal of such court, or by the British consul or vice-consul, or other accredited representative of the British Government in the country where the declaration is made, or shall be made directly before such British consul or vice-consul or other accredited representative; and provided also, that the directors, cashier or other officer

or agent of any bank may require corroborative evidence of any fact alleged in any such declaration. R. S. C. chap. 120, sec. 32.

If the directors require the transmission to be authenticated in some other manner than is set out in this and the three following sections, any rules they make should be reasonable and not more onerous than those prescribed by the Act.

Until such declaration is made, the person entitled to the transmitted shares would be debarred, not only from drawing dividends or voting on these shares, but also from transferring or dealing with them.

40. Transmission by marriage.—If the transmission of any share of the capital stock has taken place by virtue of the marriage of a female shareholder, the declaration shall be accompanied by a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife with the holder of such share, and shall be made and signed by such female shareholder and her husband; and they may include therein a declaration to the effect that the share transmitted is the separate property and under the sole control of the wife, and that she may receive and grant receipts for the dividends and profits accruing in respect thereof, and dispose of and transfer the share itself, without requiring the consent or authority of her husband; and such declaration shall be binding upon the bank and persons making the same, until the said persons see fit to revoke it by a written notice to that effect to the bank; but the omission of a statement in any such declaration that the wife making the same is duly authorized by her husband to make the same shall not invalidate the declaration. R. S. C. chap. 120, sec. 33.

When the marriage domicile of the female shareholder is in a province or country where by law she has the exclusive control of her property as if she had remained single, the bank might dispense with the husband's joining in the declaration. If, however, the marriage domicile should be in the Province of Quebec, the husband would by law, in

the absence of a notarial ante-nuptial contract of marriage, become entitled to the stock. In case there is such a marriage contract, it will probably make provision both as to the capital of the stock and as to the dividends. Even where the husband is by law entitled to the stock and dividends, the declaration might be equivalent to a power of attorney to enable the wife to receive dividends, or even to transfer the stock.

41. Transmission by decease.—If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will, or the letters of administration, or act of curatorship or tutorship, or an official extract therefrom, shall, together with such declaration, be produced and left with the cashier or other officer or agent of the bank, who shall, thereupon, enter in the register of shareholders the name of the person entitled under such transmission. R. S. C. chap. 120, sec. 34.

The provisions of this section are included in the following section, which also contains certain additional provisions regarding the Province of Quebec, as well as other parts of the Empire and foreign countries.

Transmission is not a transfer within the meaning of section 35, and the bank cannot refuse to register the transmission on the ground of indebtedness or lien: *In re Bentham M. S. Co.*, 11 Ch. D. 900 (1878).

The Quebec Statute 55-56 Vict. chap. 17, imposes a tax on the transmission of property by death, and provides (Art. 1191*d*, 5) that no transfer of the property of any estate or succession shall be valid nor shall the title vest in any person until the tax has been paid. It was held that this statute was *intra vires*, and a bank was justified in refusing to register a transfer of shares by executors until proof was given that the tax had been paid: *Hencker v. Bank of Montreal*, Q. R. 7 S. C. 257 (1895).

An executor filed with the bank a copy of the probate of a will, and required the entry of his name as entitled to the stock of the testator in his capacity of executor.

The bank refused on the ground that the stock was specifically bequeathed to certain legatees. He applied for an injunction, and it was held that it was the duty of the bank to enter his name in the register, and that there was no obligation on the bank to see that the bequests of the will were carried out by the executor: *Boyd v. Bank of New Brunswick*, Canadian Bankers' Journal, vol. 1, p. 80 (1893).

42. Transmission by decease.—If the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of an authentic notarial copy of the will of the deceased shareholder, if such will is in notarial form according to the law of the Province of Quebec, or of any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testamentary or testamentative expedient in Scotland, or, if the deceased shareholder died out of Her Majesty's dominions, the production to and deposit with the directors of any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid. R. S. C. chap. 120, sec. 35.

In the Province of Quebec a will may be made in any one of three forms: (1) Notarial, (2) holograph, and (3) in English form before two witnesses. The two latter require probate. A notarial will is made in the presence of two notaries, or of one notary and two witnesses, and does not require probate; a copy certified by the notary who retains possession of the original will being equally authentic with a copy of a will in one of the other forms admitted to probate and certified by the clerk of the Court.

"Letters of verification of heirship" are issued by the Superior Court of Quebec in cases of intestacy when the deceased has property outside of that province: Civil Code, Art. 650a. Administrators and letters of administration are unknown in Quebec. The property of a deceased intestate vests immediately in his heirs or next of kin, in accordance with the French legal maxim "le mort saisit le vif." These must provide for the administration of the estate themselves.

Where shares belong to a Quebec minor he must be represented by a tutor appointed by the prothonotary or a Judge of the Superior Court: Civil Code, Art. 249. A curator is appointed by the same authority to any person who is interdicted for imbecility, insanity, madness or prodigality; also to emancipate minors and to children conceived but not yet born: Civil Code, Arts. 325 and 338. Curators to property are those appointed: (1) to the property of absentees; (2) in cases of substitution; (3) to vacant estates; (4) to the property of extinct corporations; (5) to property abandoned, and (6) to property accepted under benefit of inventory: Civil Code, Art. 347.

A shareholder in the province of Quebec by his will made his mother usufructuary legatee of all his property; a nephew who was a minor living with his parents in the U. S. being named universal legatee in ownership. A tutor *ad hoc* to the property of the minor was appointed by the Court at Montreal, for the taking of the inventory. The executors and the tutor *ad hoc* obtained leave of the Court to sell the bank stock to make repairs on certain buildings. A regular tutor was subsequently appointed, and he duly accepted the executors' account, including this item. It was held that the order to sell was illegal, the tutor *ad hoc* having no such authority, but as the matter was ratified by a tutor duly appointed, and the minor received the benefit, he could not, after coming of age, recover the value of the stock from the bank: *Donohue v. Banque Jacques Cartier*, Q. R. 11 S. C. 90 (1896).

43. Not bound to see to trusts.—The bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any share of its stock is subject; and the receipt of the person in whose name any such share stands in the books of the bank, or, if it stands in the name of more persons than one, the receipt of one of such persons shall be a sufficient discharge to the bank for any dividend or any other sum of money payable in respect of such share, unless express notice to the contrary has been given to the bank; and the bank shall not be bound to see to the application of the money paid upon such receipt, whether given by one of such persons or all of them. R. S. C. chap. 120, sec. 37.

The person who stands in the books of the bank as the registered holder of shares has a right to deal with and transfer them. If, however, he holds them in trust, to the knowledge of the directors or officers of the bank, and is about to commit a breach of trust, they should notify the *cestui que trust* in order that he may take steps to prevent it by injunction or otherwise.

In the case of *La Societe Generale v. Tramways Union Co.*, 14 Q. B. D. 424 (1884), the Master of the Rolls expressed a doubt as to the secretary or directors being personally liable for not preventing such a breach of trust. In the same case, Cotton, L.J., said, p. 445: "Where the directors are asked to register a transfer which from circumstances in fact known to them at the time would be a violation of the rights of others, in my opinion they cannot, either safely to themselves or without disregard of their duty, register the transfer, at least without allowing time for enquiry." Lindley, L.J., said, p. 453: "I have no doubt, if directors allow a transferor to make a transfer which they know to be fraudulent, they could be made liable for the value of the shares transferred; they would make themselves parties to his fraud." It is worthy of note, however, that although the judgment in this case was affirmed in the House of Lords, 11 A. C. 20 (1885), none of their lordships went quite so far as the above extracts from the remarks of the Judges in the Court of Appeal.

The fact that bank shares are purchased "in trust" at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditors: *Muir v. Carter*, and *Holmes v. Carter*, 16 S. C. Can. 473 (1889).

TRUST ESTATES.

44. [Not personally liable.—No person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator of or for any estate, trust or person named in the books of the bank as being so represented by him, shall be personally subject to any liability as a shareholder, but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such estate and funds would be, if living and competent to hold the stock in his own name; and if the trust is for a living person, such person shall also himself be liable as a shareholder; but if such estate, trust or person so represented is not so named in the books of the bank, the executor, administrator, guardian, trustee, tutor or curator shall be personally liable in respect of such stock as if he held it in his own name as owner thereof.] 63-64 Vict. chap. 26, sec. 8.

The above section was by the amending Act of 1900, substituted for section 44 in the original Act. The words "tutor or curator," were not in the original clause, and some other verbal changes were made. These are Quebec legal terms, *ante*, p. 70.

Where a person holds stock simply "in trust," or as "executor," "administrator," "trustee," "tutor," "curator," or the like, he is personally liable for unpaid calls, and also for the double liability in case of the insolvency of the bank. The only way to escape such liability is to have the testator, intestate, *cestui que trust*, minor, or other person whom he represents, also named in the books of the bank.

In Quebec a mandatary or agent who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator or principal also: C. C. 1716. A person who subscribes for stock in his own name for another is liable thereon jointly and severally with the latter: *Molsons Bank v. Stoddart*, M. L. R. 6 S. C. 18 (1890).

An absolute transfer of bank shares was made by trustees and executors to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue. It was held that such registration by the bank, unless with actual knowledge of a breach of trust, was not wrongful. Notice that the shares were held by the executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same executors to other residuary legatees contained notice of the substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors, were held to be insufficient to affect the bank with the knowledge of the particular trusts sought to be enforced: *Simpson v. Molsons Bank*, [1895] A. C. 270.

The present section refers exclusively to shares of the bank held in trust; the other question as to the bank taking shares in a company held in trust as collateral security, or otherwise, dealing with them is treated under sections 64 and 66.

ANNUAL STATEMENT AND INSPECTION.

45. Annual statement.—At every annual meeting of the shareholders for the election of directors, the outgoing directors shall submit a clear and full statement of the affairs of the bank, containing on the one part,—

The amount of the capital stock paid in, the amount of notes of the bank in circulation, the net profits made, the balances due to other banks, and the cash

deposited in the bank, distinguishing deposits bearing interest from those not bearing interest; and on the other part,—

The amount of the current coin, the gold and silver bullion, and the Dominion notes held by the bank, the balances due to the bank from other banks, the value of the real and other property of the bank, and the amount of debts owing to the bank, including and particularizing the amounts so owing upon bills of exchange, discounted notes, mortgages and other securities,—

Exhibiting, on the one hand, the liabilities of, or the debts due by the bank, and on the other hand the assets and resources thereof; and the said statement shall also exhibit the rate and amount of the last dividend declared by the directors, the amount of reserved profits at the date of such statement, and the amount of debts due to the bank, over-due and not paid, with an estimate of the loss which will probably accrue thereon. R. S. C. chap. 120, sec. 24.

The date of the annual meeting is fixed either by the subscribers to the stock at their meeting for organization, or subsequently by by-law of the shareholders: sections 13 and 18. The items of information required to be embodied in the annual statement are in the main the same as those in the monthly statement to the Minister of Finance: Schedule D. The reserved profits and the probable loss on overdue debts are not given in the returns to the Government.

This section does not apply to the Bank of British North America: sections 5 and 6.

2. [**Further statements.**—The directors shall also submit to the shareholders such further statements of the affairs of the bank, other than statements with reference to the account of any person dealing with the bank, as the shareholders require by by-law passed at the annual general meeting, or at any special general meeting of the shareholders called for the purpose, and the statements so required shall be submitted at the annual general meeting, or at any special general meeting called for the purpose,

or at such time and in such manner as is set forth in the by-law of the shareholders requiring such statements.] 63-64 Vict. chap. 26, sec. 8.

This sub-section was added by the amending Act of 1909, in order to enable shareholders to obtain fuller information in case they so desired. Only directors are allowed to inspect the accounts of customers of the bank: section 46.

By section 99 the making of a false statement is, unless it amounts to a higher offence, made a misdemeanor punishable by imprisonment for a term not exceeding five years, and any officer of the bank who is a party thereto or uses the statement with intent to deceive, shall be held to have made the false statement wilfully, and shall also be responsible for all damages sustained by any person in consequence thereof. See *Parker v. McQuesten*, 32 U. C. Q. B. 273 (1872); *McDonald v. Rankin*, M. L. R. 7 S. C. 44 (1890); *In re Denham & Co.*, 25 Ch. D. 752 (1883).

46. Inspection of books.—The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors; but no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank. R. S. C. chap. 120, sec. 25.

While the directors have the right to inspect the books, correspondence and funds of the bank, they are not bound to do so: *Hallmark's Case*, 9 Ch. D. 332 (1878); *In re Denham & Co.*, 25 Ch. D. 752 (1883). The fact that the directors have not inspected the books, whereby they would have detected the embezzlement of the bank funds by the cashier, is no defence in an action by the bank against the sureties of the cashier: *Springer v. Exchange Bank*, 14 S. C. Can. 716 (1887).

In England, in the case of *Tassell v. Cooper*, 9 C. B. 509 (1850), doubt was expressed by Maule, J., whether there was any such duty there upon a bank as that imposed by this section, not to disclose the state of a customer's account. In *Hardy v. Veasey*, L. R. 3 Ex. 107 (1868), Byles, J., expressed the opinion that a bank might make such

disclosure on a justifiable occasion, and that when it was made with a reasonable hope and an honest intention of getting assistance for the customer, no action would lie. In *Foster v. Bank of London*, 3 F. & F. 214 (1862), where a bill was presented and there were not sufficient assets, and the bank informed the holder of the amount of the deficiency, and so enabled him by paying in a small sum to obtain payment of the bill, it was held that the bank should not have gone further than to say "not sufficient assets," and that an action lay for this breach of duty.

Evidence as to a customer's account is not privileged at common law, and the present section merely prohibits a bank voluntarily permitting any examination of customer's accounts save by a director. A local manager of a bank when duly served with a subpoena *duces tecum* is bound to produce the bank books in his office, even when the bank is not a party to the suit, and to give evidence as to the entries in them. Inconvenience to the bank is no ground for refusing to produce the books, which *prima facie* are to be deemed in his custody: *Hannum v. McRae*, 18 Ont. Pr. R. 185 (1898).

DIVIDENDS.

- 47. Declaration of dividends.**—The directors of the bank shall, subject to the provisions of this Act, declare quarterly or half yearly dividends of so much of the profits of the bank as to the majority of them seems advisable; and they shall give at least thirty days' public notice of the payment of such dividends previously to the date fixed for such payment; and they may close the transfer books during a certain time, not exceeding fifteen days, before the payment of each dividend. R. S. C. chap. 120, sec. 26, in part.

The Dominion Bank is the only one which so far has adopted quarterly dividends; the other banks declare them half-yearly. Canadian banks pay their dividends on the paid-up capital. Where the subscribed capital is not wholly paid up the declaration of dividends should be specific on this point. In England the charter of a company

provided that the directors might "declare a dividend to be paid in proportion to the shares." Part of the capital was fully paid up, and on another part only 25 per cent. was paid. The directors declared a dividend in proportion to the amount paid. The House of Lords set this aside, and held that the shares were all to be treated alike, those partly paid to receive the same as those fully paid. Their lordships held that it was not unreasonable that shareholders should be compensated for their risk, even if they had not actually paid the money: *Oakbank Oil Co. v. Crum*, 8 A. C. 65 (1882). In England it has been held that in case of a sale, if there be no agreement to the contrary, a dividend, if declared before the sale, belongs to the seller, if declared after the sale, to the purchaser, even although the transfer may have been completed only after the dividend was declared. Where stock was sold by auction on the 21st of August, to be completed transferred on the 29th, and a meeting of shareholders was held on the 28th of August, which declared a dividend for the half year ending June 30th, it was held that the dividend belonged to the purchaser: *Black v. Homersham*, 4 Ex. D. 24 (1878). The purchaser of a life interest in stock is entitled to a dividend becoming due on the day following the sale: *Anson v. Towgood*, 1 Jac. & W. 637 (1820). A dividend declared on the 16th of September made payable on the 1st of November, was held to belong to the life tenant, who died on the 18th of September: *Wright v. Tuckett*, 1 J. & H. 266 (1860). A testatrix held certain bank shares on which, in June, 1865, a dividend was declared, payable half in July, 1865, and half in January, 1866. She died in December, 1865. It was held that the January dividend formed part of the corpus of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate: *De Gendre v. Kent*, L. R. 4 Eq. 283 (1867).

In Canada, a different usage has prevailed generally with regard to bank dividends, as between the seller and the purchaser. On the stock exchange, in the absence of an agreement to the contrary, it is understood that in case a

sale is made in time to allow of the transfer being completed before the books are closed, the dividend previously declared belongs to the purchaser. In the case of a sale after that time it belongs to the seller. Banks make out their dividend warrants in favor of the person in whose name the stock stands at the time of the closing of the transfer books.

The bank has a lien on unpaid dividends, if the holder of the shares is indebted to it: sec. 65.

Notice of the dividend is to be given for at least thirty days in one or more newspapers published at the head office of the bank, and in the Canada Gazette: sec. 102.

The next two sections lay down the rules as to the amount of dividends, and as to the liability of directors.

48. Dividend not to impair capital. — No dividend or bonus shall ever be declared so as to impair the paid-up capital; and if any dividend or bonus is so declared or made payable, the directors who knowingly and wilfully concur therein shall be jointly and severally liable for the amount thereof as a debt due by them to the bank; and if any part of the paid-up capital is lost, the directors shall, if all the subscribed stock is not paid up, forthwith make calls upon the shareholders to an amount equivalent to such loss; and such loss and the calls, if any, shall be mentioned in the next return made by the bank to the Minister of Finance and Receiver-General: Provided that, in any case in which the capital has been impaired as aforesaid, all net profits shall be applied to make good such loss. R. S. C. chap. 120, sec. 27.

If the statement prepared by the proper officers of the bank shews that there is a surplus over and above the paid-up capital, directors declaring a dividend upon this in good faith would not be liable even if an examination of the books would have revealed the actual situation. Only a director who knowingly joined in declaring a dividend which impaired the capital would be liable. It is to be observed the calls required by this section would not restore the capital or enable dividends to be declared. This can only be done

by allowing profits to accumulate or by reducing the capital as provided by section 28.

49. When dividend limited.—No division of profits, either by way of dividends or bonus, or both combined, or in any other way, exceeding the rate of eight per cent. per annum, shall be made by the bank, unless, after making the same, it has a rest or reserve fund equal to at least thirty per cent. of its paid-up capital; and all bad and doubtful debts shall be deducted before the amount of such rest is calculated R. S. C. chap. 120, sec. 28.

RESERVES.

50. Part in Dominion notes.—The bank shall hold not less than forty per cent. of its cash reserves in Dominion notes; and every bank holding at any time a less amount of its cash reserves in Dominion notes than is prescribed by this section shall incur a penalty of five hundred dollars for each and every violation of the provisions of this section: R. S. C. chap. 120, sec. 39, in part.

These Dominion notes are issued under R. S. C. chap. 31, as amended by 58-59 Vict. chap. 16. The limit is \$20,000,000, and the Government must hold for their redemption at least twenty-five per cent. of the amount outstanding, in gold and securities guaranteed by the British Government. The above limit may be exceeded provided the Government holds specie equal to such excess in addition to the amount above stated. They are a legal tender, and are redeemable in specie at the chief city of each province. Monthly statements of the amount of notes outstanding and the amount of gold and securities held for their redemption are published in the Canada Gazette.

The local Legislature has authority to enact a by-law imposing a tax on the Dominion notes held by a bank as part of its cash reserves: *Windsor v. Commercial Bank*, 15 N. S. (3 R. & G.) 420 (1882).

The penalty for the violation of this section may be recovered by the crown as provided in section 98.

Banks are not required by the Act to keep any fixed reserve. The average amount of reserves in specie and Dominion notes kept by Canadian banks is about three-fourths of the amount of their notes in circulation, and nearly ten per cent. of their total liabilities. Of this about sixty-five per cent. is usually held in Dominion notes and the other thirty-five per cent. in specie.

2. **Supply of Dominion notes.**—The Minister of Finance and Receiver-General shall make such arrangements as are necessary for insuring the delivery of Dominion notes to any bank, in exchange for an equivalent amount of specie, at the several offices at which Dominion notes are redeemable, in the cities of Toronto, Montreal, Halifax, St. John, N.B., Winnipeg, Charlottetown and Victoria, respectively; and such notes shall be redeemable at the office for redemption of Dominion notes in the place where such specie is given in exchange. R. S. C. chap. 120, sec. 39, sub-sec. 2, in part.

NOTE ISSUE.

Canadian banks are Banks of Issue as well as of Discount and Deposit. Their notes form the chief circulating medium for sums of five dollars and upwards. The amount of bank notes in circulation for 1900 has ranged from forty-one to fifty-three million dollars.

51. **Bank notes.**—The bank may issue and re-issue notes payable to bearer on demand and intended for circulation; but no such note shall be for a sum less than five dollars, or for any sum which is not a multiple of five dollars, and the total amount of such notes, in circulation at any time, shall not exceed the amount of the unimpaired paid-up capital of the bank: R. S. C. chap. 120, sec. 40, in part.

Before 1871 Canadian banks issued notes for one dollar and upwards. The Bank Act of that year took away the right to issue notes for less than five dollars. In 1880 the present rule was adopted.

See the amending Act of 1899 as to the issue of sterling notes on page 82.

Bank notes are promissory notes payable to bearer on demand. They circulate as cash, are not deemed to be overdue, and are not discharged by being returned to the bank, but may be reissued. They are not subject to the statutes of limitation or prescription, at least not until after demand and dishonour.

2. **Special provisions.**—Notwithstanding anything contained in the next preceding sub-section, the total amount of such notes in circulation at any time of La Banque du Peuple and the Bank of British North America respectively shall not exceed seventy-five per cent. of the unimpaired paid-up capital of such banks respectively, but each of such banks may issue such notes in excess of the said seventy-five per cent. upon depositing, with respect to such excess, with the Minister of Finance and Receiver-General, in cash or bonds of the Dominion of Canada, an amount equal to the excess; Provided always that in no case shall the total amount of the notes of either of the said banks in circulation at any time exceed the unimpaired paid-up capital of such bank; and the cash or bonds so deposited shall be available by the Minister of Finance and Receiver-General for the redemption of notes issued in excess as aforesaid, in the event of the suspension of the said banks respectively:

The limiting of the circulation of the notes of these two banks to seventy-five per cent. of their unimpaired paid-up capital instead of allowing them the full amount, as is done in the case of the other banks by the preceding section, is on account of there being no double liability on their shares.

3. **Penalties for excess of circulation.** — If the total amount of the notes of the bank in circulation at any time exceeds the amount authorized by this section, the bank shall incur penalties as follows: If the amount of such excess is not over one thousand dollars, a penalty equal to the amount of such excess; if the amount of such excess is over one thousand dollars and is not over twenty thousand dollars, a penalty of one thousand dollars; if the amount of such excess is over twenty thousand dollars and is not over

one hundred thousand dollars, a penalty of ten thousand dollars; if the amount of such excess is over one hundred thousand dollars and is not over two hundred thousand dollars, a penalty of fifty thousand dollars; and if the amount of such excess is over two hundred thousand dollars, a penalty of one hundred thousand dollars: R. S. C. chap. 120, sec. 40, sub-sec. 2, in part.

These penalties are recoverable by the Attorney-General of Canada or the Minister of Finance and Receiver-General for the crown as provided in section 98.

4. **Notes to be cancelled.**—All notes heretofore issued or re-issued by the bank, and now in circulation, which are for a sum less than five dollars, or for a sum which is not a multiple of five dollars, shall be called in and cancelled as soon as practicable. R. S. C. chap. 120, sec. 40, in part.

STERLING NOTES IN BRITISH POSSESSIONS.

In 1899 the following Act was passed to enable Canadian banks to issue sterling notes in other British possessions. The first bank to avail itself of the privilege was the Bank of Nova Scotia, which has an office in Kingston, Jamaica. The Act was assented to on the 10th of July, 1899, and is 62-63 Victoria, chapter 14.

1. **[Issue of sterling notes.**—Notwithstanding the provisions of section 51 of the Bank Act, any bank to which that Act applies may issue and reissue at any office or agency of the bank in any British colony or possession other than Canada, notes of the bank payable to bearer on demand and intended for circulation in such colony or possession, for the sum of one pound sterling each, or for any multiple of such sum, provided the issue or reissue of such notes is not forbidden by the laws of such colony or possession.
2. **Where redeemable.**—The notes so issued shall be redeemable at par at any office or agency of the bank in the colony or possession in which they are issued for circulation, and not elsewhere, except as herein-after specially provided; and the place of redemption of such notes shall be legibly printed or stamped across the face of each note so issued.

3. **When redeemable in Canada.**—In the event of the bank ceasing to have an office or agency in any such British colony or possession, all notes issued in such colony or possession under the provisions of this Act shall become payable and redeemable at the par value thereof (that is to say, at four dollars and eighty-six and two-third cents per pound sterling) in the same manner as notes of the bank issued in Canada are payable and redeemable; provided always that no notes issued for circulation in a British colony or possession other than Canada shall be re-issued in Canada and that nothing herein shall be construed as authorising the issue or reissue by the bank in Canada of notes payable to bearer on demand and intended for circulation for a sum less than five dollars or for a sum which is not a multiple of five dollars.

4. **Included in returns.**—The amount of the notes at any time in circulation in any colony or possession, issued under the provisions of this Act shall, at the rate of four dollars and eighty-six and two-third cents per pound sterling, form part of the total amount of the notes in circulation within the meaning of section 51 of the Bank Act, and, except as herein otherwise specially provided, shall be subject to all the provisions of the Bank Act; but nothing herein contained shall enable the bank to increase the total amount of its notes in circulation in Canada and elsewhere beyond the limit fixed by the said section 51 of the Bank Act.]

52. **Pledging notes prohibited.**—The bank shall not pledge, assign, or hypothecate its notes; and no advance or loan made on the security of the notes of a bank shall be recoverable from the bank or its assets:

This whole section is new, and its provisions are intended to prevent the repetition of irregularities which have taken place in connection with more than one of the banks that have failed within the last few years, where attempts have been made to obtain fraudulent preferences by such irregular issue or pledging of notes.

No bank should issue its notes except for *bona fide* circulation, and when so issued they form a first charge upon its assets in case of insolvency: sec. 53.

2. **Penalty for pledging.**—Every person who, being the president, vice-president, director, principal partner *en commandite*, general manager, manager, cashier, or other officer of the bank, pledges, assigns, or hypothecates, or authorizes, or is concerned in the pledge, assignment or hypothecation of the notes of the bank, and every person who accepts, receives or takes, or authorizes or is concerned in the acceptance or receipt or taking of such notes as a pledge, assignment or hypothecation, shall be liable to a fine of not less than four hundred dollars and not more than two thousand dollars, or to imprisonment for not more than two years, or to both.
3. **Penalty for improper issue.**—Every person who, being the president, vice-president, director, principal partner *en commandite*, general manager, manager, cashier, or other officer of a bank, with intent to defraud, issues or delivers, or authorizes or is concerned in the issue or delivery of notes of the bank intended for circulation and not then in circulation, —and every person who, with knowledge of such intent, accepts, receives or takes, or authorizes or is concerned in the acceptance, receipt or taking of such notes,—shall be guilty of a misdemeanor, and liable to imprisonment for a term not exceeding seven years, or to a fine not exceeding two thousand dollars, or to both.
53. **Notes a first charge.**—The payment of the notes issued or re-issued by the bank and intended for circulation, and then in circulation, together with any interest paid or payable thereon as hereinafter provided, shall be the first charge upon the assets of the bank in case of its insolvency; and the payment of any amount due to the Government of Canada, in trust or otherwise, shall be the second charge upon such assets; and the payment of any amount due to the government of any of the Provinces, in trust or otherwise, shall be the third charge upon such assets: R. S. C. chap. 120, sec. 79, in part.

Until 1881 holders of notes ranked concurrently with depositors and other unsecured creditors of a bank, after which the Act 43 Viet. chap. 22, sec. 12, provided that "The payment of the notes issued by a bank and intended for

circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency." The provision as to interest and as to the ranking of the Dominion and Provincial Governments is new.

In the case of the Bank of Prince Edward Island, which existed under a provincial charter and never came under the Dominion Bank Act, it was held that the Dominion Government as a depositor had a right of priority over note holders and other ordinary creditors. *The Queen v. Bank of Nova Scotia*, 11 S. C. Can. 1 (1885).

In the case of the Exchange Bank, which was under the Bank Act and had its head office in Montreal, it was held that the Crown was bound by the provisions of the Quebec codes, which only gave the Crown priority in the case of certain officials accountable for its moneys, and that as a depositor and ordinary creditor of a bank in liquidation the Dominion Government had no priority over the ordinary creditors: *Exchange Bank v. The Queen*, 11 App. Cas. 157 (1886).

Where by an arrangement with the Dominion Government an insurance company made the deposit of \$50,000 required by the Insurance Act with the Maritime Bank, which was to pay the interest to the company, it was held that this was not the money of the Crown, but was held by the Finance Minister in trust for the company, and was not subject to the prerogative of payment in full in priority to other creditors: *Maritime Bank v. The Queen*, 17 S. C. Can. 657 (1889). The Provincial Government of New Brunswick had moneys in the Maritime Bank when it failed. The Supreme Court decided that under section 79 of R. S. C. chap. 120, note holders had a right to priority over the Government, and that the latter had priority over depositors and simple contract creditors: *Maritime Bank v. Receiver-General*, 20 S. C. Can. 695 (1889). The liquidators of the bank appealed against the latter part of this judgment, but it was affirmed by the Privy Council: [1892] A. C. 437.

If the present Act had been in force it would not have affected the first of these cases, as it was governed by the

provincial law; in the case of the Exchange Bank the Government would have obtained priority over other depositors.

2. **Ranking of penalties.**—The amount of any penalties for which the bank is liable shall not form a charge upon the assets of such bank, in case of its insolvency, until all other liabilities are paid.

The penalties for which the bank may become liable under the Act are \$500 for not holding forty per cent. of its reserves in Dominion notes: sec. 50; up to \$100,000 for over-issue of circulation: sec. 51, sub-sec. 3; up to \$500 for doing business prohibited by sections 64 to 78 inclusive: sec. 79; \$50 a day for not sending in monthly returns: sec. 85, sub-sec. 2; \$500 a day for not sending in special returns when required: sec. 86, sub-sec. 2; \$50 a day for not sending in the list of shareholders: sec. 87, sub-sec. 3; and \$50 a day for not reporting unpaid balances: sec. 88, sub-sec. 3.

These penalties are recoverable at the suit of Her Majesty and belong to the Crown for the public uses of Canada: sec. 98.

The following provision was added by section 10 of the amending Act of 1900, to prevent the improper issue of its notes by a bank after suspending payment:—

10. **[Issue of notes.]**—The bank shall not, during any period of suspension of payment of its liabilities, issue or reissue its notes payable to bearer on demand and intended for circulation, and if, after any such suspension, the bank resumes business without the consent in writing of the curator herein-after provided for, it shall not issue or reissue any of such notes until authorized by the Treasury Board so to do, and every person who, being president, vice-president, director, general manager, manager, clerk or other officer of the bank, issues or reissues, or authorizes or is concerned in the issue or reissue of such notes, and every person who accepts, receives or takes, or authorizes or is concerned in the acceptance, receipt or taking of such notes from the bank, or from such president, vice-president, director, general manager, manager, clerk, or other officer of the

bank, in payment, or part payment, or as security for the payment, of any amount due or owing to such person by the bank, is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years, or a fine not exceeding two thousand dollars, or to both.] 63-64 Vict. chap. 26, sec. 10.

- 54. Deposit with Minister of Finance.**—Every bank to which this Act applies, and which is carrying on its business at the time when this Act comes into force, shall, within fifteen days thereafter, pay to the Minister of Finance and Receiver-General, a sum of money equal to two and one-half per cent. of the average amount of its notes in circulation during the twelve months next preceding the date of the coming into force of this Act, or if such bank has not been in operation for twelve months, a sum of money equal to two and one-half per cent. of the average amount of its notes in circulation during the time it has been in operation; and each bank shall, within fifteen days from and after the first day of July, in the year one thousand eight hundred and ninety-two, pay to the Minister of Finance and Receiver-General such further sum of money as is necessary to make the total amount so paid by each bank to be a sum equal to five per cent. of the average amount of its notes in circulation during the twelve months next preceding the date last mentioned,—which sum shall be adjusted annually as hereinafter provided:

The provisions for "The Bank Circulation Redemption Fund" provided for in this section are not found in any former Bank Act. As its name indicates it is intended to provide for the redemption of the notes of an insolvent bank when this is not done within the specified time in the ordinary course of the liquidation.

The banks to which the Act applies are those named in schedule A. The Act came into force on the 1st of July, 1891: section 104.

2. The Merchants Bank of Prince Edward Island shall, on or before the day upon which it becomes subject to the provisions of this Act, pay to the Minister of Finance and Receiver-General such sum as appears

to the satisfaction of the Treasury Board to be equal to two and one-half per cent. of the average amount of its notes in circulation during the then preceding twelve months; and shall further pay to the Minister of Finance and Receiver-General, within fifteen days from and after the first day of July in the year then next following, such further sum as is necessary to make the total sum paid by the said bank to be a sum equal to five per cent. of the average amount of its notes in circulation from the time the said bank became subject to the provisions of this Act to the said first day of July,—which sum shall be adjusted annually as hereinafter provided:

The Merchants Bank of Prince Edward Island became subject to the provisions of the Act of the 1st of March, 1892, in accordance with the minute of the Treasury Board of the 24th of December, 1891, published in the Canada Gazette on the 20th of February, 1892.

3. **As to new banks.**—The Minister of Finance and Receiver-General shall, upon the issue of a certificate under this Act authorizing a bank to issue notes and commence the business of banking, retain out of any moneys of such bank then in his possession the sum of five thousand dollars,—which sum shall be held for the purposes of this section, until the annual adjustment hereunder takes place in the year then next following, at which time the amount at the credit of the bank shall be adjusted by payment to or by the bank of such sum as is necessary to make the amount at the credit of the bank to be a sum of money equal to five per cent. of the average amount of its notes in circulation from the time it commenced business to the time of such adjustment,—which sum shall be adjusted annually as hereinafter provided:

Before the Minister of Finance can issue a certificate to a new bank, it must have paid in to him at least \$250,000: sec. 13. When he issues his certificate he pays to the bank the amount of its deposit, less the sum of \$5,000 for "The Bank Circulation Redemption Fund."

4. **Circulation redemption fund.**—The amounts so paid, retained, and kept on deposit as aforesaid shall form

a fund to be known as "The Bank Circulation Redemption Fund,"—which fund shall be held for the following purpose, and for no other, namely: In the event of the suspension by the bank of payment in specie or Dominion notes of any of its liabilities as they accrue, for the payment of the notes then issued or reissued by such bank, and intended for circulation, and then in circulation, and interest thereon; and the Minister of Finance and Receiver-General shall, with respect to all notes paid out of the said fund, have the same rights as any other holder of the notes of the bank:

If the liquidator of the insolvent bank does not redeem the notes in circulation within two months after the suspension, the Minister of Finance may redeem them with the moneys at the credit of the fund, and the amount of these notes, with interest from the date of the suspension, will then be a first charge in his favor with other note holders on the bank: sec. 53.

5. **Fund to bear interest.**—The fund shall bear interest at the rate of three per cent. per annum, and it shall be adjusted, as soon as possible after the thirtieth day of June in each year, in such a way as to make the amount at the credit of each bank contributing thereto, unless herein otherwise specially provided, equal to five per cent. of the average note circulation of such bank during the then next preceding twelve months:
6. **Note circulation determined.**—The average note circulation of a bank during any period shall be determined from the average of the amount of its notes in circulation, as shown by the monthly returns for such period made by the bank to the Minister of Finance and Receiver-General; and where, in any return, the greatest amount of notes in circulation at any time during the month is given, such amount shall, for the purposes of this section, be taken to be the amount of the notes of the bank in circulation during the month to which such return relates:
7. **Notes to bear interest.**—In the event of the suspension by the bank of payment in specie or Dominion notes of any of its liabilities as they accrue, the

notes of such bank, issued or reissued and intended for circulation, and then in circulation, shall bear interest at the rate of [five] per cent. per annum, from the day of such suspension to such day as is named by the directors, or by the liquidator, receiver, assignee or other proper official, for the payment thereof,—of which day notice shall be given by advertisement for at least three days in a newspaper published in the place in which the head office of the bank is situate; but in case any notes presented for payment on or after any day named for payment thereof are not paid, all notes then unpaid and in circulation shall continue to bear interest to such further day as is named for payment thereof,—of which day notice shall be given in manner above provided: Provided always, that in case of failure on the part of the directors of the bank, or of the liquidator, receiver, assignee or other proper official, to make arrangements within two months from the day of suspension of payment by the bank as aforesaid for the payment of all of its notes and interest thereon, the Minister of Finance and Receiver-General may thereupon make arrangements for the payment of the notes remaining unpaid, and all interest thereon, out of the said fund, and shall give such notice of such payment as he thinks expedient, and on the day named by him for such payment all interest on such notes shall cease, anything herein contained to the contrary notwithstanding; but nothing herein contained shall be construed to impose any liability on the Government of Canada or on the Minister of Finance and Receiver-General beyond the amount available from time to time out of the said fund: 63-64 Vict. chap. 26, sec. 11.

If the amount at the credit of the fund should be insufficient to pay the notes in full with interest, it would appear to be inequitable that interest should cease from the day named as to those notes which cannot be then redeemed. In the Act of 1890 the rate was six per cent., which was the legal rate, at the time. By section 11 of the amending Act of 1900, it was reduced to five per cent., the legal rate fixed by 63-64 Vict. chap. 29.

8. Payments from fund.—All payments made from the said fund shall be without regard to the amount

contributed thereto by the bank in respect of whose notes the payments are made; and in case the payments from the fund exceed the amount contributed by such bank to the fund, and all interest due or accruing due to such bank thereon, the other banks shall, on demand, make good to the fund the amount of such excess, *pro rata* to the amount [which each bank had or should have contributed to the fund at the time of the suspension of the bank in respect of whose notes the payments are made;] and all amounts recovered and received by the Minister of Finance and Receiver-General from the bank on whose account such payments were made shall, after the amount of such excess has been made good as aforesaid, be distributed among the banks contributing to make good such extra *pro rata* to the amount contributed by each: Provided always, that each of such other banks shall only be called upon to make good to the said fund its share of such excess, in payments not exceeding in any one year one per cent. of the average amount of its notes in circulation, — such circulation to be ascertained in such manner as the Minister of Finance and Receiver-General decides: and his decision shall be final: Amended by 63-64 Vict. chap. 26, sec. 12.

9. **When to be repaid.**—In the event of the winding up of the business of a bank by reason of insolvency or otherwise, the Treasury Board may, on the application of the directors, or of the liquidator, receiver, assignee or other proper official, and on being satisfied that proper arrangements have been made for the payment of the notes of the bank and any interest thereon, pay over to such directors, liquidator, receiver, assignee or other proper official, the amount at the credit of the bank, or such portion thereof as it thinks expedient:
10. **Management of fund.**—The Treasury Board may make all such rules and regulations as it thinks expedient with reference to the payment of any moneys out of the said fund, and the manner, place and time of such payments, the collection of all amounts due to the said fund, all accounts to be kept in connection therewith, and generally the management of the said fund and all matters relating thereto:

11. **Enforcement of payment.**—The Minister of Finance and Receiver-General may, in his official name, by action in the Exchequer Court of Canada enforce payment (with costs of action) of any sum due and payable by any bank under the provisions of this section.

The following additional provision as to the payment of interest on the notes of a suspended bank was made by section 13 of the amending Act of 1900.

13. [**When notes bear interest.**—Notwithstanding anything to the contrary contained in section 54 of the said Act, all notes of a bank which has suspended payment, and all interest on such notes, which are paid by the Minister of Finance and Receiver-General out of "The Bank Circulation Redemption Fund" after the amount at the credit of such bank in the fund, adding thereto all interest due or accruing due on such amount, has been exhausted, shall bear interest at the rate of three per cent. per annum from the time such notes and interest are paid until such notes and interest are repaid to the Minister of Finance and Receiver-General by or out of the assets of such bank.]

55. **Notes payable at par.**—The bank shall make such arrangements as are necessary to ensure the circulation at par in any and every part of Canada of all notes issued or reissued by it and intended for circulation; and towards this purpose the bank shall establish agencies for the redemption and payment of its notes at the cities of Halifax, St. John, Charlottetown, Montreal, Toronto, Winnipeg and Victoria, and at such other places as are, from time to time, designated by the Treasury Board.

This is new law, and was enacted to secure the circulation of all bank notes at par throughout the Dominion. It will be seen that an agency for the redemption of its notes must be established by each bank in the chief city of each province. No other places have as yet been designated by the Treasury Board.

56. **Redemption of notes.**—The bank shall always receive in payment its own notes at par at any of its offices, and whether they are made payable there or not:

2. The chief place of business of the bank shall always be one of the places at which its notes are made payable. R. S. C. chap. 120, sec. 41.

57. Payment in Dominion notes.—The bank, when making any payment, shall, on the request of the person to whom the payment is to be made, pay the same, or such part thereof, not exceeding one hundred dollars, as such person requests, in Dominion notes for one, two, or four dollars each, at the option of such person: Provided always, that no payment, whether in Dominion notes or bank notes, shall be made in bills that are torn or partially defaced by excessive handling. R. S. C. chap. 120, sec. 42, in part.

58. Signing of bonds, notes, etc.—The bonds, obligations and bills, obligatory or of credit, of the bank under its corporate seal, and signed by the president or vice-president, and countersigned by a cashier or assistant cashier, which are made payable to any person, shall be assignable by indorsement thereon; and bills or notes of the bank signed by the president, vice-president, cashier or other officer appointed by the directors of the bank to sign the same, promising the payment of money to any person or to his order, or to the bearer, though not under the corporate seal of the bank, shall be binding and obligatory on it in like manner and with the like force and effect as they would be upon any private person, if issued by him in his private or natural capacity, and shall be assignable in like manner as if they were so issued by a private person in his natural capacity: Provided always, that the directors of the bank may, from time to time, authorize, or depute any cashier, assistant cashier or officer of the bank, or any director other than the president or vice-president, or any cashier, manager or local director of any branch or office of discount and deposit of the bank, to sign the notes of the bank intended for circulation. R. S. C. chap. 120, sec. 43.

The present section reverses the ordinary rule as to the transfer of the two classes of documents covered by it. Usually stricter rules prevail as to transferring instruments

under seal than to those not under seal. Bonds, obligations and bills of the bank under its corporate seal made payable to any person are transferable by simple indorsement without qualification. Bills or notes of the bank not under its seal are placed on the same footing as similar paper issued by a private person, and if they meet the requirements of the definition of a bill of exchange or promissory note would come under section 8 of the Bills of Exchange Act, which provides that "When a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties, but it is not negotiable."

Take for example an ordinary bank deposit receipt without the seal of the bank, payable to a person named. If it contains the words, "Not transferable," or other words to that effect, it is not a negotiable instrument and is not transferable by delivery or indorsement. It would be a chose in action, and would require to be assigned in writing, either on the document itself or by a separate instrument in order to give the assignee the right to sue in his own name, according to the law of the respective provinces. See the Ontario Judicature Act, R. S. O. chap. 51, sec. 58 (5); R. S. Man. chap. 1, sec. 3; Cons. Ord. N. W. T. chap. 41; Rev. Stat. B. C. chap. 56, sec. 16 (17). In Quebec it would come under Articles 1570 and 1571 of the Civil Code, which would require that a copy of the instrument of sale should be served on the bank before the purchaser could sue in his own name. Its not being negotiable would prevent any holder acquiring greater rights under it than possessed by the first holder.

59. Signing by machinery.—All bank notes and bills of the bank whereon the name of any person intrusted or authorized to sign such notes or bills on behalf of the bank is impressed by machinery provided for that purpose, by or with the authority of the bank, shall be good and valid to all intents and purposes as if such notes and bills had been subscribed in the proper handwriting of the person intrusted or authorized by the bank to sign the same respectively, and shall be bank notes and bills within the meaning of

all laws and statutes whatever, and may be described as bank notes or bills in all indictments and civil or criminal proceedings whatsoever: Provided always, that at least one signature to each note or bill must be in the actual handwriting of a person authorized to sign such note or bill. R. S. C. chap. 120, sec. 44.

60. **Unauthorized notes.**—Every person, except a bank to which this Act applies, who issues or reissues, makes, draws, or indorses any bill, bond, note, cheque or other instrument, intended to circulate as money, or to be used as a substitute for money, for any amount whatsoever, shall incur a penalty of four hundred dollars, which shall be recoverable with costs, in any court of competent jurisdiction, by any person who sues for the same; and a moiety of such penalty shall belong to the person suing for the same, and the other moiety to Her Majesty for the public uses of Canada: R. S. C. chap. 120, sec. 83, sub-sec. 1.

Most of the penalties under the Act are recoverable by the Crown under section 98; the present is by an ordinary *qui tam* action.

2. **Unlawful intention presumed.**—The intention to pass any such instrument as money shall be presumed, if it is made for the payment of a less sum than twenty dollars, and is payable either in form or in fact to the bearer thereof, or at sight, or on demand, or at less than thirty days thereafter, or is overdue, or is in any way calculated or designed for circulation, or as a substitute for money; unless such instrument is a cheque on some chartered bank paid by the maker directly to his immediate creditor, or a promissory note, bill of exchange, bond or other undertaking for the payment of money, paid or delivered by the maker thereof to his immediate creditor, and is not designed to circulate as money or as a substitute for money. R. S. C. chap. 120, sec. 83, sub-sec. 2.

61. **Defacement of notes.**—Every person who in any way defaces any Dominion or Provincial note, or bank note, whether by writing, printing, drawing, or stamping thereon, or by attaching or affixing thereto, anything in the nature or form of an advertisement, shall be liable to a penalty not exceeding twenty dollars.

This penalty is recoverable under section 98.

62. Stamping counterfeit notes.—Every officer charged with the receipt or disbursement of public moneys, and every officer of any bank, and every person acting as or employed by any banker, shall stamp or write in plain letters the word "counterfeit," "altered" or "worthless," upon every counterfeit or fraudulent note issued in the form of a Dominion or bank note, and intended to circulate as money, which is presented to him at his place of business; and if such officer or person wrongfully stamps any genuine note he shall upon presentation, redeem it at the face value thereof. 50-51 Vict. chap. 47, sec. 1.

63. Imitation of notes.—Every person who designs, engraves, prints, or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, handbill or advertisement in the likeness or similitude of any Dominion or bank note, or any obligation or security of any Government, or of any bank, is liable to a penalty of one hundred dollars or to three months' imprisonment, or to both. 50-51 Vict. chap. 47, sec. 2.

This section has been repealed by section 981 of the Criminal Code, 1892; but is substantially re-enacted as section 442 of the Code. The offence is punishable by summary conviction before two justices of the peace.

BUSINESS AND POWERS OF THE BANK.

The legal relation between a bank and its customers in their ordinary dealings is simply that of debtor and creditor. Money paid into a bank or placed to the credit of a customer in the books of a bank is not impressed with any trust, and there is nothing of a fiduciary nature in the relation between the parties. The obligation of the bank is to pay a like amount to the customer's use on an order from him by a cheque or otherwise as may have been arranged between the parties.

Canadian banks are Banks of Issue, of Discount and of Deposit. The sections relating to them as Banks of Issue are those from 51 to 59 inclusive. The following sections

from 64 to 83, inclusive, regulate and govern their operations as Banks of Discount, while section 84 relates to them as Banks of Deposit.

Apart from issuing notes for circulation, and receiving deposits, it may be said in a general way that banks are only authorized to deal in money and documents for the payment of money. These latter they may buy, sell, discount, lend money upon, or take as collateral security for loans. Except as authorized by the Act they are prohibited from dealing in goods or lands, or lending money upon their security. Section 64 lays down these powers in a general way; 65 gives banks a lien upon the stock and dividends of its debtors; 66 prescribes how they may deal with collateral securities; 68 with mortgages taken as additional security; 67, 69, 70 and 71 with lands; 72 with mortgages on vessels; and 73 to 78 inclusive with warehouse receipts, bills of lading and analogous securities.

64. Branches—powers of bank.—The bank may open branches, agencies and offices, and may engage in and carry on business as a dealer in gold and silver coin and bullion, and it may deal in, discount, and lend money and make advances upon the security of, and may take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, foreign and other public securities, and it may engage in and carry on such business generally as appertains to the business of banking; but, except as authorized by this Act, it shall not, either directly or indirectly, deal in the buying, or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever; and it shall not, either directly or indirectly, purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; and it shall not, either directly or indirectly, lend money or make advances upon the security, mortgage, or hypothecation of any land.

tenements, or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise. R. S. C. chap. 120, secs. 45, 46, 59 and 60, in part.

Branches.—The system of Branch Banks adopted in Canada was borrowed from Scotland. For some purposes a branch is treated as an independent institution, but for most purposes it is considered as an integral part of the main body.

For the payment of cheques it is considered as distinct from the head office or other branches. A customer at one branch is not entitled to present a cheque except at the branch where his account is kept. If it is cashed at another branch, for a holder, all parties are in the same position as though it was on another bank: *Woodland v. Fear*, 7 E. & B. 519 (1857).

The same principle applies as to notice of dishonour or protest. Each branch indorsing has a day to send notice to the next preceding indorser: *Clode v. Bayley*, 12 M. & W. 51 (1843); *Prince v. Oriental Bank*, L. R. 3 A. C. at p. 332 (1878); *Steinhoff v. Merchants' Bank*, 46 U. C. Q. B. 25 (1881); *The Queen v. Bank of Montreal*, 1 Exch. Can. 154 (1886); *Fielding v. Corry*, [1898] 1 Q. B. 268. A branch cannot keep open after receiving notice that the head office has suspended payment; but until such notice is received its authority to do business is not revoked.

But for most purposes a bank and its branches are in law held to be one. Where notice affects the liability of a bank, it is not necessary that it should be given to all the branches. It is sufficient to give notice at the head office, and this will be good against all the branches after a sufficient time has elapsed to allow of its being sent from the head office to the branches: *Willis v. Bank of England*, 4 A. & E. 21 (1835).

Another result of treating a head office and a branch as one, is, that entries of sums transferred or transmitted are on the same footing as entries in the same office. A note was paid in at the head office and transmitted to a branch

where it was payable, and the signature there cancelled. The head office was notified and the amount credited; but before the customer was advised it was discovered that the note should not have been marked paid. It was marked "cancelled in error" and the entries reversed. Held that the bank had a right to do so: *Prince v. Oriental Bank*, L. R. 3 A. C. 325 (1878). See also *Simson v. Ingham*, 2 B. & C. 65 (1823); *Irwin v. Bank of Montreal*, 38 U. C. Q. B. 375 (1876); *Bain v. Torrance*, 1 Man. R. 32 (1884).

Another result of this principle is that if a customer has accounts at two or more branches, the bank may consolidate them, and a cheque may be refused when there appears to be money to his credit, if upon the whole there are not sufficient funds: *Garnett v. McKewan*, L. R. 8 Ex. 10 (1872); *Prince v. Oriental Bank*, 3 A. C. at p. 333 (1878); *Teale v. Brown*, 11 T. L. R. 56 (1894).

A bank is bound to know the amounts of its own drafts, and if one branch pays a draft drawn by another branch, the amount of which had been fraudulently raised, the bank cannot recover the money from the holder who has acted in good faith: *Union Bank v. Ontario Bank*, 9 R. L. 631 (1879).

Where a bank has its head office in another province, but has a branch in Ontario, it is deemed to be resident within Ontario, and moneys deposited at a branch in that province may be attached as debts due to the depositors: *Wentworth v. Smith*, 15 Ont. Pr. R. 372 (1893).

The bank as a dealer.—In the Bank Act, R. S. C. chap. 120, it was provided by section 45, that a bank should not engage "in any trade whatsoever except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking." It will be seen that the terms of the present Act are more specific, and that in addition to its right to discount, lend money, make advances, and take certain collateral securities, which will be considered further on, a bank is given express power to deal "in gold and silver coin and bullion, bills of exchange, promissory notes and other negotiable securities,

or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, foreign, and other public securities."

"Dealing" in these instruments and securities, as distinguished from discounting or lending money or making advances on them, would ordinarily mean buying and selling them outright without an indorsement of them by the customer, or with an indorsement "without recourse" when they are made payable to his order. This is the usual way in which these instruments and securities, except bills of exchange and promissory notes, are disposed of. In that event the seller simply warrants that they are genuine and that he has a right to transfer them, and that he is not aware at the time that they are valueless; practically the same warranties as if he was selling coin or bullion. Bills of Exchange Act, sec. 58, sub-sec. 3; *Lewis v. Jeffery*, M. L. R. 7 Q. B. 141 (1875); *Jones v. Ryde*, 5 Taunt. 488 (1814); *Gompertz v. Bartlett*, 2 E. & B. 489 (1853); *Gurney v. Womersley*, 4 E. & B. 139 (1854); *Nichols v. Fearson*, 7 Peters (U. S.) 103 (1833).

The Bank Act of 1871 contained a provision similar to that quoted above from R. S. C. chap. 120. Like the latter, it also authorized a bank to acquire and hold corporation bonds and debentures as collateral security and to realize upon them. It was held that this authorized a bank not only to lend money on these securities, but also to purchase them absolutely: *Jones v. Imperial Bank*, 23 Grant 269 (1876).

"Other securities" in this section means securities of the same kind as those mentioned, namely, similar to bills of exchange and promissory notes. It would probably be held to include cheques, bonds payable to bearer or a person named, negotiable deposit receipts and the like.

Discounts.—By this section a bank is authorized to discount "bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and

obligations of municipal corporations, or Dominion, Provincial, British, foreign, and other public securities." When a bank discounts a negotiable instrument it really becomes the purchaser, and the instrument becomes a part of its assets. The expression "discounting" is not, however, usually applied to the acquisition of such bonds, debentures and public securities. As a rule they are either bought without the seller's indorsement or they are received by the bank as collateral security. "Discounting" is usually applied to bills of exchange and promissory notes not yet due, and which the bank acquires from the drawer or indorser, crediting him with the face of the instrument less the discount for the time it has to run. If the customer does not indorse it, it is a simple sale, and the seller only warrants its genuineness, and is not responsible if the maker or acceptor does not meet it or subsequently becomes insolvent: *Gurney v. Womersley*, 4 E. & B. 133 (1854).

Usually, however, the customer indorses the bill or note discounted by a bank. This transaction is sometimes spoken of as the bank lending him money on the security of the instrument; but such is not its real nature. It is in effect a sale with warranty. The bill or note becomes the property of the bank, absolutely, and it agrees to look in the first instance to the acceptor or maker for payment, and only to the customer in case of their default of payment at maturity and notice to him of such default: *Carstairs v. Bates*, 3 Camp. 301 (1812); *Morley v. Culverwell*, 7 M. & W. 174 (1840); *Rouquette v. Overmann*, L. R. 10 Q. B. 525 (1875); *Re Gomersall*, 1 Ch. D. 142 (1875).

A bank may discount a cheque as well as a bill or note. If this is done without getting the customer's indorsement he cannot be sued upon it or directly for the money advanced him. When a cheque drawn upon one branch of a bank, was presented for payment at another branch where the holder was known to the officers and they cashed it for him, it was held that the cheque was cashed on the credit of the holder, and that the bank was, on its dishonor, entitled to charge him with the money he received: *Woodland v. Fear*, 7 E. & B. 519 (1857).

While discounted bills are current the bank has no lien on the customer's cash balance, and ought not to dishonor his cheques during that time, if the account is in funds: *Bower v. Foreign Gas Co.*, 22 W. R. 740 (1874).

As a discounted bill is the property of the bank, it follows that if it is accidentally destroyed or lost, the loss falls on the bank: *Carstairs v. Bates*, 3 Camp. 301 (1812).

Where the bank agreed with an indorser, who was a surety for contractors, that all moneys earned should apply on the discounted paper, and the bank without his consent applied some of the moneys otherwise, the surety was held to be discharged: *O'Gara v. Union Bank*, 22 S. C. Can. 404 (1893).

Where a customer gave a bank a bill of exchange to discount, it had no right to keep the bill and apply the proceeds on his former indebtedness without his consent: *Landry v. Bank of Nova Scotia*, 29 N. B. 564 (1889); *Flecker v. Bank of U. S.*, 8 Wheaton 338 (1823).

Collateral security.--A bank may not only discount the negotiable instruments named in this section, but may also make advances upon them, and take them as collateral or further security for loans made by it. There is this difference to be noted between discounting and taking as collateral security. The former, as already stated, is a selling, and the instrument discounted becomes the property of the bank. The latter is rather a pledging or hypothecating of the instrument, which remains the property of the customer, but is subject to the lien of the bank for the amount of the advances or loan, with interest and any other accessory charges. If such an instrument should be lost or destroyed, without negligence, the loss, if any, would fall on the customer and not on the bank.

When a bank receives as collateral security a negotiable instrument which is payable to bearer, or is indorsed in blank or indorsed in its favor, it becomes the holder of the paper within the meaning of the Bills of Exchange Act, and can exercise all the rights of a holder, one of which is that it

may sue upon it in its own name. Such a pledging is a negotiation of the instrument: Bills of Exchange Act, sec. 31. When the bank so acquires it before maturity, in good faith, without notice of any defect in the title of the customer, it holds it free from any defect of title of prior parties: *Ib.* sec. 38.

The bank can sue upon such paper when it becomes due, and before the maturity of the debt for the security of which it was given as collateral: *Shaw v. Crawford*, 16 U. C. Q. B. 101 (1857); *Ross v. Tyson*, 19 U. C. C. P. 294 (1869); *Ward v. Quebec Bank*, Q. R. 3 Q. B. 122 (1894).

If it realizes more than its debt from its collaterals or otherwise, it holds the surplus as a trustee for the customer, who is entitled to it, and also to the surrender of any collaterals on hand after payment of the debt. The bank is liable if it does not exercise due diligence in presenting such collateral paper for payment and giving notice to indorsers in case of non-payment: *Peacock v. Purcell*, 14 C. B. N. S. 728 (1863); *Browne v. Commercial Bank*, 10 U. C. Q. B. 129 (1852); *Ryan v. McConnell*, 18 O. R. 409 (1889).

A power of attorney to sell, dispose of, assign and transfer promissory notes does not give the right to pledge them as security for a loan: *Jonmenjoy v. Watson*, 9 A. C. 561 (1884).

Where a bank took a note indorsed by a customer as collateral security for past advances amounting to \$10,000, and after the maturity of this note deposits amounting to more than \$100,000 were passed to his credit in the books of the bank, it was held that in the absence of any agreement as to the imputation of payments, they would be applied to the oldest debt, and the collateral was discharged, the bank having no claim on the maker or the customer who indorsed it: *Exchange Bank v. Nowell*, M. L. R. 3 S. C. 129 (1887).

A letter of guarantee was given to secure advances on certain accepted drafts discounted by a bank. It was declared to be a continuing guarantee. The drafts were re-

newed. It was held that the guarantee covered the renewals, although renewals were not expressly mentioned: *Brush v. Molsons Bank*, Q. R. 3 Q. B. 12 (1893). The expression "collateral security" is sometimes used in the sense of a secondary, at other times in the sense of a primary security: *Athill v. Athill*, 16 Ch. D. 211 (1880).

Where a bank has received as collateral security bills or notes or other securities, and also holds liable some person who may occupy the position of a surety, care should be exercised in dealing with such securities if the surety is to be held responsible. The law of Quebec on the subject is expressed in Article 1959 of the Civil Code: "The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor." This also expresses the law in the other provinces where the English law prevails.

In the case of the *Central Bank v. Garland*, 20 O. R. 142 (1890), goods were sold for which the purchasers gave their notes and also hire receipts, by which the property remained in the vendor until the goods were paid for. These notes were discounted through a third party, and the bank was aware of the hire receipts being taken, but there was no express contract in regard to them. It was held that the hire receipts were accessory to the debt, and that the bank was entitled to recover them from the assignee of the vendor. This case was affirmed on appeal: 18 Ont. A. R. 438 (1891).

A promissory note was given in payment of the price of some real estate and was secured by mortgage on the property. The note was indorsed to the Quebec Bank. It was held that under Articles 1573 and 1574 of the Civil Code the bank became entitled to the mortgage without signification of the transfer and could even bring an hypothecary action against the holder of the mortgaged property: *Quebec Bank v. Bergeron*, 11 Q. L. R. 368 (1885).

The law in Ontario as to the right of the surety who pays to get an assignment of the securities held by the bank is contained in section 2 of the Mercantile Amendment

Act, R. S. O. chap. 145, which reads as follows: "Every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty shall be entitled to have assigned to him, or a trustee for him, every judgment, specialty, or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty." The Civil Code of Quebec is to the same effect: "Art. 1950. The surety who has paid the debt is subrogated in all the rights which the creditor had against the debtor."

A bank received the note of a third party as collateral security for a \$200 note which it discounted. On maturity of this latter note the maker paid \$25 and gave his note for \$175. This did not relieve the maker of the note given as collateral: *Canadian Bank of Commerce v. Woodward*, 8 Ont. A. R. 347 (1883).

When timber limits given to a bank as collateral security were offered at auction and withdrawn, and subsequently sold at private sale for what was held to be a grossly inadequate price, the bank was held liable for the difference between the sum obtained and the real value of the limits: *Prentice v. Consolidated Bank*, 13 Ont. A. R. 69 (1886).

If a bank agrees to give a customer a line of credit, accepting negotiable paper as collateral, it is not obliged, so long as the paper remains uncollected, to give any credit in respect of it; but when any portion of the collaterals is paid, it operates at once as payment of so much of the customer's debt, and must be credited to him: *Cooper v. Molsons Bank*, 26 S. C. Can. 611 (1896). Affirmed in Privy Council, 26 A. R. 571 (1898); 14 T. L. R. 276. A bank on discounting a note received collateral security from a third party, on condition that it would use diligence in collecting the note. It renewed the note and released one of the indorsers for a consideration. The depositor of the collateral sued for and recovered it: *Banque du Peuple v. Pacaud*, Q. R. 2 Q. B. 424 (1893).

NEGOTIABLE INSTRUMENTS.

This section authorizes banks to deal in bills of exchange, promissory notes and other "negotiable securities." The expression "negotiable securities" or "negotiable instruments" is used in two senses. It is frequently used to describe any written security which may be transferred by indorsement and delivery, or by delivery alone, so as to vest in the holder the legal title, and thus enable him to sue upon it in his own name. In a narrower and more technical sense it applies only to those instruments which, like bills of exchange, by indorsement or delivery before maturity, vest in the *bona fide* holder for value not only the rights of the transferrer, but the right to claim the full amount for which the instrument is drawn: *Goodwin v. Robarts*, L. R. 10 Ex. 337 (1875); *Crouch v. Credit Foncier*, L. R. 8 Q. B. at p. 381 (1873); *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. at p. 294.

The expression would seem to have been used in this section in the latter sense as there is added "or the stock, bonds, debentures, and obligations of municipal and other corporations, or Dominion, Provincial, British, foreign and other public securities," some of which would come within the former meaning. All of these when in their usual form, except "stock" when used to designate capital or shares, would be negotiable instruments in the wider sense; while some of them may come within that designation in the narrower or more technical sense. In the broader meaning it would include warehouse receipts and bills of lading, which it is evident from subsequent sections were not intended to be included. The powers conferred by the present section were evidently intended to be confined to money and securities for money.

Bills and notes.—Bills of exchange and promissory notes both had a negotiable quality by the law merchant, and they have always been recognized as such in Canada, as well in the Province of Quebec through the French law,

as in those provinces which derived their laws from England. By far the larger part of the business of our Canadian banks is in the discounting of bills and notes.

For questions which may arise in connection with them the reader is referred to the Bills of Exchange Act, 1890, and works on that subject.

Cheques.—A cheque is defined by section 72 of the Bills of Exchange Act as a bill of exchange drawn on a bank, payable on demand. Cheques are negotiable in the same sense and to the same extent as bills or notes. Being intended for immediate payment, and not bearing interest, they are seldom dealt in as negotiable securities. As a rule, banks receive cheques on other banks or on their own branches only for collection.

For the law on the subject of cheques, the reader is referred to that portion of the Bills of Exchange Act and the notes thereon, which is found in the present work following the schedules to this Act.

Bank deposit receipts.—The instruments of this class which were considered in the earlier Canadian cases were not made payable to order or bearer, and so were held not to be negotiable instruments under the law relating to promissory notes as it then stood, so as to enable the holder by indorsement or delivery to recover in his own name. See *Mander v. Royal Canadian Bank*, 20 U. C. C. P. 125 (1869); *Bank of Montreal v. Little*, 17 Grant 313 (1870); *Lee v. Bank B. N. A.*, 30 U. C. C. P. 255 (1879); followed in *Armour v. Imperial Bank*, 15 C. L. J. 391 (1895). In *Voyer v. Richer*, 13 L. C. J. 213 (1869), the Quebec Courts held that even when the receipt was payable to order it was not negotiable. In the Privy Council, L. R. 5 C. P. 461 (1874), it was said that there was "high authority in favor of considering it to be negotiable," but the case was decided on another ground. In *Re Central Bank*, 17 O. R. 574 (1889), it was held that the bank which had issued such a receipt, payable to order, was estopped from denying its negotiable character. Under section 8 of the Bills of Exchange Act,

if such a receipt contains words prohibiting transfer or indicating an intention that it should not be transferable, it would not be a negotiable instrument, but would be a chose in action and require to be assigned in writing, in accordance with the provincial law: *In re Commercial Bank of Manitoba, Barkwell's Claim*, 11 Man. R. 494 (1897).

Such words would not prevent the depositor from thus transferring the receipt and enabling the transferee to draw the money. It would prevent its being transferred by indorsement or delivery under the law merchant or the Bills of Exchange Act, and would prevent the transferee from acquiring any greater rights than the transferor had. It would enable the bank to set up against the holder any equities it might have against the depositor prior to the transfer.

Such receipts have been held in the United States to be negotiable instruments: *Miller v. Austin*, 13 Howard, U. S. 218 (1851).

They may also be the subject matter of a good *donatio mortis causa*: *Hewitt v. Kaye*, L. R. 6 Eq. 198 (1868); *In re Mead*, 15 Ch. D. 651 (1880); *In re Dillon*, 44 Ch. D. 76 (1890).

Municipal debentures.—Banks are also authorized to deal in the stock, bonds, debentures, and obligations of municipal corporations, to discount them, to lend money and make advances upon their security, and to take them as collateral security for loans. Nor are they restricted to those issued by municipal bodies in Canada. Care, however, should be taken to see that they are authorized by statute, and that the requirements of the statutes under which they purport to have been issued have been complied with.

Where the power to issue debentures for a given purpose exists, but there has been some irregularity in connection with the passing of the by-law or non-compliance with certain directions, the corporation is estopped from denying the validity of the debentures in the hands of a *bona fide* holder: *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B.

642 (1870); *Confederation Life v. Howard*, 25 O. R. 197 (1894); *Board of Knox Co. v. Aspinwall*, 21 Howard (U. S.) 539 (1858); *Supervisors v. Schenk*, 5 Wallace (U. S.) 772 (1865); *Pendleton County v. Amy*, 13 Wallace (U. S.) 297 (1871).

Where, however, the debenture refers to a by-law and the by-law on its face shows that it is for a purpose not authorized by law, the debenture is invalid: *Confederation Life v. Howard*, 25 O. R. 197 (1894); *Wiltshire v. Surrey*, 2 B. C. R. 79 (1891); *Marsh v. Fulton County*, 10 Wallace (U. S.) 676 (1870).

Money paid for worthless debentures can be recovered back, as money paid without consideration, or for a consideration that has failed: *Straton v. Rastall*, 2 T. R. 366 (1788); *Young v. Cole*, 3 Bing. N. C. 724 (1837); *Confederation Life v. Howard*, 25 O. R. 197 (1894).

In 1855 by the Act of the old Province of Canada, 18 Vict. chap. 80, municipal debentures issued in Upper or Lower Canada, payable to bearer were declared to be transferable by delivery, and those payable to any person or order, by indorsement; the holder for the time being having the right to sue in his own name, and his title not being liable to be impeached if he was a *bona fide* holder for value without notice.

Similar provisions are found in the municipal Acts now in force in most of the provinces of the Dominion. See the Ontario Municipal Act, R. S. O. chap. 223, secs. 429 to 436; Municipal Code, Quebec, Arts. 981 to 987; R. S. Q. Arts. 4629, 4630; also the special Acts of incorporation of the respective cities in the Province of Quebec; Rev. Stat. Man. chap. 100, secs. 433 to 439; Rev. Stat. B. C. chap. 144, secs. 100 to 109.

The negotiability of municipal debentures is sometimes restrained by a provision for registration in the books of the corporation.

They are usually issued for a term of years under the corporate seal, with interest coupons payable

annually or semi-annually attached. It has been thought that their being under seal would prevent their being considered as negotiable instruments; but section 90 of the Bills of Exchange Act shows that this is not an objection in Canada. The coupons are generally in the form of ordinary promissory notes signed by one or more of the officers who execute the debentures.

In Ontario such debentures have long been held to be negotiable, and *bona fide* holders for value have been protected: *Anglin v. Kingston*, 16 U. C. Q. B. 121 (1857); *Trust & Loan Co. v. Hamilton*, 7 U. C. C. P. 98 (1857); *Crauford v. Cobourg*, 21 U. C. Q. B. 113 (1861); *Seally v. McCallum*, 9 Grant 434 (1862).

In Quebec they have been held to be negotiable like promissory notes, and in suing might be declared upon as such: *Eastern Townships Bank v. Compton*, 7 R. L. 446 (1871); *Roxton v. E. T. Bank*, Ramsay, A. C. 240 (1882); *Macfarlane v. St. Cesaire*, M. L. R. 2 Q. B. 160 (1886); *St. Cesaire v. Macfarlane*, 14 S. C. Can. 738 (1887); *Ottawa v. M. O. & W. Ry. Co.*, 14 S. C. Can. 193 (1886); *Pontiac v. Ross*, 17 S. C. Can. 406 (1890).

In the United States, such municipal bonds, negotiable in form, notwithstanding they are under seal, are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities (when the power to issue them exists), in the hands of holders for value before maturity without notice: 1 Dillon, *Municipal Corporations*, 4th ed., secs. 486, 513: See *Cromwell v. Sac. Co.*, 96 U. S. 51 (1877).

Decisions conflict as to whether coupons are entitled to grace. The weight of authority is in favor of their being payable on the very day of maturity without grace: 2 Daniel, secs. 1490a, 1505.

Coupons dishonored bear interest from their maturity: R. S. O. chap. 51, sec. 114 (2); C. C. 1069, 1077.

Company stock or shares.—Banks are also authorized to “deal in, discount, and lend money and make advances upon

the security of, and take as collateral security for any loan made by it, the stock, bonds, debentures, and obligations of corporations, whether secured by mortgage or otherwise;" their powers as to dealing in these securities being the same as with regard to bills of exchange and promissory notes.

The word "stock" in this section would include not only such corporation bonds and debentures as are sometimes called stock, and debenture stock when authorized by statute, but also the shares or capital stock of joint stock and other companies. These latter are not negotiable in the ordinary sense, but are usually assigned or transferred in the books of the company in accordance with the provisions of the governing statute or by-laws.

The power of a bank to "deal in" the stock of such corporations would probably not be held to justify their dealing in them as brokers, investors or speculators. By acquiring a controlling interest, for example, in trading or loan companies they might come within the spirit of the prohibition as to engaging in trade, or lending upon mortgage. Their dealing in them should be in the way of a banking business. In *Re Barned's Banking Company*, L. R. 3 Ch. 105 (1867), similar words were, however, held to authorize a company to take shares in another company. In the *Royal Bank of India's Case*, L. R. 4 Ch. 252 (1869), Selwyn, L.J., said: "I entirely agree with the judgment of Lord Cairns in the case of *Barned's Banking Company*, that there is not, either by the common or statute law, anything to prevent one trading corporation from taking or accepting shares in another trading corporation. . . . I apprehend that making advances upon shares in public companies is within the ordinary course of the dealing of bankers. . . . Then it is said that the consequence is one of very great hardship, as involving the shareholders in the Royal Bank of India in a great number of liabilities in respect of other companies with which they had nothing to do, and many cases have been suggested in argument, such as that of bankers becoming partners in a brewing company, or a shipping company, or many other things with

which, in their own articles of association, they had no connection whatever. But I think the answer to that is, that such dangers are necessarily involved in lending money upon securities of this kind."

The only prohibition is as to its own stock or the stock of another bank.

Even where certificates are issued to represent such shares or stock they are not recognized in England as being negotiable. See *Swan v. N. B. Australasian Co.*, 2 H. & C. 175 (1863); *France v. Clark*, 26 Ch. D. 257 (1844); *London & County Bank v. River Plate Bank*, 20 Q. B. D. 232 (1887); *Sheffield v. London Joint Stock Bank*, 13 A. C. 333 (1888); *Colonial Bank v. Cady*, 15 A. C. 267 (1890).

In the United States they are not considered to be negotiable; but are said to be quasi-negotiable or assignable, being generally subject to certain restrictions in the charter or by-laws of the company. See 2 Daniel, secs. 1708, 1709.

Where a bank held shares of a joint stock company as collateral security, it was held not to be liable for calls on such shares: *Railway Advertising Co. v. Molsons Bank*, 2 L. N. 207 (1879); *Exchange Bank v. C. & D. Savings Bank*, M. L. R. 6 Q. B. 196 (1887). But in *Re Central Bank, Home Savings & Loan Co.'s Case*, 18 Ont. A. R. 489 (1891), where the loan company was authorized to lend money on bank shares, and accepted transfers, absolute in form, it was held liable for calls.

Under the Act of 1871, as amended in 1879, a bank could not make loans on the stock of a joint stock company, and no action would lie on behalf of a bank claiming to have made a loss on such a loan induced by false reports of directors of the company: *Bank of Montreal v. Geddes*, 3 L. N. 146 (1880).

When a bank has advanced money on the stock of a company it is not obliged to sell the stock before bringing an action against the directors of the company for having made false reports and for paying dividends not justified by the

profits, and thereby unduly inflating the price of the stock and inducing the bank to lend upon it: *Montreal C. & D. Savings Bank v. Geddes*, 19 R. L. 684 (1890).

Bonds or debentures of other corporations.—Banks may also deal in these securities in the same manner as with bills and notes. Railway and other commercial corporations incorporated by special Dominion or Provincial Acts are usually authorized to issue bonds or debentures up to a certain limit, which are secured by a lien or mortgage on the undertaking made in favor of trustees for the holders of the bonds. Companies incorporated by Dominion letters patent may also issue bonds or debentures for borrowed money: R. S. C. chap. 119, sec. 37. In Ontario, by R. S. O. chap. 119, sec. 38, bonds and debentures of corporations, if payable to bearer, are transferable by delivery, and if to order, by indorsement and delivery, and the holder may sue in his own name. Other provinces have similar provisions.

See *Bank of Toronto v. Cobourg P. & M. Ry. Co.*, 7 O. R. 1 (1884), where bonds are compared to promissory notes; and *Desrosiers v. Montreal P. & B. Ry. Co.*, 6 L. N. 388 (1883), as to coupons.

In England such bonds and debentures of both home and foreign companies have frequently come before the Courts. Even when they were made payable to order or bearer, the transferee has sometimes been denied the right to sue in his own name, although as a general rule the company which has issued such securities has been held to be estopped from denying their negotiability. The course of the jurisprudence has been towards placing such instruments more nearly on the same footing as bills and notes. The case of *Sheffield v. London Joint Stock Bank*, 13 A. C. 333 (1888), in the House of Lords, was understood to have somewhat restricted their negotiability. This interpretation was put upon it in *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270; but the House of Lords, in reversing this latter decision, explained that the Sheffield judgment was based upon the particular facts of that case. For

a full discussion of the law as to such bonds or debentures in England: see *Re Blakely Ordinance Co.*, L. R. 3 Ch. 154 (1867); *Re Natal Investment Co.*, *ibid.* 355 (1868); *Re General Estates Co.*, *ibid.* 758 (1868); *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1871); *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642 (1870); *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374 (1873); *Goodwin v. Roberts*, 1 A. C. 476 (1876); *Re Romford Canal Co.*, 24 Ch. D. 85 (1883); *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

Certain debentures issued by an English company and payable to bearer had conditions indorsed on them which prevented their being promissory notes. Plaintiffs who owned them kept them in a safe, the key of which was entrusted to their secretary. The latter fraudulently pledged them to defendants, who made the advances in good faith. It was proved that commercial usage had for many years treated such debentures as negotiable instruments transferable by delivery. It was held that although plaintiffs were not estopped by their conduct from denying defendants' title, yet the latter were entitled to hold them as transferable by mere delivery, and that *Crouch v. Credit Foncier* had been in effect overruled by *Goodwin v. Roberts*: *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

Where an agent in possession of debentures of a corporation, payable to bearer, which are past due, but on which interest is being paid, pledges them for an advance for himself, the fact that they are past due does not destroy their negotiable character, and is not alone sufficient to put the person advancing the money on his guard. Nothing short of bad faith will affect his title. The fact that they are past due does not affect persons claiming ownership, who are not liable as makers or indorsers. A negotiation of such debentures is not subject to Articles 1487, 1488, 1489 and 1490 of the Civil Code as to sales by persons who are not the owners of the things sold: *Macnider v. Young*, Q. R. 3 Q. B. 539 (1894). This judgment was affirmed in the Supreme Court where it was also held (following *In re*

European Bank, L. R. 5 Ch. 338), that a person taking such instruments after maturity, took them subject not only to the equities of prior parties to them, but also to the equities of third parties: *Young v. Macnider*, 25 S. C. Can. 272 (1895).

In the United States such bonds, as well as those issued by the Federal and State Governments, and by municipalities, if made payable to order or bearer, are generally considered to be negotiable in the highest sense of that term, as are also the interest coupons: 2 Daniel, secs. 1486 to 1517*a*.

On account of having the latter attached they are frequently called "Coupon Bonds." If the bond is secured by a mortgage, this covers the coupon and interest on it if not paid on presentation at maturity. Neither the mortgage security, nor the informal nature of the coupons prevents their being negotiable instruments: 2 Daniel, secs. 1486 to 1517, *Venables v. Baring*, [1892] 3 Ch. 527.

Government securities. — Banks are also authorized to deal in "Dominion, Provincial, British, foreign and other public securities." These bonds or debentures are usually in the form of negotiable instruments, payable to order or bearer. In the English Courts the question of the negotiability of foreign Government bonds has often come up. The question to be decided has been held to be, whether they were treated as negotiable in the English money market, if consistent with what appeared on their face, and not simply whether they were made payable to order or bearer, or whether they were considered to be negotiable in foreign countries. See *Glyn v. Baker*, 13 East 509 (1811), as to East India Bonds; *Gorgier v. Mieville*, 3 B. & C. 45 (1824), as to Prussian Government bonds; *Lang v. Smyth*, 7 Bingham 284 (1831), as to Neapolitan bonds; *Atty.-Gen. v. Bouwens*, 4 M. & W. at p. 190 (1838), as to Russian and Danish bonds; *Heseltine v. Siggers*, 1 Exch. 856 (1848), as to Spanish stock; *Picker v. London & County Bank*, 18

Q. B. D. at p. 518 (1887), as to Prussian Government bonds. The course of the jurisprudence is in the direction of favoring the negotiability of such instruments.

Letters of credit.—A letter of credit is not a negotiable instrument: *Orr v. Union Bank*, 1 Macq. H. L. at p. 523 (1854); *British Linen Co. v. Caledonian Ins. Co.*, 4 Macq. 107 (1861). A circular note is a letter of credit in which the person in whose favor it is granted carries with him a letter containing the signature to be shewn to the correspondents of the bank to whom the note may be presented. This is called a letter of indication: *Confans Stone Quarry Co. v. Parker*, L. R. 3 C. P. 1 (1867). A bank cannot deal in such securities as a "letter of credit" signed by the Provincial Secretary of Quebec without the authority of an order in council, which is dependent upon the vote of the legislature, and therefore not a negotiable instrument within the Bills of Exchange Act or the Bank Act: *Jacques Cartier Bank v. The Queen*, 25 S. C. Can. 84 (1895).

A bank cannot revoke a letter of credit at pleasure; but after notice of revocation has been given to the holder, he is not bound to present it for acceptance in order to recover from the bank: *Bank of Toronto v. Ansell*, 5 L. N. 408 (1873).

Post-office orders.—A post-office money order is not a negotiable instrument: *Fine Art Society v. Union Bank*, 17 Q. B. D. at p. 713 (1886).

A general banking business.—In addition to the right to issue notes for circulation and to receive deposits given in other sections, and in addition to the special powers as a bank of discount enumerated in the earlier part of this section, a bank is authorized to "engage in and carry on such business generally as appertains to the business of banking." This, of course, is subject to the limitations and restrictions contained in the Act.

A bank, like any other corporation, has the right to do such acts and to enter into such contracts as may be necessary to enable it to carry out the object of its incorporation, or to exercise the powers that are either expressly or

by implication conferred upon it by the Act. Section 67 gives it the power to acquire real estate for its own use, and to dispose of the same. Sections 65, 69, 70 and 78 show how it may dispose of stock, lands and merchandise in which it may not traffic, but which come into its possession indirectly through its dealings authorized by the Act.

A branch of general banking business not specified in the Act is the collection of bills and other negotiable instruments for its customers. The bank presents them for payment, and if paid, places the amount, less its charge for collection, to the credit of the customer. Such instruments while in the custody of the bank remain the property of the customer, subject to any lien the bank may have, if it allows the customer to draw against them, or if it places the amount to his credit before it is paid. The bank may sue the other parties to the bill if it is not paid; but cannot sue the customer unless it has a lien on the bill for an advance, overdraft or other liability: *Ex parte Schofield*, L. R. 12 Ch. D. 337 (1879); *Misa v. Currie*, 1 A. C. 554 (1876). The bank is liable for any loss that may arise from not duly presenting the bill for payment, or for not giving due notice of dishonor: *Steinhoff v. Merchants Bank*, 46 U. C. Q. B. 25 (1881). The bank may make a reasonable charge for such services.

A similar rule would apply where a customer delivers a bill to a bank to get accepted for him. In case acceptance is refused and the bank fails to inform the customer, it will be liable for any damage arising from such neglect: *Van Wart v. Wooley*, 3 B. & C. 439 (1824); *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526 (1871).

When a bank receives a note for collection and in the regular course of business places the same in the hands of a responsible and solvent agent, it is not liable for the loss of the note in the mails. In any case the offer of the bank to give security to the makers and endorser that they would never be troubled if they paid the note was sufficient: *Lilman v. Montreal City & District Savings Bank*, Q. R. 13 S. C. 262 (1897).

Directors of a bank, without special authorization, have power to borrow such sums as may be required to meet the liabilities of the bank, and to give a promissory note or other usual acknowledgment therefor. The fact that the engagement to repay was accomplished by other stipulations that were *ultra vires* would not discharge the bank from liability to repay the loan or render the note invalid: *Bank of Australasia v. Breillat*, 6 Moore P. C. 152 (1847).

Authority to carry on such business as generally appertains to the business of banking covers the case of a bank guaranteeing payment to the vendors in England of the price of goods sold to a customer in Montreal, on having the bills of lading addressed directly to the bank, and does not come within the prohibition as to dealing in merchandise: *Molsons Bank v. Kennedy*, 10 R. L. 110 (1879).

Where a bank discounted a draft on the assurance that the acceptor of a maturing bill would accept it, and a cheque for the proceeds was sent to the acceptor with a statement of what had occurred, and the latter kept the cheque and retired the maturing bill with it, but refused to accept the new one, he was held liable to the bank for the amount: *Torrance v. Bank of British North America*, L. R. 5 P. C. 246 (1873).

In a case very similar to the foregoing, *Dunspaugh v. Molsons Bank*, 23 L. C. J. 57 (1878), where the bank made advances after being shown a telegram from the acceptor that he would accept a renewal, it was held entitled to recover the amount of its advances from the acceptor, who declined to accept the renewal. Again, where the drawer telegraphed the acceptor to draw on him for the amount of a maturing bill, and a bank, on seeing the telegram, advanced the money to retire the maturing bill, its claim against the drawer, who refused to accept the new bill, was maintained: *Bank of Montreal v. Thomas*, 16 O. R. 503 (1888).

A manufacturer discounted with a bank an unaccepted draft on a customer, and at the same time assigned to the bank the claim for the price of the goods. The customer

refused to accept the draft, but remitted the money to the seller who had become insolvent and it came into the hands of his curator. The latter claimed that the bank had no power to accept such an assignment. It was held that the transaction was authorized by the present section and also by section 74 of the Bank Act: *Merchants Bank v. Darveau*, Q. R. 15 S. C. 325 (1898).

Bankers are subject to the same principles of law as ordinary agents, and when they receive a bill for collection cannot bind the principals by setting off the amount of the bill against a balance due by them to the acceptor, or otherwise than by receiving payment in money only: *Donogh v. Gillespie*, 21 Ont. A. R. 292 (1894).

A firm of contractors, in pursuance of an agreement with an indorser of a note discounted, assigned to a bank moneys which would be coming to them on a railway contract, and gave the manager a power of attorney to collect the money. It was held that the bank might under its general powers take an assignment of such a chose in action as additional security: *Molsons Bank v. Carscaden*, 8 Man. R. 451 (1892).

A bank is not authorized to enter into a contract of suretyship guaranteeing the payment by a customer of the hire of a steamship under a charter party, and where the bank has derived no benefit from such a contract a claim against it under such circumstances will be dismissed: *Johansen v. Chaplin*, M. L. R. 6 Q. B. 111 (1889); *Watts v. Wells*, M. L. R. 7 Q. B. 387 (1890).

A Milwaukee bank sent to a Toronto bank a bill drawn at forty-five days, together with a bill of lading for wheat. It was held that in the absence of instructions the latter bank was right in giving up the bill of lading on the bill being accepted. Evidence of usage in the United States and Canada was given. It was held that the latter alone was relevant: *Wisconsin Bank v. Bank of British North America*, 21 U. C. Q. B. 284 (1861). To the same effect, *Goodenough v. City Bank*, 10 U. C. C. P. 51 (1860).

Where a customer deposits a cheque for collection and it is passed to his credit, the bank has a right to charge it back when it is dishonored, even when the customer did not endorse it: *Owens v. Quebec Bank*, 30 U. C. Q. B. 382 (1870).

Where the directors of a bank are authorized to deal with money, to advance money, to take money from their customers, to indorse bills, and to do a general banking business, they have power, when the formation of a company is of importance to the bank, to guarantee the payment of interest on the debentures of the company: *In re West of England Bank*, 14 Ch. D. 317 (1880).

When a bank receives for collection, without special instructions, a cheque on a bank in the same place, it should present it either the same day or the next business day; if on a bank in another place, it should be forwarded within the same delay: *Redpath v. Kolfage*, 16 U. C. Q. B. 433 (1858); *Owens v. Quebec Bank*, 30 *ibid.* 382 (1870); *Boyd v. Nasmith*, 17 O. R. 40 (1888); *Blackley v. McCabe*, 16 Ont. A. R. 295 (1889); *Sawyer v. Thomas*, 18 *ibid.* 129 (1890); *Marler v. Stewart*, 2 Stephens, Que. Dig. 111 (1878); *Heywood v. Pickering*, L. R. 9 Q. B. 428 (1874).

The same diligence should be used in presenting for payment a bill payable on demand, and for presenting for acceptance a bill entrusted to the bank for that purpose. If a bill is not accepted within two days after it is presented for acceptance, it should be treated as dishonored: Bills of Exchange Act, sec. 42.

A bank gave an open letter of credit for £15,000, and requested parties negotiating bills under it to indorse particulars on the back of it. Bills were drawn under it, and when negotiated were indorsed as requested. The bank failed; and the party to whom the letter was given was indebted to the bank apart from these bills. The bank was held liable to the holder of the bills, irrespective of the state of the account between it and the party to whom the letter was given: *Agra & Masterman's Bank, Ex parte Asiatic Banking Corporation*, L. R. 2 Ch. 391 (1867).

A bank opened two accounts with a customer, a loan account and a drawing account. It closed the latter by transferring the balance to the loan account in reduction of the customer's debt. At the time there were bills and cheques of the customer outstanding, which on being presented were dishonored. It was held that in view of the course of dealing, the bank was not entitled to close the current account without a reasonable notice, and the customer recovered £500 damages: *Buckingham v. The London and Midland Bank*, 12 T. L. R. 70 (1895).

A firm of stockbrokers had two accounts with their bankers, a current account and a loan account. They had deposited as security for their general indebtedness bonds and shares belonging to clients, but the bankers did not know these were not their own. The brokers failed, having a balance to their credit on the current account, and owing the bank on the loan account. The bankers sold the securities for more than the total amount due on the loan account. It was held that the two accounts should be treated as one; that the bankers should apply the balance to the credit of the current account in reduction of the amount due on the other, and use the proceeds of the securities only to pay the balance, the surplus belonging to the owners of the securities. Two days before the stoppage of the brokers a client had sent them a cheque to pay for some stock they had purchased for him. They paid this in to their current account, and the purchase was not completed. Held, that the client had no equity on the balance of the current account as against the owners of the securities: *Mutton v. Peat*, [1900] 2 Ch. 79.

Banks as bailees.—Sometimes banks keep for safety boxes of valuables, such as plate, jewellery, etc., for their customers. If they make a charge for this, they would incur the same responsibility as other depositaries or bailees. If on the other hand, as is usually the case, they do it without making a charge, they will be liable only in the case of gross negligence. Where a box containing securities was kept in the inner vault of a bank and was stolen by the

cashier, the Privy Council held that the owner could not recover as no charge was made for the service: *Giblin v. McMullen*, L. R. 2 P. C. 317 (1868). In the case of such deposits the Statute of Limitations or prescription does not begin to run until after a demand has been made on the bank for delivery of the property: *In re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154.

Business prohibited to banks.—A bank being created for the purpose of carrying on a banking business, anything outside of that would be beyond its scope. There are, however, certain transactions or lines of business, more or less connected with banking, which it might be claimed that a bank had a right to engage in if not specially prohibited.

Subject to the exceptions named in the Act, these are laid down in the present section as follows:

1. A bank is prohibited from dealing in the buying or selling or bartering of goods, wares and merchandise, or engaging in any trade or business whatsoever. The exceptions are contained in sections 68, 73, 74, 75 and 76, which relate to property which a bank may acquire through a valid chattel mortgage, warehouse receipt, bill of lading or security. Such goods, wares and merchandise may be disposed of as pointed out in sections 68 and 78.

In *Radford v. Merchants' Bank*, 3 O. R. 529 (1883), a bank sold goods which it had acquired by means not recognized by the Act, and was sued for breach of warranty. It was held that the action would not lie, as the bank was prohibited from selling goods.

In *Ayers v. South Australia Banking Co.*, L. R. 3 P. C. 548 (1871), a similar prohibition was considered, and it was said that it would not prevent the property from passing or the purchaser from the bank getting a good title to the goods.

2. A bank is also prohibited from purchasing, or dealing in, or lending money, or making advances upon the security of any pledge of any share of its own capital stock, or the capital stock of any bank. This prohibition is absolute.

If directors should undertake to buy up shares with the bank's money in order to keep up the price of the stock or for any other purpose, they would be personally liable: *McDonald v. Rankin*, M. L. R. 7 S. C. 44 (1890).

In the winding up of the Central Bank, a question was raised as to shares which the cashier had purchased for the bank and which he had subsequently disposed of. It was held that the purchasers could not set up this illegality so as to escape payment of the double liability to the liquidators: *Nasmith's Case*, 16 O. R. 293 (1888). See *Stone v. City and County Bank*, 3 C. P. D. 282 (1877). A person who had shares transferred to him on behalf of the bank is also responsible for the double liability on the winding up: *Henderson's Case*, 17 O. R. 110 (1889).

It is unnecessary, however, for a bank to take security upon its own stock held by a debtor, as section 65 gives it a privileged lien on such stock and its dividends until the debt is paid. Sections 35 and 38 also give it the power to prevent the transfer of any such stock until all liabilities to it are cleared off. This applies not only to debts due but also those to mature. In the case of *The Exchange Bank v. Fletcher*, 19 S. C. Can. 278 (1890), it was assumed that under the Act of 1871 as amended in 1879, a bank had no authority to lend upon the security of the shares of another bank. Such shares were transferred to the managing director of the Exchange Bank as security for advances made by the latter. He fraudulently pledged them to another bank for his private debt and absconded. It was held that the prohibition to make advances on such security applied to the bank lending, and not to the borrower, and the loan having been repaid, the Exchange Bank was condemned to return the shares or to pay their value.

3. A bank is also prohibited from lending money or making advances upon the security, mortgage, or hypothecation of any land, tenements or immovable property. It may, however, take a mortgage on land by way of additional security for debts contracted to it in the course of its business: sec. 68. See the notes under that section as to how this provision has been interpreted.

Under the Act of 1871, it was held that the cashier of a bank who had indorsed notes for a customer of the bank might, if in good faith, take a mortgage on the customer's real estate to protect himself on the indorsements: *Thibaudeau v. Beaudoin*, 3 L. N. 306 (1880).

4. A bank is also prohibited from lending money or making advances upon the security, mortgage or hypothecation of any ship or vessel, except that it may take a mortgage on them by way of additional security: sec. 68; and it may advance money for aiding in the building of ships or vessels: sec. 72. See the notes to these sections.

5. A bank is also prohibited from lending money or making advances on the security of any goods, wares and merchandise, except as it may lend upon chattel mortgage by way of additional security for debts contracted: sec. 68; or on a bill of lading or warehouse receipt under section 73; or on a security under section 74. See the notes to these sections and to section 75.

As to what would be the result of a bank's doing or attempting to do any of the acts prohibited in this section it would be difficult to lay down any general rule, as each case would be governed largely by its particular circumstances. In the first place the bank would be liable to the penalty of \$500 for each violation, which would be payable to the Dominion Government: secs. 79 and 98.

In the next place it is to be observed that these acts, in so far as they do not come within the exceptions in other sections, are not only *ultra vires* in the sense that they are outside the objects for which banks are incorporated, but they are also illegal, as being positively prohibited by the Act.

It has been laid down as the result of the English authorities on the subject, that while any such transaction is merely executory, neither party can have as against the other any cause of action; and that even when executed wholly or in part by one of the parties, it is not, nor is any part of it enforceable by an action directly upon the engagement itself; the most that the party complaining can

obtain is an account. If a loan is made and a prohibited security is taken, the bank would have no right to claim or enforce the security, but the borrower would be liable for the loan. Where a security is partly legal and partly illegal, the right of a bank has been maintained for the portion that was legal.

In *Bank of Toronto v. Perkins*, 8 S. C. Can. at page 610 (1883), Ritchie, C.J., said: "This prohibition (as to lending on mortgage) is a law of public policy in the public interest, and any transaction in violation thereof is necessarily null and void. No Court can be called upon to give effect to any such transaction or to enforce any contract or security on which money is lent or advances as thus prohibited are made. It would be a curious state of the law, if, after the legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel Courts to enforce and give effect to their illegal transactions." In the same case, at p. 617, Strong, J., said: "Whenever the doing of any act is expressly forbidden by statute, whether on grounds of public policy or otherwise, the English Courts hold the act, if done, to be void, though no express words of avoidance are contained in the enactment itself."

In the *National Bank of Australasia v. Cherry*, L. R. 3 P. C. 299 (1870), Lord Cairns laid down the rule that the prohibition to lend on the security of real estate was a matter of public policy, and that when such a transaction was entered into, the contract for the loan of the money would be perfectly valid, and the only question would be whether the bank had power to take the security. If this was *ultra vires* the bank could not hold it. It was also pointed out that the object of the legislation was not so much to make contracts for advances void, but rather to make it *ultra vires* for the bank to take, on the occasion of contracts for these advances, securities of the kind mentioned.

Money was borrowed from a savings bank on the security of letters of credit of the Quebec Government. The debtor

assigned and the bank filed its claim with the curator. Certain creditors contested it on the ground that the transaction was *ultra vires* and illegal. It was held that though the lending of money on the pledge of such securities was *ultra vires*, and though this might affect the pledge as regards third parties interested in the securities, it was not, of itself, and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank from claiming back the money with interest: *Rolland v. La Caisse d'Economie*, 24 S. C. Can. 405 (1895).

It is a question whether the only results of a bank's engaging in prohibited business are the incurring of the penalties laid down in section 79, and the avoidance of the contract entered into and the security taken in certain cases, or whether it also renders itself liable to the forfeiture of its charter at the suit of the Crown. In 1872 the Minister of Justice granted a fiat for a *scire facias* to set aside the charter of La Banque Nationale on this ground, but the matter was not followed up. In 1881 another application was made to the then Minister of Justice for a fiat to prosecute the Bank of St. Hyacinthe in the Exchequer Court to have its charter declared forfeited for engaging in business prohibited by the Act. The Minister in refusing the application said that no authority had been given him for the annulling of a charter created by Act of Parliament, and he was not satisfied that the officers of the bank had intentionally and materially violated the terms of their charter: *Sarrazin v. Bank of St. Hyacinthe*, 28 L. C. J. 270 (1881).

BANKER'S LIEN.

By the law merchant, which is part of the common law, and consequently to be judicially noticed without being proved, a bank has a general lien on the securities of its customers in its hands. The rule was stated as follows by Lord Campbell in *Brandao v. Barnett*, 12 Cl. & F. 787 (1846): "Bankers must undoubtedly have a general lien on all securities deposited with them as bankers, by a customer, unless there be an express contract, or circumstances

that show an implied contract inconsistent with lien." The language was approved and adopted by the Privy Council in the case of the *London Chartered Bank v. White*, 4 A. C. at p. 422 (1879).

This lien does not apply to plate, securities, etc., merely deposited in the bank for safe keeping: *Ex parte Eyre*, 12 L. J. Ch. 266 (1843); *Leese v. Martin*, L. R. 17 Eq. 224 (1873).

In the Province of Quebec, where the civil law and not the common law prevails, the general rule is found in Article 1975 of the Civil Code, which says: "If another debt be contracted after the pledging of the thing and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." In the case of banking this would be subject to Article 1978, which says: "The rules contained in this chapter are subject in commercial matters to the laws and usages of commerce." There is an absence of judicial authority as to how far the law merchant would be recognized. In the case of *The Exchange Bank v. The City and District Savings Bank* cited below, *Matthieu, J.*, held that securities pledged for a special debt could not be held for an anterior debt. It does not appear that the general bankers' lien was claimed in the matter, and his finding as to the contract in question might bring it within the exception mentioned above by Lord Campbell.

It must be understood that the deposit and the debt are respectively made and due not only by the same person but in the same right.

ILLUSTRATIONS.

1. When advances are made by a bank contemporaneously with a deposit of title deeds, the presumption would be that the security was for the advances and not for an antecedent debt. In a conflict of testimony, however, the fact that the latter was legal and the former illegal was taken into account, and the transaction upheld: *Royal Canadian Bank v. Cummer*, 15 Grant 627 (1869).

2. Commercial securities pledged to guarantee a special loan cannot be retained by the creditor until a debt anterior to that for which the securities were pledged should be paid, unless there was a special agreement to that effect: *Exchange Bank v. City and District Savings Bank*, 14 R. L. 8 (1885).

3. Where warehouse receipts were pledged to a bank for a certain debt, a parol agreement that the surplus of the proceeds after the sale of the goods was to apply on other debts due to the bank, was upheld: *Thompson v. Molsons Bank*, 16 S. C. Can. 664 (1889); see also *Insky v. Hochelaga Bank*, Q. R. 10 S. C. 510 (1896).

4. If the bankers' lien exists in the Province of New Brunswick, the person against whom it is sought to enforce it, must be a customer of the bank: *Allen v. Bank of New Brunswick*, 17 N. B. (1 P. & B.) 446 (1877).

5. A banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule: *Davis v. Bowsher*, 5 T. R. at p. 491 (1794).

6. A bank has no lien for its general balance on securities casually left in the office by a customer after a refusal to make advances on them: *Lucas v. Dorrien*, 7 Taunton 278 (1817).

7. Security given by a customer for the amount "which shall or may be found due on the balance" of his account, covers only the then existing balance, and does not operate as a continuing security: *Re Medewe*, 26 Beavan 588 (1859).

8. The fact that securities were deposited as security for a specific advance is not inconsistent with the claim of a bank to hold them for the general balance: *Jones v. Peppercorne*, 28 L. J. Ch. 158 (1859).

9. Where plaintiff delivered to his broker scrip certificates purporting to be transferable by delivery, which the broker in fraud of his principal deposited with a bank as security for his own debt, plaintiff was estopped from denying their negotiability or the lien of the bank: *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194 (1877).

10. A bank has no lien for the balance of an account upon boxes containing plate or securities, which were deposited with it for safe custody, the depositor retaining the keys: *Leese v. Martin*, L. R. 17 Eq. 224 (1873).

11. Where a customer has three separate accounts in a bank and there is no special agreement regarding them and the bank has had no notice that any of them is for other persons, they have a lien on each for any balance due on the others: *Teale v. Brown*, 11 T. L. R. 56 (1894).

AGENTS, TRUSTEES, ETC.

Difficult questions sometimes arise when banks receive securities or acquire claims upon them from agents, trustees and others who may be acting for principals or other third parties.

It is in the nature of bills and notes and other instruments that are negotiable in the full sense of that term, that the person who acquires them in good faith before maturity for value without notice of any defect or irregularity, or in the language of the Bills of Exchange Act, becomes a holder in due course, may acquire a better title than that of the person from whom they are received. If a bank takes such securities in good faith for value from a person who negotiates them in breach of trust, or even from a thief, it may acquire a perfect title. It has long been well settled that not even gross negligence is sufficient to invalidate such a title, that nothing short of fraud or bad faith will accomplish this.

With respect to such securities as bonds, debentures, scrip stock, and the like, there has been of recent years a conflict of authority.

In *The Bank of Montreal v. Sweeny*, 12 A. C. 617 (1887), the Privy Council held, affirming the judgment of the Supreme Court of Canada, that where a customer of the bank transferred to the manager, as security for a private debt, certain shares in a joint stock company, which he held "in trust," this was sufficient to have put the bank upon enquiry, and it was responsible to the real owner. See *Muir v. Carter*, and *Holmes v. Carter*, 16 S. C. Can. 473 (1889); *Raphael v. McFarlane*, 18 S. C. Can. 183 (1890); and *Shaw v. Spencer*, 100 Mass. 382 (1868).

In *Petry v. La Caisse d'Economie*, 19 S. C. Can. 713 (1891), the plaintiffs were held not to be entitled to get back moneys which one of them had paid to redeem such stock with full knowledge of the facts.

The case of *Sheffield v. London Joint Stock Bank*, 13 A. C. 333 (1888), arose over certain Grand Trunk Railway and other railway and canal bonds transferred in blank and delivered to a broker or money lender, who made advances on them. He deposited them with the bank as security for his running account. The House of Lords held that the bank should have known from the nature of the broker's business that he was not the owner, and maintained the action of the real owner for the bonds or their value.

In *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270, Kekewich, J., and the Court of Appeal, relying upon the case of *Sheffield* against the same bank above cited, held that where a broker pledged certain foreign bonds of plaintiffs, with those of other persons, to raise a lump sum, the bank had no reason to believe that the broker had authority to pledge the securities in that way, and did not acquire a good title. This decision was reversed by the House of Lords, which held that the circumstances were not sufficient to have aroused the suspicion of the bank, which was entitled to retain and realize upon the securities, as having acquired them in good faith and for value. They further stated that the case of *Sheffield* against the bank turned entirely upon the special facts of that case: *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

In *London & Canadian L. & A. Co. v. Duggan*, [1893] A. C. 506, the Privy Council held, reversing a judgment of the Supreme Court of Canada, that where the manager of the Federal Bank held certain shares in a joint stock company simply as manager "in trust," these words implied that he held them in trust for the Federal Bank, and that there was nothing to put the London and Canadian Company upon further enquiry.

Bank holidays.—The Bank Act has no provision for holidays. The expression is popularly used for those days which are holidays for the maturity of bills and notes under the Bills of Exchange Act, section 14, as amended by 56 Vict. chap. 30, 57-58 Vict. chap. 55 and 1 Edw. VII. These are: (a) In all the provinces, except Quebec, Sundays, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning sovereign, and if such birthday is a Sunday, then the following day; Victoria Day (May 24th); the first day of July (Dominion Day); the first Monday in September (Labor Day); any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada; and the day next following New Year's Day, Victoria Day, Dominion Day and Christmas Day, when those days respectively fall on Sunday.

(b) In the Province of Quebec the foregoing days, and also The Epiphany (January 6th), The Ascension (movable), All Saints' Day (November 1st), Conception Day (December 8th).

(c) And also in any province any day appointed by proclamation of the Lieutenant-Governor for a public holiday, or for a fast or thanksgiving, or being a non-judicial day by virtue of a statute of such province.

Banking hours.—No hours are prescribed for banks by the Act. In most places they are fixed by usage at from 10 to 3 on all business days except Saturdays, when they are from 10 to 1. A bill or note cannot be protested for non-payment until after 3 o'clock, even on a Saturday: Bills of

Exchange Act, sec. 51, sub-sec. 6 (b). When the bill was under discussion in the House of Commons it was proposed to make the hour 1 o'clock on Saturday, but the argument that Saturday was market day in many towns, and the chief business day, prevailed. The acceptor or maker of a bill or note could no doubt claim that he was not liable for the costs of protest before 3 o'clock, and if he could show that he was injured by notices of protest sent out before that time he might have a right of action.

Clearing house.—The first clearing house was established in London in 1775. It was at first simply a place of meeting where the clerks of the different banks exchanged cheques, bills, etc. The risks run in carrying large sums of money led to the appointment of several clerks who were common to all the banks using the clearing house, to whom each bank would report the payment of the balance settling the transaction. The saving in the use of money has been very great, as a rule not more than 3 or 4 per cent. of the aggregate transactions being paid in bank notes or specie.

A clearing house was organized in Montreal on the 20th of December, 1888, an example since followed by Toronto, Halifax, Hamilton, Winnipeg, St. John, Vancouver, Victoria and Ottawa. Its objects and methods have been described as follows by Davidson, J., in the case of *La Banque Nationale v. Merchants Bank*, M. L. R. 7 S. C. (1891), at page 336: "Its purposes are to provide simple and expeditious facilities for the daily settlements of the banks with each other, by the effecting at one place and at one time of the daily exchanges between the associated banks, and the payment of the differences resulting from such exchanges. These objects are carried out in this way: Every morning at 10 o'clock each bank has at the clearing house all the cheques and other demands it has received against all the other banks during the preceding day, making them up into separate bundles for each bank, with a statement on the cover showing the aggregate of the contents of each bundle. The settlement is made on these statements, without regard

to the fact whether the contents of the bundle were correctly ticketed or found good claims against the bank charged. Thus each messenger is, in a few minutes, able to receive and take to his bank all the claims of the other banks against it. To attempt to examine and challenge securities at the clearing house would make its purposes inoperative. These temporary clearing house balances are subsequently verified at the bank by a scrutiny of the cheques and other demands of which they are composed."

In the above case a temporary regulation made when the clearing house was organized, that dishonored cheques received in the morning should be returned before noon, was relied upon as a ground for refusing to receive one returned in the afternoon, the refusal being based on the statement that the securities had been given up early in the afternoon. An attempt was also made to prove a usage to the same effect as the rule. The Court held that a custom or usage of trade or banking must be strictly proved, that the rule in question only purported to be a temporary one, that the usage alleged was not general, and the rule had fallen into disuse, and that the ordinary rule of law as to the return of cheques for which there are no funds had not been superseded. Previous to the clearing house the undisputed practice was to return such cheques at 3 o'clock.

The Canadian Bankers' Association, incorporated in 1900 by the Act 63-64 Victoria, chapter 93, is authorized to establish clearing houses at any place in Canada, and to make rules and regulations for their operations. A bank may or may not become a member of the clearing house, and may withdraw if it chooses.

The above Act, and the by-laws of the Association made in accordance with its provisions, will be found in the latter part of the present work.

The practice of the Toronto Clearing House was considered in a recent case. A depositor of the Bank of Hamilton in Toronto drew a cheque for \$5, payable to bearer, and had it marked. He altered it to \$500, deposited it in

the Imperial Bank in Toronto and drew out most of the money. The next day the cheque was sent to the Clearing House, and charged to the Bank of Hamilton as \$500. The following morning when comparing the marked cheques with the ledger the forgery was discovered, and the Bank of Hamilton claimed \$495 from the Imperial Bank. The latter took the ground that what took place was equivalent to payment and that notice should have been given a day sooner. To this it was answered that the Imperial Bank had not meantime altered its position or lost its recourse, and it was ordered to pay the \$495: *Bank of Hamilton v. Imperial Bank*, 31 O. R. 100 (1899); affirmed in appeal, 27 Ont. A. R. 590 (1900); and in the Supreme Court, May 21st, 1901.

65. Lien on debtor's shares.—The bank shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares of its own capital stock and on any unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until such debt is paid; and the bank shall, within twelve months after such debt has accrued and become payable, sell such shares, and notice shall be given to the holder thereof of the intention of the bank to sell the same, by mailing such notice in the post office to the last known address of such holder, at least thirty days prior to such sale; and upon such sale being made the president, vice-president, manager or cashier shall execute a transfer of such shares to the purchaser thereof in the usual transfer book of the bank, which transfer shall vest in such purchaser all the rights in or to such shares which were possessed by the holder thereof, with the same obligation of warranty on his part as if he were the vendor thereof, but without any warranty from the bank or by the officer of the bank executing such transfer. R. S. C. chap. 120, sec. 59, in part.

The privileged lien given to the bank by this section on its shares held by debtors is to be distinguished from the general banker's lien on securities for a general balance considered under the preceding section. The lien of the present section is the creation of the statute; that treated

of under the preceding section is part of the law merchant, and is not mentioned in the Act.

By section 35 it is provided that no transfer of shares is valid unless the holder pays off his debts and liabilities if required, or unless his remaining shares are worth more than such debts and liabilities. Section 38 provides that the officers of the bank shall not execute the transfer of shares sold under execution, until all debts, liabilities and liens in favor of the bank have been discharged.

Under a clause giving a company the right to refuse a transfer made by a shareholder indebted to the company, it was held that this meant indebted on any account: *Ex parte Stringer*, 9 Q. B. D. 436 (1882); that it also meant "indebted whether solely or jointly with others": *Bentham Mills Co.*, 11 Ch. D. 900 (1879); and that where a bill was taken for the original debt the right existed, but the remedy was suspended until the maturity of the bill: *London, Birmingham, etc., Banking Co.*, 34 Beav. 332 (1865).

The language of this section, "any debt or liability for any debt to the bank," is so comprehensive that it would appear to include any claim of the bank under which the holder of the shares might ultimately become liable to it.

It is to be observed that the general lien of the bank on securities or deposits exists only when the debt is due and payable. See the notes to the preceding section.

The lien would only exist if the debt or liability were against the holder in the same right or interest as that in which he held the shares. For instance, if the debt or liability was personal and the stock were held by him "as executor, administrator, guardian or trustee of or for some person named," as provided in section 44, or *vice versa*, there would be no lien. Even if the person represented were not named, and the shares were held by him simply "as executor" or "in trust" the principle laid down in *Bank of Montreal v. Sweeny*, 12 A. C. 617 (1887), and *Murray v. Pinkett*, 12 Cl. & F. 764 (1846), would prevent the bank from obtaining a lien after notice that the shares did not really belong to its debtor.

A bank has a lien on its shares held by a member of a firm for a debt due to it by such firm: *In re Chinic & Union Bank*, 14 Q. L. R. 289 (1888).

The bank may waive its right of lien, but care should be taken in case it holds any sureties for the debt or liability. Article 1959 of the Civil Code says: "The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor." The English law as to suretyship is to the same effect.

The clause requiring the bank to sell the shares within twelve months after the debt has accrued and become payable is new. The sale should be by auction after reasonable publicity and notice. The notice to the debtor should indicate the time and place of sale. If the bank does not exercise its right of sale under this section within twelve months after the maturity of the debt, it would then need to fall back upon the remedy that might be given to it by the law of the particular province where its head office is situate. In most of the provinces it would require to get judgment and sell the shares under execution, when it would be paid by preference out of the proceeds.

66. Sale of collateral securities.—The stock, bonds, debentures or securities, acquired and held by the bank as collateral security, may, in case of default to pay the debt, for securing which they were so acquired and held, be dealt with, sold and conveyed either in like manner and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act, or in like manner as and subject to the restrictions under which a private individual might in like circumstances deal with, sell and convey the same, but without obligation to sell the same within twelve months: R. S. C. chap. 120, sec. 60, sub-sec. 2, in part.

If any of the securities held by the bank as collateral security mature before the debt to which they are collateral, the bank has a right to collect them and apply them in payment of the debt. The present section has reference to

bonds or debentures that do not mature until after the debt, and to stock and other similar securities.

The bank is bound to use due diligence and prudence in realizing on these securities. It may either proceed as is prescribed for its own shares in the preceding section, or it may avail itself of the law of the province as to the disposal of articles held in pledge.

Unless there be a special agreement to that effect, the bank does not acquire a title to the collateral securities on the default to pay the debt. If the collateral be a security for a sum of money the bank may collect it when due; if it be stock or a security for the payment of money it may take steps to have it sold. At English common law a pledgee may sell the pledge at public auction without judicial process on giving the debtor reasonable notice to redeem: *Tucker v. Wilson*, 1 Peere Williams 261 (1714); *Lockwood v. Ewer*, 9 Modern 275 (1742); *Pigot v. Cubley*, 15 C. B. N. S. 701 (1864). In the Province of Quebec, in the absence of a special agreement, the bank would require to obtain judgment, and then seize and sell in the ordinary way, when it would be paid by privilege out of the proceeds: C. C. Art. 1971. The bank has the option of exercising these remedies or of pursuing the method indicated in section 65.

Where the pledgor has only a limited interest in the collateral the bank can only sell such interest. Where there is the right to sell without judicial authority, the sale can only be made after reasonable notice of the time and place of sale, unless such notice has been waived by agreement, made when the debt was contracted, or when the time of payment was extended. See the next sub-section.

2. **Right may be waived.**—The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of such stock, bonds, debentures or securities, made at the time at which such debt was incurred, or if the time of payment of such debt has been

extended, then by an agreement made at the time of such extension.

- 67. Real estate for occupation.**—The bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business, and may sell or dispose of the same, and acquire other property in its stead for the same purpose. R. S. C. chap. 120, sec. 47.

This would not prevent the bank from buying, leasing, or erecting a larger building than actually needed for its own business, and renting the portion which it did not actually require. The validity of the transaction would turn upon whether it was acquired *bona fide* for its own business, or whether it was entered into as a speculation in violation of the Act: *Horsey's Claim*, L. R. 5 Eq. 561 (1868).

- 68. Mortgages as collateral.**—The bank may take, hold and dispose of mortgages and hypothèques upon real or personal, immovable or movable property, by way of additional security for debts contracted to the bank in the course of its business; and the rights, powers and privileges which the bank is by this Act declared to have or to have had in respect of real or immovable property mortgaged to it, shall be held and possessed by it in respect of any personal or movable property which is mortgaged or hypothecated to it. R. S. C. chap. 120, sec. 48.

This section is substantially the same as that in the Bank Act of 1850 of the old Province of Canada, which has been continued in the succeeding Acts. By section 64 a bank is prohibited, except as authorized by the Act, from lending money or making advances upon the security, mortgage, or hypothecation of any land, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise. The present section contains some of the exceptions. A bank may not lend money upon such security; but it may take mortgages upon such property by way of additional security for debts contracted to the bank in the course of its business.

It will be observed that the expression used is "debts contracted" and not "debts previously contracted," as in the National Banking Act of the United States. Our jurisprudence has not been uniform as to whether our Act should be construed in the same sense as that of the United States. All are agreed that a mortgage cannot be taken to secure future advances. Opinions differ as to whether it can be taken to secure a debt contracted simultaneously with the taking of the mortgage as additional security. The weight of authority would appear to be that possibly it may be taken at the same time, provided it be clear that the money is not really advanced on the security of the mortgage. In a simultaneous transaction the presumption would be against its validity, and if a very short time intervened this might be taken as a suspicious circumstance.

This question was discussed in two cases—one in Upper Canada before Confederation, and the other in Quebec since that event. In the former of these cases, *The Commercial Bank v. Bank of Upper Canada*, 7 Grant (1859), at page 430, Chief Justice Robinson says: "It is quite true that whenever the money is advanced, whether it be just before or at the time of making the mortgage, then there is literally a debt due, but not a debt contracted in the course of the business of the bank, that is, of its legitimate and proper business, which the lending money upon mortgage of real property certainly cannot be, until the statutes are repealed or altered. When it is shown that the mortgage in any case was taken by a bank "as an additional security for a debt contracted to it in the course of its business," then the question occurs whether that can only be taken to mean a debt that had been previously incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the bank was about to allow a party to contract, by advancing him money at that time in the proper course of their business. . . . I think it might perhaps be held that the spirit and intention of the Act are not opposed to it, and that a mortgage so taken might be upheld, when it appears that the mortgage

was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving color to the mortgage. That would be a question of fact, upon which the conclusion that a jury might come to would be in general so uncertain that I dare say the banks will not think it prudent to risk their money on a real security in any such case, where the nature of the transaction might appear to be at all equivocal—so long, I mean, as the present statutes continue in force.”

In the Quebec case, *Bank of Toronto v. Perkins*, 1 Dorion 362 (1881), Dorion, C.J., in giving the judgment of the Court, said: “I am of opinion that the transfer made to the appellant of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made, is an evasion of the Banking Act, 34 Vict. chap. 5, sec. 40, which forbids banks to advance on the security of real estate, and that this prohibition being in the public interest, a law of public policy, the transfer made by Bonnell to the appellant was null and void. The whole policy of the law is against such transactions. The one under consideration cannot come under section 41 of the Act, for it is not a debt contracted in the ordinary course of its business. Banks do not usually take mortgages to secure the notes which they discount. Section 41 of the Banking Act is not for the purpose of nullifying the disposition contained in the 46th section, but merely to enable the bank to secure themselves against the possibility of a loss by reason of a change in the position of the debtor or his indorsers, after the loan has been made.” See also section 51, sub-section 2.

This case was taken to the Supreme Court, where the judgment holding the mortgage to be invalid was affirmed. The language of some of the Judges would seem to imply that they considered the transaction void, because the mortgage was taken at the same time as the note was discounted, or rather before, while some of the others were not prepared to put it on that ground. All of them, however,

agreed that the real transaction was a loan upon the security of the mortgage, which was a violation of the Banking Act, and consequently void: 8 S. C. Can. 603 (1883).

This section of the Act does not purport to give a bank any right under a mortgage upon real or personal property beyond what might be claimed by an individual under the law of the province where the transaction takes place; so that the provincial law as to the form of the mortgage, its registration, etc., would apply. Thus in the Province of Quebec, where the law does not recognize chattel mortgages or mortgages on personal property, the present section would not make them valid or legal in favor of a bank even as an additional security. This, of course, is apart from the rights under bills of lading and warehouse receipts conferred by section 73, and under the assignment by way of security under section 74.

Vessels being personal property the present section would authorize the taking of mortgages on them by way of additional security. Those upon British vessels are governed by the Imperial Merchant Shipping Act, 1894, 57-58 Vict. chap. 60, sec. 31; those upon Canadian vessels by R. S. C. chap. 72. As to mortgages on vessels for advances for their construction, see section 72.

The powers which a bank may exercise with respect to real estate on which it holds a mortgage are set out in sections 69, 70 and 71. All the powers conferred by these sections as to such real estate are by this section made applicable to personal property as well. This would include the right to deal with and dispose of such property in the same manner as individuals would have the right to do.

A question may arise as to whether the word "debts" is here used in the narrower sense of the English law as a sum of money due, or in the broader sense of an obligation or liability as in the civil law. For example, if a bank agreed to purchase debentures to be delivered at a future time, could it take a mortgage on real or personal property as additional security for the debt or liability thus contracted? It is possible that the meaning given to the word debt in

this connection might be governed by the law of the province. In the case of *Carver v. Braintree*, 2 Story's U. S. Circuit Court Reports, 432 (1843), it was held that in a statute making members of a corporation personally liable for "debts contracted" by the corporation, the words included not only debts in the narrower or technical sense, but any liabilities incurred by the corporation. See to the same effect *Mill Dam Foundry v. Hovey*, 21 Pickering (Mass.) 417 (1839).

ILLUSTRATIONS.

1. The Act of 1842 authorized banks to hold mortgages and hypothèques on real estate and property as additional security for debts contracted with them in the course of their dealings. This was held to mean real property only, and to refer to pre-existing debts: *McDonell v. Bank of Upper Canada*, 7 U. C. Q. B. 252 (1850).

2. The Bank of Upper Canada having by its charter no right to hold vessels, either as owner or mortgagee, is not liable for supplies to the vessel, either on implied assumpsit or the promise of the directors: *Lyman v. Bank of Upper Canada*, 8 U. C. Q. B. 354 (1852).

3. Mortgages may be taken as additional security simultaneously with the discount of notes to which they are collateral: *Commercial Bank v. Bank of Upper Canada*, 7 Grant, 250 (1859).

4. The Bank of Upper Canada was held entitled to take as security, for previous advances, the interest of a railway company in a contract for the construction of certain cars, and to lease them to the railway company: *Bank of Upper Canada v. Killaly*, 21 U. C. Q. B. 9 (1861).

5. An unregistered chattel mortgage taken as additional security upheld against an assignee in insolvency: *Bank of Montreal v. McWhirter*, 17 U. C. C. P. 506 (1867).

6. A customer deposited title deeds with a bank. He swore that the mortgage thereby created was to secure

future advances; the manager of the bank that it was an additional security for past indebtedness. The legality of the latter position and the banker's knowledge of the law were circumstances that partly led the Court to accept this view: *Royal Canadian Bank v. Cummer*, 15 Grant, 627 (1869).

7. A mortgage was taken by a bank as additional security for notes under discount, and renewals. Sums were paid in on other transactions, and these notes were paid by cheques drawn against the proceeds of other discounted notes. Held, that this mode of keeping the accounts had not operated as a discharge of the mortgage debt: *Cameron v. Kerr*, 3 Ont. A. R. 30 (1878); *Dominion Bank v. Oliver*, 17 O. R. 402 (1889).

8. A mortgage or pledge of timber limits in Quebec "for advances made and to be made" by a bank, is valid as to the former, and invalid as to the latter: *Grant v. Banque Nationale*, 9 O. R. 411 (1885).

9. Where a bank has taken a chattel mortgage as additional security, it may arrange for a sale and disposal of the mortgaged property. This is not a dealing in goods, but a realization of its securities: *Stewart v. Union Bank*, 15 Ont. A. R. 749 (1888).

10. An indorser took a mortgage on real estate belonging to a company to secure his indorsements of the company's paper discounted by a bank. He assigned the mortgage to the bank before the contemplated indorsements. This was not a violation of section 45 of the Bank Act, R. S. C. chap. 120: *Essex Land Co., Trout's Case*, 21 O. R. 367 (1891).

11. A bank took a mortgage on real estate as additional security to secure notes. An indorser of one of the notes being sued, pleaded that the bank had released some of the land without his consent. It was held that this was no defence to the action on the note, but the Court reserved his right to make the bank account to him for its dealings

with the property when the security had answered its purpose, or the debt was paid by the sureties, or the application of the moneys from the security could be properly ascertained: *Molsons Bank v. Heilig*, 26 O. R. 276 (1895).

12. An assignment of a mortgage taken colorably as additional security on the discounting of a note, when the advance was in reality made on the security of the mortgage, is null: *Bank of Toronto v. Perkins*, 8 S. C. Can. 603 (1883).

13. Where an accommodation indorser paid to a bank a note that had been discounted, he was held entitled to a mortgage on real estate given by the maker to the bank as collateral. It was urged in review for the first time that this mortgage was null as having been given for future advances. This claim was not allowed; not being pleaded or legally proved: *McCaffrey v. La Banque du Peuple*, Q. R. 5 S. C. 135 (1894).

14. A chattel mortgage taken simultaneously with the discount of a note by a bank is void: *Bathgate v. Merchants Bank*, 5 Man. R. 210 (1888).

15. A debtor to a bank mortgaged to it certain stock in trade, and all future stock to be acquired during the currency of the mortgage, and assigned book debts, and agreed to assign all future book debts of the business as security for the debt to the bank. The chattel mortgage, besides the usual proviso for redemption, seizure and sale in case of default, etc., and for application of the proceeds, and covenants for payment, contained a covenant on the part of the bank to pay the then commercial indebtedness of the mortgagor, and the expense of running the business out of the proceeds of the sale of the stock, and the book accounts and debt; but not so as to increase the then indebtedness to the bank, all moneys received being paid into the bank. When default occurred the bank took possession and sold, there not being enough to pay what was due to it. It was held that the securities taken were valid under the Bank Act, R. S. C. chap. 120,

and that the debtor could not compel the bank to pay the other creditors or to share with them: *Gillies v. Commercial Bank*, 10 Man. R. 460 (1895).

16. A customer of a bank gave a mortgage by the deposit of title deeds to secure advances to be made. This was *ultra vires*, but afterwards, when the bank sued, on condition of its not taking judgment, he agreed that the deeds should be a security for the sum for which judgment was about to be signed. This was held to be a valid security for a debt previously incurred: *National Bank of Australasia v. Cherry*, L. R. 3 P. C. 299 (1870).

17. The charter of a bank prohibited its making advances on merchandise. A statute allowed owners of sheep to give a preferential lien on the clip of wool from season to season. It was held that such a lien given to the bank for advances was valid: *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548 (1871).

69. Purchase of lands.—The bank may purchase any lands or real or immovable property offered for sale under execution, or in insolvency, or under the order or decree of a court, as belonging to any debtor to the bank, or offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank or offered for sale by the bank under a power of sale given to it for that purpose, in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may acquire a title thereto as any individual purchasing at sheriff's sale, or under a power of sale, in like circumstances, could do, and may take, have, hold and dispose of the same at pleasure. R. S. C. c. 120, s. 49.

Former Bank Acts did not contain the above words authorizing the bank to purchase lands "offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank." An individual having a second mortgage has the same right

to purchase as a stranger, and to buy the property at less than its value, even if he himself be in actual possession when the sale is held: *Shaw v. Bunny*, 33 Beav. 494 (1864); *Kirkwood v. Thompson*, 12 L. T. N. S. 811 (1865); *Harron v. Yernen*, 3 O. R. at p. 133 (1883). A mortgagee exercising the power of sale cannot become the purchaser either directly or indirectly.

As the law of the Province of Quebec does not give a mortgagee any power to sell under a power of sale, the addition does not give a bank any new right in that province. It is necessary there in all cases for the bank to sue on its mortgage, and then to have the lands seized and sold by the sheriff, unless they are brought to sale by some other execution creditor. The plaintiff or any other creditor may buy the property at the sheriff's sale.

Section 70 of the Bank Act was repealed by section 14 of the Amending Act of 1900, and the following substituted:—

70. [**Absolute title acquired.**—The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, and may purchase and acquire any prior mortgage or charge on such property.
2. **Sale in seven years.**—No bank shall hold any real or immovable property, howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof, or any extension of such period as hereinafter provided, but such property shall be absolutely sold or disposed of so that the bank shall no longer retain any interest therein unless by way of security: Provided that the Treasury Board may direct that the time for the sale or disposal thereof be extended for a further period, or periods, not to exceed five years, the whole period during which the bank may so hold such property under the provisions of this sub-section not to exceed twelve years.

3. **Liable to forfeiture.**—Any real or immovable property, not within the exception aforesaid, held by the bank for a longer period than authorized by the preceding sub-section, shall be liable to be forfeited to Her Majesty for the use of the Dominion of Canada, but no such forfeiture shall take effect until the expiration of at least six calendar months after notice in writing to the bank by the Minister of Finance and Receiver-General of the intention of Her Majesty to claim such forfeiture, and the bank may, notwithstanding such notice, before the forfeiture is effected, sell or dispose of such property free from liability to forfeiture.
2. **Section retroactive.**—The provisions of this section shall apply to any real or immovable property heretofore acquired by the bank and held by it at the time of the coming into force of this Act. 63-64 Vict. chap. 26, sec. 14.

This section in the Act of 1890 consisted simply of the above sub-section 1, with a proviso that a bank should not hold any real estate, except that required for its own use, for more than seven years. As was pointed out in the notes on that section in the first edition of this work, a violation of this provision would expose the bank to the penalty of \$500 imposed by section 79, but no other penalty was imposed, nor any provision made as to what would become of the property.

This omission was remedied by the Amending Act of 1900 which repealed the original section 70, and substituted for it the section as above given. It will be seen by the last clause that the new provision is retroactive, so that sub-sections 2 and 3 are applicable to property previously acquired.

The terms "equity of redemption" and "foreclosure" used in sub-section 1 are unknown to Quebec law, and the means therein indicated are not applicable to that province. There a mortgage is a mere pledge of the property; the ownership and title remain in the mortgagee. As already mentioned, the remedy of the bank is to get a judgment and seize and sell the property. It is probable that sub-section 1 would authorize a sale of the mortgaged land to the bank.

Before these rights had been expressly conferred on banks, it was held that they had been impliedly given: *Bank of Upper Canada v. Scott*, 6 Grant 451 (1858). See to the same effect: *Bank of New South Wales v. Campbell*, 11 A. C. 192 (1886).

By section 68, a bank has like powers as to personal property mortgaged or hypothecated to it.

71. Title to lands.—Nothing in any charter, Act or law shall be construed as ever having prevented or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged real or immovable property, whatever the value thereof is, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any property so mortgaged. R. S. C. chap. 120, sec. 51.

72. Advances for building ships.—Every bank advancing money in aid of the building of any ship or vessel shall have the same right of acquiring and holding security upon such ship or vessel, while building and when completed, either by way of mortgage, hypothecation, privilege, or lien thereon, or purchase or transfer thereof, as individuals have in the Province wherein such ship or vessel is being built, and for that purpose may avail itself of all such rights and means of obtaining and enforcing such security, and shall be subject to all such obligations, limitations and conditions as are, by the law of such Province, conferred or imposed upon individuals making such advances. R. S. C. chap. 120, sec. 52.

The provisions of this section were first embodied in the Bank Act in 1872. It will be seen that the restrictions imposed on advances by banks on other kinds of property are removed, and the mortgage or other security may be taken either before, or at the time of, or subsequent to the advance, and either during the building or after the completion of the vessel. It also allows the bank to purchase the vessel to secure its advances. In addition to the rights thus given under provincial laws, the Dominion Act respecting the Registration of Ships, R. S. C. chap. 72, contains important provisions which by the present section are made

applicable to banks. A ship about to be built, or being built, may be recorded with the nearest registrar of shipping, and a mortgage given for advances in aid of its building in the form contained in a schedule to the Act. Section 48 of the Act specially provides that deeds and documents relating to this matter in the Province of Quebec may be in notarial form.

Vessels being personal property, banks may, in addition to the rights conferred by this section, take a mortgage upon them by way of additional security under section 68. The provisions of R. S. C. chap. 72, above referred to, are enacted by the Dominion Parliament under the authority given it by section 91 of the British North America Act to make laws relating to Navigation and Shipping.

73. Warehouse receipts as collateral.—The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor [or as security for any liability incurred by it for any person] in the course of its banking business; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank, instead of to the previous holder or owner of such goods, wares and merchandise: R. S. C. chap. 120, sec. 53, sub-sec. 2; 63-64 Vict. chap. 26, sec. 14.

The words "or as security for any liability incurred by it for any person" in the fourth and fifth lines were added by section 15 of the Act of 1900.

This section may be said to contain another exception to the rule laid down in section 64, that except as authorized by the Act, no bank shall lend money on the security of any goods, wares or merchandise. The bank cannot purchase or discount the warehouse receipt or bill of lading, it can only take them as collateral security. Section 75 sets out the precise terms and conditions on which they may

be taken by a bank. They may either be made out directly in favor of the bank, or they may be negotiated to it by indorsement or delivery, as the case may be.

For the definition of "warehouse receipt," "bill of lading," and "goods, wares and merchandise," as used in the Act, see section 2, ante p. 7.

Mortgages of real and personal property treated of in the preceding sections are such instruments as are recognized by that name under the laws of the respective provinces. The Act only authorizes banks to use them in part as individuals may under the respective provincial laws. Warehouse receipts and bills of lading in the present section and the "security" mentioned in section 74, on the other hand, are instruments defined in the present Act and may be in conflict with the laws of the various provinces. This has given rise to a constitutional question as to how far the Dominion Parliament, under the sub-sections of section 91 of the British North America Act relating to "Banking," "Shipping" or the "Regulation of Trade and Commerce," can legislate on the subjects of warehouse receipts or bills of lading, and whether such legislation is valid when it conflicts with that of the provinces legislating on the same subjects under the authority of section 92 regarding "Property and Civil Rights."

In Ontario the legislation regarding warehouse receipts and bills of lading is found in "The Mercantile Amendment Act," R. S. O. chap. 145. In Quebec it is to be found in R. S. Q. Arts. 5643-5650. The foundation of both these Acts was in the Consolidated Statutes of Canada, 1859, chap. 54, which provided that such documents should be transferable by indorsement. In Ontario there has been subsequent legislation which is embodied in the Mercantile Amendment Act above cited. In Quebec the law in force in the former Province of Canada at Confederation remains unchanged.

In the case of *Smith v. Merchants Bank*, 8 Ont. A. R. 15 (1883), the Judges of the Court of Appeal were of opinion that the Bank Act of 1871, in so far as it was in conflict

with the law of Ontario on the subject, was invalid. Their judgment was, however, reversed in the Supreme Court: 8 S. C. Can. 512 (1884). The point was again raised in *Tennant v. Union Bank*, 19 Ont. A. R. 1 (1892). It was not argued in the Court of Appeal, as that Court was bound by the decision of the Supreme Court on the subject. In the Privy Council it was held that, although the warehouse receipts in question were not valid securities under the provisions of the Ontario "Mercantile Amendment Act," the Dominion Bank Act validated them. It also held that subsection 15 of section 91 of the B. N. A. Act, relating to Banking, gave to the Dominion Parliament power to legislate respecting every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with "property and civil rights in the province," and confers upon a bank privileges as a lender which the provincial law does not recognize. Also, that legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority, even though it trenches upon the matters assigned to the provincial legislatures by section 92: *Tenant v. Union Bank*, [1894] A. C. 31.

It is to be observed that the conflict has arisen largely from the fact that successive Bank Acts, beginning with 1871, have introduced changes regarding the person who might give such a receipt, the class of property that might be covered by it, the place where the property might be kept and the like, most of the changes being in the direction of giving greater facilities, while corresponding changes were not made in the provincial laws regarding warehouse receipts in general.

Section 54 of the Bank Act, R. S. C. chap. 120, provided that the person granting a warehouse receipt might be the owner of the goods covered by it. In the present Act, the term warehouse receipt is only applied where the person granting it is not the owner of the goods. Section 74 provides for the case where they are the same person, and the instrument is simply called a "security." Not only the persons who may grant this security, but also the kind of

goods for which it may be granted, differ from the classes of persons and goods named in section 54.

A bank should be careful in taking a warehouse receipt to see that it complies with the definition in section 2 (*d*). It should be a receipt given by a person for goods, wares or merchandise, in his actual, visible and continued possession, as bailee thereof in good faith, and not as his own property. He must be the owner or keeper of the place or places where the property is stored. The place of storage and the property should be described so that they may be clearly identified. Other conditions will be found in section 75.

A warehouse receipt or bill of lading can only be taken as collateral security for the payment of a debt incurred in favor of a bank in the course of its banking business, that is, business done by it in accordance with the terms of section 64. The collateral security need not be furnished by the principal debtor; it may be for the payment of any debt.

A bank is bound to exercise ordinary diligence and care in looking after property which may be pledged to it in any of the ways authorized by the Act. As long as it does so, it is not liable for the loss of the property or for any damage done to it; nor is it prevented from suing for the amount of the secured debt: *Coggs v. Bernard*, 2 Ld. Raymond 909 (1703).

ILLUSTRATIONS.

1. Where there is a usage of trade authorizing it, a warehouse receipt may cover flour subsequently brought into the warehouse in the place of a similar quantity removed: *Wilmot v. Mailland*, 3 Grant 107 (1851). So of a bill of lading for wheat ground into flour: *Mason v. G. W. Ry. Co.*, 31 U. C. Q. B. 73 (1871).

2. A document in the following form, without any indorsement, is not a warehouse receipt under Con. Stat. Canada, chap. 54, or the Amending Act of 1861: "Received in store at our warehouse at * * * from sundry parties, 17,900

lbs. batting, to be delivered pursuant to the order of the Bank of British North America, to be indorsed hereon. The said batting is separate from," etc., etc.: *Bank of British North America v. Clarkson*, 19 U. C. C. P. 182 (1869). Followed in *Royal Canadian Bank v. Miller*, 29 U. C. Q. B. 266 (1870).

3. A shipper of flour sold it and delivered two bills of lading endorsed by him in blank to the purchaser, who got a bill discounted by a bank to pay for the flour, and attached to it one copy of the bill of lading as collateral. A person holding the other copy of the bill of lading got possession of the flour and disposed of it. It was held that a bill of lading signed by the purser was valid, that an indorsement of it in blank was sufficient under C. S. C. chap. 54, and that the bank was entitled to recover the full value of the flour: *Royal Canadian Bank v. Carruthers*, 29 U. C. Q. B. 283 (1870).

4. Where the usage of trade is that grain of the same quality received from different persons is stored together and mixed, a warehouse receipt covers the specified quantity of the quality mentioned: *Coffey v. Quebec Bank*, 20 U. C. C. P. 555 (1870); *Bank of Hamilton v. Noye Mfg. Co.*, 9 O. R. 631 (1885).

5. Where a bank held a warehouse receipt signed by the clerk of a warehouseman and indorsed by the latter, it was held that the receipt was invalid as the clerk was not a warehouseman, and the bank was not entitled to recover on an insurance policy assigned to it by the warehouseman: *Todd v. Liverpool Insurance Co.*, 20 U. C. C. P. 523 (1870).

6. The holder of warehouse receipts of grain had it insured, and then indorsed the warehouse receipts to a bank as collateral security. It was held that under the Dominion Act, 31 Vict. chap. 11, sec. 7, the property in the grain passed to the bank and he could not recover on a policy insuring him as owner: *McBride v. Gore Insurance Co.*, 30 U. C. Q. B. 451 (1870).

7. A shipping note given by the agent of a railway is a bill of lading within the Ontario Statute, 33 Vict. chap. 19, sec. 3. A bank is entitled to recover as indorsee without alleging that it received the bill of lading as collateral: *Royal Canadian Bank v. Grand Trunk Ry. Co.*, 23 U. C. C. P. 225 (1873).

8. A warehouse receipt indorsed to a bank for "40 bales of corks" not distinguishing by separate marks or values, held not to cover corks received in the warehouse after its date to replace others taken out, the bales having distinguishing marks and being of varying values: *Llado v. Morgan*, 23 U. C. C. P. 517 (1874).

9. Incurring liability, as for instance, giving an accommodation note, is not contracting a debt, for securing which a warehouse receipt may be taken: *Cockburn v. Sylvester*, 1 Ont. A. R. 471 (1877); overruling *Re Coleman*, 36 U. C. Q. B. 559 (1875).

10. Where warehouse receipts are indorsed to a bank as collateral security. It was held that under the Dominion an insurable interest in the goods: *Parsons v. Queen Ins. Co.*, 29 U. C. C. P. 188 (1878).

11. The provisions as to warehouse receipts in the Bank Act does not apply to foreign banks: *Commercial National Bank v. Corcoran*, 6 O. R. 527 (1884).

12. The giving to the bank of warehouse receipts as security for advances to the company in question was held not to be such a hypothecating, mortgaging or pledging of the company's property as required a by-law sanctioned by the shareholders under the Letters Patent Act: *Merchants Bank v. Hancock*, 6 O. R. 285 (1884).

13. Where a bank advanced money to consignees to pay the draft attached to a bill of lading and returned the latter to the consignees, who stored the grain and delivered the warehouse receipt to the bank, it was held entitled to the grain as against execution creditors of the consignees: *Dominion Bank v. Davidson*, 12 Ont. A. R. 90 (1885).

14. A bank took several warehouse receipts as collateral security for notes discounted. The bank sold the goods, and the proceeds were more than the amount of the discounted paper. It claimed the right to apply the surplus on other debts of the customer, under a parol agreement. It was held that the bank had a right to do so: *Thompson v. Molsons Bank*, 16 S. C. Can. 664 (1889).

15. A firm of saw millers obtained from a bank advances on promissory notes indorsed by them. To the maker of the notes they gave warehouse receipts on logs, described as being in certain lakes in transit to the mills, and subsequently, in pursuance of a written agreement when the advances were made, gave warehouse receipts of the lumber manufactured from the logs. The maker of the notes indorsed the receipts to the bank. It was held that they were bad as to the logs, the lakes not being "places kept by the signers of the receipts," and good as to the lumber: *Tennant v. Union Bank*, 19 Ont. A. R. 1 (1892).

16. A warehouseman is not liable for a loss resulting from a cause the danger and risk of which was made known to the owner of the goods at the time they were warehoused: *Fry v. Quebec Harbour Commissioners*, Q. R. 9 S. C. 14 (1896).

17. Goods held under a duly indorsed warehouse receipt as collateral security for advances may be properly and legally insured as being the property of the holder of such receipt, who had made advances on it: *Wilson v. Citizens Ins. Co.*, 19 L. C. J. 175 (1875).

18. A bank is not liable in damages for not giving notice of the arrival of goods to a customer to whom it has endorsed the bill of lading, even when it has received such notice. The customer should ascertain by what vessel the goods are coming or notify the agents of the marks on the goods and ask that he be informed of their arrival: *Masson v. Merchants Bank*, Q. R. 14 S. C. 293 (1898).

19. A bank which has acquired a bill of lading as collateral security may redeliver it to the pledgor for a limited purpose, as for example, to sell the goods and hand over to it the proceeds towards satisfaction of the debt, without thereby losing its rights: *North Western Bank v. Poynter*, [1895] A. C. 56.

2. **Previous holder an agent.**—If the previous holder of such warehouse receipt or bill of lading is the agent of the owner of the goods, wares and merchandise mentioned therein, the bank shall be vested with all the right and title of the owner thereof, subject to his right to have the same re-transferred to him, if the debt [or liability] as security for which they are held by the bank, is paid: R. S. C. chap. 120, sec. 53, sub-sec. 3; 63-64 Vict. chap. 26, sec. 15.

The words "or liability" in the 7th line, were added by section 15 of the Act of 1900.

The expression "agent," as used above, is defined in the next following sub-section. An agent may be the holder of a warehouse receipt or bill of lading either as being the person named in the receipt or bill as the person from whom the goods were received, or to whose order they were subject, or as indorsee, or as the holder of a receipt or bill transferable by delivery.

Such an agent may transfer to a bank a warehouse receipt or bill of lading under the circumstances mentioned in section 75, and the bank become vested with all the right and title of the owner as above indicated, even if the agent has no right to pledge the receipt or bill and is acting fraudulently, provided of course the bank itself is acting in good faith.

If the agent is a warehouseman he cannot give the bank a valid warehouse receipt for the goods of his principal which he has in store.

The powers given to an agent under this section are among those conferred on agents under the Factors Acts. The Ontario Act is R. S. O. chap. 150. Section 2 provides that such an agent may sell or pledge the goods of his

principal. The clauses corresponding to the present section are as follows: "2. Any agent entrusted with the possession of goods or of the documents of title thereto, shall be deemed the owner thereof for the following purposes, that is to say: * * * (3) To give validity to any agreement by way of pledge, lien or security, *bona fide* made with such agent, as well for an original loan, advance or payment made upon the security of the goods or documents, as for any further or continuing advance in respect thereof; and (4) To make such contract binding upon the owner of the goods and on all other persons interested therein, notwithstanding the person claiming such pledge or lien had notice that he was contracting only with an agent." "Documents of title" in the foregoing section includes warehouse receipts and bills of lading. By section 16 the owner may redeem the goods on paying the amount of the lien.

The law of Quebec is found in Article 1740 of the Civil Code, and is in the same words as the Ontario Statute, both having been taken from chapter 59 of the Consolidated Statutes of Canada.

A bank may avail itself of the provisions of the provincial law in so far as the business of banking would justify, and there is no statutory prohibition of the transaction in question.

The English Factors Act, 1889, is to the same effect. It has been held by the English Courts that bankers and others dealing with such agents or factors are protected if they are acting in good faith, notwithstanding the bad faith of the agent, or the revocation of his authority. See *Navulshaw v. Brownrigg*, 2 DeG. M. & G. 441 (1852); *Chunder Sein v. Ryan*, 5 L. T. N. S. 559 (1861); *Sheppard v. Union Bank*, 7 H. & N. 661 (1862); *Jewan v. Whitworth*, L. R. 2 Eq. 692 (1866); *Portalis v. Telley*, L. R. 5 Eq. 140 (1867).

The pledge of goods to a bank by a trader as collateral security, the goods being held by him under warehouse receipts duly indorsed to him, and the pledge being in the

course of the bank's regular business, is a commercial matter, and the bank receiving such pledge in good faith and not knowing that the goods did not belong to the pledger, thereby acquires a valid title to the goods, and the right to dispose of them for its benefit: *Canadian Bank of Commerce v. Stevenson*, Q. R. 1 Q. B. 371 (1892). See also *Robertson v. Lajoie*, 22 L. C. J. 169 (1878).

3. **Definition of agent.**—In this section the expression “agent” means any person intrusted with the possession of goods, wares and merchandise, or to whom the same are consigned, or who is possessed of any bill of lading, receipt, order, or other document used in the course of business as proof of the possession or control of goods, wares and merchandise, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive the goods, wares and merchandise thereby represented; and such person shall be deemed the possessor of such goods, wares and merchandise, bill of lading, receipt, order or other document as aforesaid, as well if the same are held by any person for him or subject to his control as if he is in actual possession thereof. R. S. C. chap. 120, sec. 53, sub-sec. 1.

It will be seen that an “agent” under this section is any person (1) intrusted with the possession of goods or (2) to whom goods are consigned, or (3) possessed of any of the documents of title named indorsed to him or in blank or in favor of the bearer. An “agent” under R. S. O. chap. 150, or Art. 1740 C. C., is a person (1) intrusted with the possession of goods, or (2) intrusted with the documents of title to goods.

As to goods themselves, it will be observed that in the above sub-section the agent must be a person “intrusted” with their possession, or one to whom they have been consigned. As to documents of title, it is enough that he be “possessed” of them. Under the Factors Act he requires to have been “intrusted” with the latter as well as with the former. It remains to be seen what restrictions, if any, the Court will place upon the somewhat general language of the Act.

In the case of *Bush v. Fry*, 15 O. R. 122 (1887), the question of what was necessary to constitute an agent under R. S. O. chap. 150, was considered. A piano was shipped to a music teacher on the representation that he had a customer for it. If this customer did not buy he was to return it. He shipped it to another city, consigned to a name which he had assumed, where he obtained advances on it. It was held that he was not an "agent" within the meaning of the Act, and that he was not "entrusted," and there was no valid lien for the advances.

In *Heyman v. Flewker*, 13 C. B. N. S. 519 (1863), Willes, J., said: "The term 'agent' does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (Factors) from which the Act has taken its name." In *Cole v. North Western Bank*, L. R. 10 C. P. 354 (1875), it was held that a warehouseman with whom goods were deposited, was not an "agent" or "intrusted with the possession of goods" within the Factors Act, although he used also frequently to sell such goods. In *Johnson v. Credit Lyonnais*, 3 C. P. D. 32 (1877), a vendor who retained the documents of title, and fraudulently obtained advances on them, was held not to be the agent of the vendee.

In *City Bank v. Barrow*, L. R. 5 A. C. 664 (1880), Art. 1740 of the Quebec Civil Code above cited was considered. An English merchant sent hides to a Montreal tanner to be tanned. He pledged the hides to the Bank of Toronto. It was held that he was not a factor or agent entitled to do so, and that the bank had no lien as against the owner. In this case Lord Blackburn cited approvingly the case of *Cole v. North Western Bank* as establishing "that an agent who can pledge or sell must be an agent of that class which, like factors, have a business which, when carried to its legitimate result, would properly end in selling or in receiving payment for goods. That would be a kind of class; factors and agents, in the class of factors. If such a person is 'entrusted,' and is entrusted in that capacity, then,

in the absence of bad faith on the part of the pledgee, the pledge is good."

In this case it was held by the Privy Council that Articles 1488, 1489 and 2268 of the Civil Code, which make valid a sale if it be a commercial matter, or if the article be bought in good faith in a fair or market or at a public sale, or from a trader dealing in similar articles, even though the article had been stolen, did not apply to a case of pledge. The Quebec Statute, 42-43 Vict. chap. 19, was subsequently passed declaring that they should also apply to a contract of pledge.

If the agent has validly pledged the goods for a portion of their value, they are held by the pledgee for him within the meaning of the last clause of the section, so that he may pledge them for further advances: *Portalis v. Telley*, L. R. 5 Eq. 140 (1867).

TIMBER LIMITS

Section 16 of the Amending Act of 1900 reads as follows:—

16. [Loans on standing timber, etc.—The bank may lend money upon the security of standing timber and the rights or licenses held by persons to cut or remove such timber.] 63-64 Vict. chap. 26, sec. 16.

This is an addition to the general powers of a bank as found in section 64. The authorization of loans upon the security for standing timber may be said to be a derogation from the prohibition to lend upon the security of land or immovable property, contained in the latter part of that section. The security of standing timber or of timber licenses is not put upon the same footing as mortgages upon real or personal property. A bank is only authorized to take the latter as additional security for debts contracted to it in the course of its business. Nor is it authorized to deal with such timber or licenses as it may do with negotiable securities. It may deal in, discount, lend money and make advances upon these latter or take them as collateral security. As to the former it is restricted to lending money upon them.

In the amending Act of 1900, the above section 16 is inserted between two sections amending sections 73 and 74 of the Bank Act, which refer respectively to warehouse receipts and bills of lading, and to securities from wholesale manufacturers, etc.; and the language authorizing the loan upon standing timber and timber licenses is almost identical with that used in these two sections with reference to loans upon these other securities. It is to be observed that the prohibition in section 75 does not expressly extend to these newly authorized loans; but as a bank is only authorized to "lend money" on these new securities, they should be taken as security when the loan is made, or the debt contracted, or there should then be a written promise or agreement that they will be given to the bank.

74. Loans to manufacturers.—The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture:

"The word 'manufacturer' includes malsters, distillers, brewers, refiners and producers of petroleum, tanners, curriers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process, or mechanical means, any goods, wares or merchandise": section 2 (f). A wholesale merchant is one who deals only with persons who buy to sell again: *Treacher v. Treacher*, Weekly Notes, 1874, p. 4. A "wholesale manufacturer" is not defined in the Act, but would probably be held to be one who, as a rule, disposes of his manufactured products to merchants and not to consumers.

The expression goods, wares and merchandise is used in the extended sense indicated in the interpretation clause, section 2 (c), and "includes, in addition to the things usually understood thereby, timber, deals, boards, staves, sawlogs and other lumber, petroleum, crude oil, and all agricultural produce and other articles of commerce."

This section is a substitute for section 54 in the former Bank Act, R. S. C. chap. 120, which provided that wharfingers, warehousemen, and certain manufacturers and dealers might give warehouse receipts to a bank for goods belonging to themselves. In the present Act the instrument is not called a warehouse receipt, but simply a "security," and is in the form of an assignment.

The form of the security to be taken by a bank under this section, and its effect, will be found in sub-section 3 and the notes thereon. A security including material to be manufactured would include the goods manufactured from it: section 76.

2. [Loans to wholesale dealers, etc.—The bank may also lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof. The bank may allow the goods, wares and merchandise covered by such security to be removed and other goods, wares and merchandise mentioned in this subsection to be substituted therefor, and those so substituted shall be covered by such security as if originally covered thereby: Provided always, that such goods, wares and merchandise so substituted are of substantially the same character and of substantially the same value as, or of less value than, those for which they have been so substituted.] 63-64 Vict. chap. 26, sec. 17.

Section 17 of the Act of 1900 repealed sub-section 2 of section 74 of the Act of 1890, and substituted the above. The first sentence is substantially a reproduction of the repealed clause with the addition of the two words "dealer" and "quarry." None of the terms "wholesale purchaser, shipper or dealer," is defined in the Act. A "wholesale merchant" is one who deals only with persons who buy to sell again: *Treacher v. Treacher*, W. N. 1874, p. 4.

In *Bank of Hamilton v. Shepherd*, 21 Ont. A. R. 156 (1894), the question was raised whether one Essery was

a wholesale purchaser, or shipper of live stock, but the Court did not find it necessary to decide this point. The security was held to be bad because it was not given when the note was negotiated, or debt contracted, as required by section 75. It was there laid down that under the law as it then stood one warehouse receipt or security under this section could not be substituted for another, and that the bank could not be affected with notice of the purpose for which the money was borrowed, provided the borrower and the goods came within the description of the section. In the *Bank of Hamilton v. Halstead*, 28 S. C. Can. 235 (1897), the Supreme Court held that assignments were invalid because the debt was not contracted at the time they were given, and because new assignments had been substituted for those originally given.

The second sentence of the above sub-section was added to overcome the effect of these decisions as to the right to substitute other similar goods for those originally covered, and to make the law correspond with the decision of the Manitoba Court in *Banque d' Hochelaga v. Merchants Bank*, 10 Man. 361 (1895). It creates another distinction between such a security and a warehouse receipt.

3. **Form of security.**—Such security may be given by the owner and may be taken in the form set forth in Schedule C to this Act, or to the like effect; and by virtue of such security, the bank shall acquire the same rights and powers in respect to the goods, wares and merchandise, stock or products covered thereby, as if it had acquired the same by virtue of a warehouse receipt.

Only the "owner" can give the security mentioned in this section. He may do it either personally or by an attorney or agent duly authorized to that effect. When a bank lends upon such security it should know the owner, and that he is a wholesale manufacturer, or such wholesale purchaser or shipper. Care should also be taken that the goods are strictly within the description of one of the preceding sub-sections, and that the form is identical with that in Schedule C, or to the like effect, and that it is taken

at the time the bill, note or debt is negotiated or contracted, or in accordance with a written promise or agreement then given or made.

The security under this section is very much of the nature of a chattel mortgage, and yet the Act places them upon a very different footing. The chattel mortgage is the creation of the local legislature or within its domain, and the Bank Act simply recognizes it where it has been so created, and by section 68 allows it to be taken only as an additional security by a bank for a debt contracted in the course of its business, and almost always, if not always, previously contracted. A security under this section, on the other hand, is the creation of the Bank Act, and by section 75 is put on the same footing as a warehouse receipt or a bill of lading, which can only be taken by a bank if the bill, note, or debt, the payment of which it is intended to secure, is negotiated or contracted at the time the bank acquires such security, or on the written promise or agreement that it would be given. See *Bank B. N. A. v. Clarkson*, 19 U. C. C. P. 187 (1869); *Dominion Bank v. Oliver*, 17 O. R. 402 (1889); *Bank of Hamilton v. Shepherd*, 21 Ont. A. R. 156 (1894); *Bank of Hamilton v. Halstead*, 28 S. C. Can. 235 (1897); *Ross v. Molsons Bank*, 2 Dorion, 82 (1881); *Perkins v. Ross*, 6 Q. L. R. 65 (1880); *Robertson v. Lajoie*, 22 L. C. J. 169 (1878).

The form of the security given in Schedule C, as amended in 1900, is as follows:—

In consideration of an advance of dollars made by the Bank to A. B., for which the said bank holds the following bills or notes: (describe the bills or notes, if any), [or, in consideration of the discounting of the following bills or notes by the Bank for A. B.: (describe the bills or notes,] the goods, wares and merchandise mentioned below are hereby assigned to the said bank as security for the payment on or before the day of of the said advance, together with interest thereon at the rate of per cent. per annum from the day of (or, of the said bills

or notes, or renewals thereof, or substitutions therefor, and interest thereon, or as the case may be).

This security is given under the provisions of section seventy-four of the Bank Act, and is subject to the provisions of the said Act.

The said goods, wares and merchandise are now owned by, are now in possession of and are free from any mortgage, lien or charge thereon (or as the case may be), and are in (place or places where the goods are), and are the following (description of goods assigned).

Dated, etc.

(N.B.—The bills or notes and the goods, etc., may be set out in schedules annexed.)

This form should be departed from as little as possible, as opinions might differ as to whether the form substituted really was "to the like effect," as required by this sub-section.

It is not necessary that the goods should be in the possession of the owner. If they are not it may be so stated in the above form, or in that event a warehouse receipt might be taken from the bailee and the security be given in this manner.

The goods should be described with as much precision as the nature of the case will admit of, and if possible by distinguishing marks, and the same principle applies to the premises where the goods are, so that there may be no difficulty in identifying them.

In *Banque d'Hochelaga v. Merchants' Bank*, 10 Man. 361 (1895), both banks claimed certain bacon under securities given under this section. The Merchants' Bank had received several such documents for advances, the goods being pointed out to them in the warehouse and labelled with the name of the bank. The owner, however, kept selling and replacing the bacon, but without the knowledge of the bank. Finally the debts were consolidated, and new notes and a new security under this section given. The selling and replacement continued, and subsequently the customer

gave a similar security to plaintiffs, setting apart and marking as theirs some of the bacon previously set apart for defendants with some of that substituted. On the customer absconding defendants took possession, and plaintiffs brought action claiming the property.

It was held that the instruments in the form of Schedule C were sufficient to pass the property at common law; that after the assignment to defendants the title was in defendants and not in the customer; that under the authority of *Great Western Ry. Co. v. Hodgson*, 44 U. C. Q. B. 187 (1879), and *Bank of Hamilton v. Noye*, 9 O. R. 631 (1885), defendants were entitled, as against the customer, to the substituted bacon; that consequently his assignment to plaintiffs was null and void. It was also held that the consolidation of the debts and securities did not operate as a discharge, and the opinion was expressed that section 75 might be construed as not clearly prohibiting the taking of a security under this section for previous advances, and that the assignment might be good under section 68.

As previously mentioned the Ontario Court of Appeal held in the *Bank of Hamilton v. Halstead*, that under the Act of 1890 such substitution could not take place. Sub-section 2 of this section as found in the Act of 1900, makes the law now agree with the Manitoba decision.

75. When security may be acquired.—The bank shall not acquire or hold any warehouse receipt or bill of lading or security under the next preceding section to secure the payment of any bill, note or debt, [or liability], unless such bill, note or debt [or liability] is negotiated or contracted at the time of the acquisition thereof by the bank, or upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank; but such bill, note or debt [or liability] may be renewed, or the time for the payment thereof extended, without affecting any such security: R. S. C. chap. 120, sec. 53, sub-sec. 4; 63-64 Vict. chap. 26, sec. 18.

The words "or liability" were added after "debt" by section 18 of the Act of 1900.

A warehouse receipt or bill of lading, or a security under section 74 can only be taken as collateral security by a bank (1) if the bill or note is negotiated at the time the bank acquires the security, or (2) if the debt or liability is contracted at the time of such acquisition, or (3) if at the time the bill or note is negotiated or the debt or liability contracted there is a written promise or agreement that such warehouse receipt or bill of lading or security shall be given.

There are several grounds for a somewhat strict interpretation of the present section, and others of a like nature. The general rule is laid down in section 64, viz., that a bank shall not either directly or indirectly lend money on the security of any goods, wares or merchandise. Sections 73 and 74, which are among the exceptions to 64, are controlled by the present section, which is prohibitory in declaring that a bank shall not acquire or hold any of the documents of title named, except on the terms indicated.

By section 31 of the Bills of Exchange Act "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." "Holder" in that Act is defined as the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. He need not be the owner, he may have it merely for discount, collection or the like; so that the negotiation of a bill or note is not necessarily a sale of the instrument, but may be a pledging or a mere transfer of possession, provided the transferee is in a position thereby to acquire the status of a holder as above defined. The word "negotiated" would appear to be used in a narrower sense in this section. Its being joined with the words "debt or liability contracted" would seem to restrict it to the purchase or discount of the bill or note by the bank, and not to include the renewal, which is treated as something distinct, in the concluding part of the section. See *Jonmenjoy Coondoo v. Watson*, 9 A. C. 561 (1884).

In the *Bank of Hamilton v. Shepherd*, 21 Ont. A. R. 156 (1894), a warehouse receipt was taken by the bank on the

renewal of a note, no actual advance being then made. It was held that this was not a negotiation, and the bank was not entitled to hold the security.

The fact that when the renewal note and the warehouse receipt were taken by the bank, another warehouse receipt, which had been taken when the debt was contracted, was surrendered, was held not to be a negotiation or sufficient to bring the transaction within the provisions of this section. In *Bank of Hamilton v. Noye*, 9 O. R. 631 (1885), it had been considered that the surrender of the antecedent lien and the taking of a new one with the renewal, might be treated as a negotiation within the meaning of the definition given in *Foster v. Bowes*, 2 P. R. 256 (1857).

In the *Bank of Hamilton v. Halsead*, 28 S. C. Can. 235 (1897), where notes were discounted and the proceeds placed to the credit of the customer when the assignments were given, but the moneys were really under the control of the bank, it was held that the notes were not "negotiated" within the meaning of this section, nor was there any "debt" contracted at the time, and that the securities were consequently void as against the assignee for creditors.

In the *Dominion Bank v. Oliver*, 17 O. R. 402 (1889), it was pointed out by Boyd, C., that in the corresponding clause of the former Act the negotiation of a note is put in contrast with its renewal; and that the mere renewal cannot be read as to mean negotiation. See to the same effect *Bank of British North America v. Clarkson*, 19 U. C. C. P. 182 (1869).

Where a warehouse receipt was indorsed to the acceptor of an accommodation bill by way of security for his acceptance, it was held that there was no debt contracted at the time so as to give the acceptor a valid claim to the property mentioned in the warehouse receipt: *Cockburn v. Sylvester*, 1 Ont. A. R. 471 (1877).

A warehouse receipt may be transferred by indorsement as collateral security for a debt contracted at the time. The obligation contracted at the time may be made to cover future advances, but not past indebtedness: *Robertson v. Lajoie*, 22 L. C. J. 169 (1878).

Where a debtor pledged warehouse receipts as collateral security for drafts, and agreed that if the proceeds of the goods were more than sufficient to pay these drafts the surplus should go to pay an old indebtedness, the agreement was held void as to the latter: *Perkins v. Ross*, 6 Q. L. R. 65 (1880).

Where a lumber company gave to a bank documents pledging logs in a river as security for previous advances, the bank acquired no lien on the logs: *Ross v. Molsons Bank*, 2 Dorion, 82 (1881).

Written promise or agreement.—The Bank Act of 1871 provided that the bill of lading or receipt should be transferred only when the bill or note was negotiated or the debt contracted, unless at that time there was an “understanding” that they should be given subsequently. In the Bank Act, R. S. C. chap. 120, the word used is “promise”; in the present Act it is “written promise or agreement.” Although these words have been so long used in this connection it is surprising how seldom they have come up for judicial interpretation.

In the *Royal Canadian Bank v. Ross*, 40 U. C. Q. B. 466 (1877), the bank made advances to be secured by bills of lading and warehouse receipts for coal and stone when received. The goods came from time to time, and bills of lading and warehouse receipts were given to the bank. The transactions were sustained, and it was held to be no objection that the agreement was to give bills and receipts for goods, of which, at the time, the customer was not possessed. See to the same effect, *McCrae v. Molsons Bank*, 25 Grant, 519 (1878). In *Suter v. Merchants' Bank*, 24 Grant, 365 (1877), a manufacturer, when getting advances from the bank, proposed that he should warehouse his goods as manufactured and pledge the receipts with the bank. This was agreed to, and such receipts given from time to time. It was held that it was no objection that the goods and receipt were not in existence at the time of the agreement. It was contended by plaintiff that the alleged agreement was not valid as it did not specify the number of cases or their value.

This was held not to be too vague or uncertain to entitle the bank to hold the receipts. In *Tennant v. Union Bank*, 19 Ont. A. R. 1 (1892), the bank made advances to mill owners for getting out logs, on a promise that warehouse receipts would be given to the bank on the lumber to be manufactured from them. These were given from time to time as the lumber was manufactured and piled in the yard of the mill owners. The bank was held entitled to the lumber covered by these receipts.

A somewhat analogous case is that where a chattel mortgage has been given in accordance with a previous promise or agreement, and it is sought to set it aside as a fraudulent preference. Instances of preferences being sustained on the ground of a previous promise or agreement will be found in *Ex parte Hodgkin*, L. R. 20 Eq. 746 (1875); *Allan v. Clarkson*, 17 Grant, 570 (1870); *McRoberts v. Steinoff*, 11 O. R. 369 (1886); *Clarkson v. Sterling*, 15 Ont. A. R. 234 (1888); *Embury v. West*, *ibid.* 357 (1888); *Lawson v. McGeoch*, 20 Ont. A. R. 464 (1893).

In scarcely any of the cases on the subject do the precise terms of the agreement come in question. In most of them all that appears is that there was an agreement to give security. Once this was clearly proved it seems to have been considered, as a rule, that the conditions were met. In *Lawson v. McGeoch*, *supra*, at page 475, MacLennan, J., says: "It is said that the agreement was too vague and uncertain to be attended to as it is not shown that any particular goods were mentioned, which were to be mortgaged. I am not pressed with this objection. The debtor was a farmer, and the mortgage was to be a chattel mortgage. I think that means a mortgage of the debtor's chattels; and that the defendant could have selected a sufficient quantity of the debtor's goods, and have required a mortgage upon them."

It is probable that, in accordance with the favor shown to commercial and banking transactions, a promise or agreement to give one of the securities mentioned in this section would be more liberally construed than one to give a chattel

mortgage. In drawing up such an agreement care should be taken that it is made wide enough. The promise may include more than the receipt or security, but the latter cannot cover more than the promise. The property need not be in the possession of the customer, or even in existence, when the customer obtains the advance; but it must be in contemplation that he is to acquire it. The promise may be to give these securities from time to time. An agreement to give a bill of lading, warehouse receipt or security for a certain class of goods up to a certain quantity, or up to a certain value, would probably be a sufficient compliance with the law.

In this way by an agreement with a wholesale manufacturer, or purchaser or shipper, mentioned in section 74, a bank might, when making advances, provide that securities should be given it from time to time as the goods are manufactured or purchased, and thus keep its claim secured, while allowing the business to be carried on.

Renewal.—A bill or note may be renewed or the time extended without affecting any such security. If taken as security for more than one bill or note it would not be necessary that they should be kept distinct in taking renewals, provided the new bills or notes did not in the aggregate amount to more than the old with the interest added, and provided no additional debt were included in any of the new paper: *Barber v. Mackrell*, W. N. 1892, p. 133.

2. **Exchange of warehouse receipt, etc.**—The bank may, on shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor, or on the receipt of any goods, wares and merchandise for which it holds a bill of lading or security, as aforesaid, it may surrender such bill of lading or security, store such goods, wares and merchandise, and take a warehouse receipt therefor, or may ship them, or part of them, and take another bill of lading therefor: R. S. C. chap. 120, sec. 53, sub-sec. 5.

A purchaser of hops had given a bank securities under section 74 on the hops. At the request of the bank he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substitution for these securities, there being no new advance. It was held that this exchange was valid under this sub-section: *Conn v. Smith*, 28 O. R. 629 (1897).

3. **Penalty for false statement.**—Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who wilfully makes any false statement in any warehouse receipt, bill of lading or security, as aforesaid. R. S. C. chap. 120, sec. 53, sub-sec. 7.

The Criminal Code, 1892, section 376, provides that any warehouseman, forwarder, etc., who gives a false warehouse or shipping receipt is guilty of an indictable offence and liable to three years' imprisonment, as is also any person who knowingly and wilfully accepts, transmits or uses any such false receipt. Section 378 makes any person liable to the same punishment who wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes in the Bank Act. Prosecutions should be taken under the Code as being the later Act.

4. **Penalty for alienation.**—Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years, who, having possession or control of any goods, wares and merchandise covered by any warehouse receipt, bill of lading or security as aforesaid, and having knowledge of such receipt, bill of lading or security, and without consent of the bank, in writing and before the advance, bill, note or debt [or liability] thereby secured has been fully paid, wilfully alienates or parts with any such goods, wares, or merchandise, or wilfully withholds from the bank possession thereof upon demand after default in payment of such advance, bill, note or debt [or liability]. Amended by 63-64 Vict. chap. 26, sec. 18.

The words "or liability" were added after "debt" in the 9th and 14th lines of this sub-section by section 18 of the Act of 1900.

Section 378 of the Criminal Code, 1892, provides that any person guilty of such an offence as that described in this sub-section shall be liable to three years' imprisonment.

76. Goods manufactured from articles pledged.—If goods, wares and merchandise are manufactured or produced from the goods, wares and merchandise, or any of them, included in or covered by any warehouse receipt, or security given under section seventy-four of this Act, while so covered, the bank holding such warehouse receipt or security shall hold or continue to hold such goods, wares and merchandise, during the process and after the completion of such manufacture or production, with the same right and title and for the same purposes and upon the same conditions as it held or could have held the original goods, wares and merchandise. R. S. C. chap. 120, sec. 56.

In the former Act, R. S. C. chap. 120, the principle of this section applied only to cereal grains manufactured into flour or malt, or hogs manufactured into pork, bacon or hams. It is now made applicable to all manufactured articles. Where other goods than those covered by the warehouse receipt or security enter into the composition of the manufactured articles nice questions may arise. If these other goods belong to the manufacturer there probably would be no difficulty, as that might be considered to be in the contemplation of the parties, and the blame, if any, would be on the manufacturer.

If, however, he should combine material covered by two or more assignments under section 74 the difficulty would be greater. In that case the question would be settled by the provincial law, as the Act is silent on the point. In Quebec the Civil Code lays down a series of rules in Articles 429 to 442, the principle being that the product might be divided according to the respective interests of the parties, or if not divisible, the party having the greatest interest might claim the whole on paying the others what they are entitled to.

In *Re Goodfallow*, 19 O. R. 299 (1890), a miller gave a bank a warehouse receipt for a certain quantity of "wheat and its product." It was held that once the wheat in the

mill was reduced to a quantity equal to or less than the amount in the receipt, the whole of it belonged to the bank, and so long as "the product" could be traced, whether in flour or in money, it was recoverable by the bank as against the miller.

The principle laid down in this section had been adopted by the Courts before it had been incorporated in the statute. See *Wilmot v. Mailland*, 3 Grant, 107 (1851); *Mason v. G. W. Ry. Co.*, 31 U. C. Q. B. 73 (1871).

77. Preference over unpaid vendor.—All advances made on the security of any bill of lading or warehouse receipt, or security given under section seventy-four of this Act, shall give to the bank making such advances a claim for the repayment of such advances on the goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor; but such preference shall not be given over the claim of any unpaid vendor who had a lien upon such goods, wares and merchandise at the time of the acquisition by the bank of such warehouse receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lien. R. S. C. chap. 120, sec. 57, in part.

The preceding section gives a bank a right to hold goods even when their form is changed. This section gives it priority for its claim over the unpaid vendor, who, under the law of Quebec, ranks above the pledgee. By Article 1994 of the Civil Code privileged claims upon movable property rank in the following order: "1. Law costs and all expenses incurred in the interest of the mass of the creditors. 2. Tithes. 3. The claims of the vendor. 4. The claims of creditors who have a right of pledge or of retention."

Article 1994c provides that the claim of a workman for cutting, drawing or rafting logs or timber shall not affect the rights of a bank under the Banking Act.

Article 1998: "The unpaid vendor of a thing has two privileged rights: 1. A right to revendicate it. 2. A right

of preference upon its price. In the case of insolvent traders these rights must be exercised within fifteen days after the delivery."

Article 1999: "The right to revendicate is subject to four conditions: 1. The sale must not have been made on credit. 2. The thing must still be entire and in the same condition. 3. The thing must not have passed into the hands of a third party who has paid for it. 4. It must be exercised within eight days after the delivery, saving the provisions concerning insolvent traders contained in the last preceding article."

Article 2000: "If the thing be sold pending the proceedings in revendication, or if, when the thing is seized at the suit of a third party, the vendor be within the delay and the thing in the condition prescribed for revendication, the vendor has a privilege upon the proceeds in preference to all other privileged creditors hereinafter mentioned. If the thing be still in the same condition, but the vendor be no longer within the delay, or have given credit, he has a like privilege upon the proceeds, except as regards the lessor or the pledgee."

The effect of the section is that if the bank has notice of the claim of the unpaid vendor it will rank after him; if it had not such notice at the time it acquired its lien it will have priority over him. The rule laid down in the case of *Tenant v. The Union Bank*, [1894] A. C. 31, would appear to uphold the constitutionality of this provision, which overrides the civil law of the province.

78. Sale of pledged goods.—In the event of the non-payment at maturity of any debt [or liability] secured by a warehouse receipt or bill of lading, or security given under section seventy-four of this Act, the bank may sell the goods, wares and merchandise mentioned therein, or so much thereof as will suffice to pay such debt with interest and expenses, returning the overplus, if any, to the person from whom such warehouse receipt, or bill of lading, or security, or the goods, wares and merchandise mentioned therein as the case may be, were acquired; but such power of sale shall be subject to the following provisions, namely: R. S. C. chap. 120, sec. 55.

The words "or liability" in the second line of this section were added by section 19 of the amending Act of 1900.

It is a well settled rule of the English common law that a pledgee, upon default, may sell at public auction goods or chattels that are pledged without judicial process and decree of foreclosure, upon giving the debtor reasonable notice to redeem: *Tucker v. Wilson*, 1 Peere Williams, 261 (1714); *Lockwood v. Ewer*, 9 Modern, 275 (1742); *Kemp v. Westbrook*, 1 Vesey, Sr., 278 (1749); *Pigot v. Cubley*, 15 Common Bench (N. S.), 701 (1864).

In the Province of Quebec under the civil law the pledgee has no such right. His remedy is to get judgment against the debtor, seize and sell the goods pledged, and obtain payment by preference out of the proceeds: Civil Code, Art. 1971.

The effect of this section is to make the law of England applicable to the whole Dominion, the following sub-sections specifying the notice to be given before selling:

2. **Notice before sale.**—No sale without the consent in writing of the owner of any timber, boards, deals, staves, saw logs or other lumber, shall be made under this Act until notice of the time and place of such sale has been given by a registered letter, mailed in the post office to the last known address of the pledger thereof, at least thirty days prior to the sale thereof; and no goods, wares and merchandise, other than timber, boards, deals, staves, sawlogs or other lumber, shall be sold by the bank under this Act without the consent of the owner, until notice of the time and place of sale has been given by a registered letter, mailed in the post office to the last known address of the pledger thereof, at least ten days prior to the sale thereof: R. S. C. chap. 120, sec. 58, sub-sec. 1.

It will be observed that the language of this sub-section is negative and prohibitory. If a sale were made without the notice required by this sub-section, it would appear to be null, at least in the Province of Quebec, where the rule of the civil law prevails that "prohibitive laws import nullity, although such nullity be not therein expressed":

C. C. Art. 14. In such case the bank would be liable in damages for its illegal act, and would also be subject to the penalty provided by section 79.

3. **Sale to be by auction.**—Every such sale of any article mentioned in this section, without the consent of the owner, shall be made by public auction, after a notice thereof by advertisement, stating the time and place thereof, in at least two newspapers published in or nearest to the place where the sale is to be made; and if such sale is in the Province of Quebec, then at least one of such newspapers shall be a newspaper published in the English language, and one other such newspaper shall be a newspaper published in the French language. R. S. C. chap. 120, sec. 58, sub-sec. 1.

Unlike the preceding sub-section, the language of this sub-section is affirmative. If the sale is made otherwise than by auction it would probably be void, as being unauthorized by either common law or statute. On the other hand, a want of notice in the newspapers might not be fatal if reasonable notice was given otherwise.

79. **Penalty for violation.**—Every bank which violates any provision contained in any of the sections numbered sixty-four to seventy-eight (both inclusive) shall incur for each violation thereof a penalty not exceeding five hundred dollars.

Section 98 provides that these penalties shall be recoverable and enforceable with costs, at the suit of Her Majesty, instituted by the Attorney-General of Canada, or the Minister of Finance and Receiver-General, and shall belong to the Crown for the public uses of Canada.

80. **No penalty for usury.**—The bank shall not be liable to incur any penalty or forfeiture for usury, and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank; and the bank may allow any rate of interest whatever upon money deposited with it. R. S. C. chap. 120, sec. 61.

This section was first enacted in the Bank Act of 1867, 31 Vict. chap. 11, sec. 17. In the old Province of Canada, by C. S. C. chap. 58, sec. 4, it was enacted that "no bank may stipulate for, take, reserve, or exact a higher rate of discount or interest than seven per cent. per annum, and that any rate of interest not exceeding seven per cent. per annum may be received and taken in advance by any such bank," and by the eighth section "six per cent. per annum shall continue to be the rate of interest in all cases where, by the agreement of the parties or by law, interest is payable, and no rate has been fixed by the parties or by the law." *The Commercial Bank v. Cotton*, 17 U. C. C. P. 214 (1866), and in appeal, *ibid.* 447 (1867), decided that the effect of the 9th section of that Act was, that as to any bank violating the provisions of the Act, as a punishment for that violation, the note or other security taken is declared void, and that the corporation should be liable to the further penalty of three times the value of the moneys lent or bargained for.

The Act of 1867, above cited, abolished all penalties and forfeitures for usury as against banks, that may have been in force in any of the provinces. Since that time a bank could not recover more than seven per cent. If, however, a higher rate were paid would the customer be entitled to recover it back? On this point the decisions have not been uniform.

In *Barnhart v. Robertson*, 6 O. S. 542 (1843), it was held that a plaintiff who had voluntarily paid more than the legal rate could maintain an action to recover the excess. Under the Act of 1853 the contrary was held in *Kaines v. Stacey*, 9 U. C. C. P. 355 (1859); *Jarvis v. Clark*, 10 U. C. C. P. 480 (1860); *Quinlan v. Gordon*, 20 Grant, Appendix I. (1861); *Hutton v. Federal Bank*, 9 Ont. P. R. 568 (1883).

In the Province of Quebec also the jurisprudence has been conflicting. In *Nye v. Malo*, 7 L. C. R. 405 (1857), it was held in appeal that under the law of 1853, abolishing the penalties for usury, the maker of a promissory note, whereon interest at a higher rate than that allowed

by law had been retained or paid, was entitled to have the excess deducted from the principal. In *Massue v. Dansereau*, 10 L. C. J. 179 (1865), the Court of Appeal, by three Judges against two, reversed the Court below, and decided that money paid voluntarily in excess of the legal rate, could not be recovered back. The question was raised in another case which went from Lower Canada to the Privy Council, *Kierzkowski v. Dorion*, 5 Moore (N.S.), 397 (1868), but their lordships there decided the case upon another ground. They say, however (p. 430), "But an action to recover such excess could not properly be called a civil proceeding for usury, the words of the Act (16 Vict. chap. 8) evidently pointing to a proceeding upon the fact of usury itself and not upon claims which resulted from it. * * * * The whole effect of this Act is, that a usurious contract shall no longer subject a party to penalty or forfeiture; but that it shall be invalid so far as it stipulates for more than six per cent."

The whole of the authorities on the subject were carefully reviewed in a recent case of *Banque de St. Hyacinthe v. Sarrazin*, Q. R. 2 S. C. 96 (1892). It was there held that the provision in this section of the Act prohibiting a bank from taking more than seven per cent. was a matter of public order, and that the defendant was entitled to credit for \$5,768.35, which the bank had from time to time taken in the course of business over and above the legal rate of seven per cent.

81. Not void for usury.—No promissory note, bill of exchange or other negotiable security, discounted by or indorsed or otherwise assigned to the bank, shall be held to be void, usurious or tainted by usury, as regards such bank, or any maker, drawer, acceptor, indorser, or indorsee thereof, or other party thereto, or bona fide holder thereof, nor shall any party thereto be subject to any penalty or forfeiture by reason of any rate of interest taken, stipulated or received by such bank, on or with respect to such promissory note, bill of exchange, or other negotiable security, or paid or allowed by any party thereto to another in compensation for, or in consideration of the rate of interest taken or to be taken thereon

by such bank; but no party thereto, other than the bank, shall be entitled to recover or liable to pay more than the lawful rate of interest in the Province where the suit is brought, nor shall the bank be entitled to recover a higher rate than seven per cent. per annum; and no innocent holder of or party to any promissory note, bill of exchange or other negotiable security, shall, in any case be deprived of any remedy against any party thereto, or liable to any penalty or forfeiture, by reason of any usury or offence against the laws of any such Province, respecting interest, committed in respect of such note, bill or negotiable security, without the complicity or consent of such innocent holder or party. R. S. C. chap. 120, sec. 62.

This section is taken from the Act of 1872 (35 Vict. chap. 8, sec. 2), which, as appears from the recital, was enacted because, although the usury laws were repealed as to banks in 1867, there were still in force in certain provinces usury laws affecting parties other than banks. These were collected in chapter 127 of the Revised Statutes of Canada relating to Interest, and formed sections 9 to 30 inclusive. They were all repealed by 53 Vict. chap. 34, sec. 2, an Act passed in the same session as the present Bank Act, so that the section would now seem to be superfluous.

82. Collection fees.—The bank may, in discounting at any of its places of business, branches, agencies or offices of discount and deposit, any note, bill or other negotiable security or paper payable at any other of its own places or seats of business, branches agencies or offices of discount and deposit in Canada, receive or retain, in addition to the discount, any amount not exceeding the following rates per cent., according to the time it has to run, on the amount of such note, bill or other negotiable security or paper, to defray the expenses attending the collection thereof, that is to say: under thirty days, one-eighth of one per cent.; thirty days or over, but under sixty days, one-fourth of one per cent.; sixty days and over, but under ninety days, three-eighths of one per cent.; ninety days and over, one-half of one per cent. R. S. C. chap. 120, sec. 63.

83. Agency fees.—The bank may, in discounting any note, bill or other negotiable security or paper, *bona fide* payable at any place in Canada different from that at which it is discounted, and other than one of its own places or seats of business, branches, agencies or offices of discount and deposit in Canada, receive and retain, in addition to the discount thereon, a sum not exceeding one-half of one per cent. on the amount thereof, to defray the expenses of agency and charges in collecting the same. R. S. C. chap. 120, sec. 64.

84. Deposits from persons unable to contract.—The bank may receive deposits from any person whomsoever, whatever his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and, from time to time, may repay any or all of the principal thereof, and may pay the whole or any part of the interest thereon to such person, without the authority, aid, assistance or intervention of any person or official being required, unless before such repayment the money so deposited in and repaid by the bank is lawfully claimed as the property of some other person, in which case it may be paid to the depositor with the consent of the claimant, or to the claimant with the consent of the depositor: Provided, always, that if the person making any such deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in and from a bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars: R. S. C. chap. 120, sec. 66, sub-sec. 1.

Sections 64 to 83 of the Act relate to banks as banks of discount; the present section relates to them as banks of deposit.

When money is paid into a bank it ceases to be the money of the person paying it in, and becomes the property of the bank. Nor does it become the property of the party to whose credit it is placed in the books of the bank. The latter simply becomes the creditor of the bank for the amount. The relation existing between the bank and its customer is not that of trustee and *cestui que trust*, but that of debtor

and creditor: *Foley v. Hill*, 2 H. L. Cas. 36 (1848); *Smith v. Leveaux*, 2 DeG. J. & S. at p. 5 (1863); *In re Agra & Masterman's Bank*, 36 L. J. Ch. 151 (1866).

Interest on deposits is not payable by a bank unless there is a special agreement to that effect: *Edwards v. Vere*, 5 B. & Ad. 282 (1833).

Securities deposited in a bank merely for safe keeping remain the property of the depositor.

As the subject of civil rights belongs exclusively to the provincial legislatures, the persons qualified to enter into contracts differ in the several provinces. Those to whom the clause restricting deposits to \$500 will apply are chiefly minors in all the provinces, and married women in several of them.

By section 45, the statement to be laid before the shareholders at the annual meeting must show not only the total amount of the deposits, but must distinguish between those bearing interest, and those not bearing interest. By section 80, the bank may allow any rate of interest whatever upon money deposited with it. In the monthly returns to the Government, Schedule D, separate statements are to be made of (1) deposits by the public, payable on demand in Canada; (2) deposits by the public, payable after notice, or on a fixed day, in Canada; (3) deposits elsewhere than in Canada; (4) deposits made by other banks in Canada.

If a customer has several accounts in a bank he may specify at the time of a payment or deposit, to which of them it is to be applied. In default of his doing so, the bank may determine its application: *Wilson v. Hirst*, 4 B. & Ad. 760 (1833); *Simson v. Ingham*, 2 B. & C. 65 (1823); *Johnson v. Roberts*, L. R. 10 Ch. 505 (1875).

Where a number of deposits and withdrawals have been made, the question of the application of these often becomes a matter of importance. The general rule is that there is a presumption that the sum first paid in is that which is first paid out. This is a presumption, however, which may be rebutted: *Clayton's Case*, 1 Mer. 608 (1816).

The rule in Clayton's Case, applies where there is one unbroken account, even between *cestuis que trustent*. But when a bank applies specific receipts to the payment of a specific balance due by a customer, the rule does not apply: *Mutton v. Peat*, [1899] 2 Ch. 556.

Where a bill or note of a customer is made payable at a bank it has a right to apply any of his funds in its possession to the payment.

A bequest of the testator's "ready money" includes his money on deposit in a bank: *Parker v. Marchant*, 1 Younge & Collyer (Ch.) 290 (1842); *Stein v. Ritherdon*, 37 L. J. Ch. 369 (1868). The balance in a bank has been held to be included in a bequest of "all the debts due to me": *Carr v. Carr*, 1 Mer. 541*n* (1811); also in request of "money in hand": *Vaisey v. Reynolds*, 5 Russ. 12 (1828); and of "all my moneys": *Manning v. Purcell*, 7 DeG. M. & G. 55 (1855).

Cheques.—As a rule, deposits payable on demand are withdrawn by cheques signed by the depositor. The law relating to Cheques is found in the Third Part of the Bills of Exchange Act, sections 72 to 81 inclusive. These sections, with full notes, will be found in the present work following the schedules to the present Act, and to them the reader is referred.

When a cheque is cashed over the counter, the money ceases to be the money of the bank, and the payment cannot be revoked, although it should be immediately discovered that the drawer's account is overdrawn: *Chambers v. Miller*, 13 C. B. N. S. 125 (1862); *Pollard v. Bank of England*, L. R. 6 Q. B. 623 (1871).

A bank is not liable for any deficit in packages of silver paid out unless the money be counted and the deficit made known before the packages are taken from the bank: *Brown v. Quebec Bank*, 2 L. C. L. J. 253 (1866).

Deposit receipts.—As a rule when money is deposited with a bank which is not to be withdrawn in the ordinary

course of business, but only after certain notice or after the expiration of a certain time, a deposit receipt is given to the customer. A considerable controversy has arisen as to whether these instruments are negotiable and transferable by delivery or indorsement. Those in question in the earlier Canadian cases had not the words "bearer" or "order," and it was held that the holder by indorsement could not recover in his own name. See *Mander v. Royal Canadian Bank*, 20 U. C. C. P. 125 (1869); *Bank of Montreal v. Little*, 17 Grant, 313 (1870); *Lee v. Bank B. N. A.*, 30 U. C. C. P. 255 (1879). In *Voyer v. Richer*, 13 L. C. J. 213 (1869), the Quebec Courts held that even where the receipt was payable to order it was not negotiable. In the Privy Council, L. R. 5 P. C. 461 (1874), it was said that there was "high authority in favor of considering it to be negotiable," but the case was decided on another ground.

In *Re Central Bank*, 17 O. R. 574 (1889), the receipt was in the following form; "Received from Messrs. Cox & Co., the sum of six thousand dollars, which this bank will repay to the said Cox & Co., or order, with interest at four per cent. per annum, on receiving fifteen days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required." Boyd, C., in giving judgment in favor of the holder by indorsement, said: "I have a very strong opinion that the deposit receipt as drawn is a negotiable instrument, under which the claimants are entitled to succeed as upon a promissory note made by the bank." He added that, being made payable to "order," it was meant to be transferable by indorsement, and the bank which had issued it in that form was estopped from denying its negotiability.

Under the Bills of Exchange Act it does not now require the words "order" or "bearer" to make it a promissory note. If intended that it shall not be negotiable, it should contain the words "not transferable" or some words to the like effect: Bills of Exchange Act, sec. 8. It would then require to be transferred in the manner provided by the law of the respective provinces for the

transfer of choses in action or rights of action; that is, by assignment and not by simple indorsement. After such assignment the assignee can sue on it in his own name. For Ontario, see the Judicature Act, R. S. O. chap. 58, sec. 58 (5); for Manitoba, Rev. Stat. chap. 1, sec. 3; for N. W. Territories, Cons. Ord. chap. 41; for British Columbia, Rev. Stat. chap. 56, sec. 16 (17). In Quebec the assignee cannot sue in his own name until a copy of the transfer has been served on the debtor, unless he is a party to it: C. C. Arts. 1570, 1571.

A deposit receipt is a good subject of a *donatio mortis causa* even when the order for its payment is in the form of a cheque signed by the depositor: *In re Dillon, Duffin v. Duffin*, 44 Ch. D. 76 (1890).

Saderquist v. Ontario Bank, 15 Ont. A. R. 609 (1889), is a case where a bank was compelled to pay the amount of a deposit receipt a second time. The depositor, on leaving the country for some months, gave the receipt to a friend, who forged his name and drew the money. On the return of the depositor he learned what had been done, but did not notify the bank or take any steps to recover. The friend left the country, and after eighteen months the depositor sued the bank and he was held entitled to recover.

Scott v. Bank of New Brunswick, 31 N. B. 21 (1891), is a very similar case, which resulted differently. In this case the friend with whom the receipt was left owed the depositor other sums, and on the return of the latter he took a mortgage from him. The jury found that the amount of the deposit receipt was not included in the mortgage, and gave a verdict for the depositor; but the Court held that he was estopped from recovering by his conduct and dismissed his action.

2. **Not bound to see to trusts.**—The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this section is subject; and except only in the case of a lawful claim,

by some other person before repayment, the receipt of the person in whose name any such deposit stands, or if it stands in the name of two persons the receipt of one, or if in the names of more than two persons the receipt of a majority of such persons, shall be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust (and with whom the deposit has been made) had notice thereof; and the bank shall not be bound to see to the application of the money paid upon such receipt. R. S. C. chap. 120, sec. 65, sub-sec. 2.

Section 43 contains similar provisions as to the bank not being bound to see to the execution of trusts to which any of its shares may be subject.

The rule of English law is that in case of money payable to trustees, the receipt must be signed by all the trustees and not by the majority merely, or it will not be valid: *Walker v. Symonds*, 3 Swanston, 63 (1818); *Hall v. Franck*, 11 Beav. 519 (1849); *Lee v. Sankey*, L. R. 15 Eq. 204 (1873). In the case of ordinary joint creditors payment to one and a receipt from him is sufficient: *Wallace v. Kelsall*, 7 M. & W. 264 (1840); *Heilbut v. Nevill*, L. R. 5 C. P. 478 (1870). In the case of money paid into a bank on joint account it is generally implied from the purpose of such an account, and the relation between bankers and their customers, that it shall not be withdrawn without the joint order of all; and the banker is not discharged by a payment to one only: Per Lord Tenterden, C.J., in *Innes v. Stephenson*, 1 M. & Rob. 145 (1831). See also *Husband v. Davis*, 10 C. B. 645 (1851); and *Brandon v. Scott*, 7 E. & B. 234 (1857).

Under the law of Quebec, payment may be validly made to one of several joint and several creditors, and a receipt given by him will bind the others; but a release or discharge given by one without payment will avail only for his own share: C. C. Arts. 1100, 1101.

It will be seen that this section of the Act differs from the law in England as to a receipt from one of two joint depositors, or from the majority of a larger number. If it is desired that the deposit shall not be withdrawn in this manner, then notice to that effect should be given to the bank.

In the case of *Bailey v. Jellett*, 9 Ont. A. R. 187 (1884), it was sought to hold a bank responsible for moneys belonging to a client which a solicitor had improperly paid into the bank in his own name, and which he had withdrawn, on the ground that the bank manager was aware of the trust. The Court held that the bank was not liable; but that it was liable for notes and cheques of the solicitor paid after the bank had notice of his death; that these sums and the balance at his credit were to be treated as trust moneys; and that the client whose money was paid in last had the preference. See *Wood v. Stenning*, [1895] 2 Ch. 433.

The leading English case on the subject is *Gray v. Johnston*, L. R. 3 E. & I. App. 1 (1868), where Lord Cairns says, p. 11: "In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must, in the second place, as was said by Sir John Leach, in the well known case of *Keane v. Robarts*, 4 Maddock, 357 (1819), be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it can be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are privy with the breach of trust which is about to be committed." In the same case Lord Westbury says, p. 14: "Supposing that a banker becomes incidentally aware that a customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no

right to refuse the payment of the cheque. * * * If an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit." It is not necessary that the word "trust" or "trustee" should be used by the customer; it is enough that there should be something to indicate to the bank, or that the bank should know that other persons are beneficially interested. See *Clench v. Consolidated Bank*, 31 U. C. C. P. 169 (1880); *Ex parte Kingston*, L. R. 6 Ch. App. 632 (1871).

When a person opened an account with a bank in his own name, followed by the word "Trust," and paid into it not only trust moneys but his own personal funds, the presumption is that it is trust money, and the onus of proving the contrary is on a personal creditor who is seeking to garnish it: *Stobart v. Arford*, 9 Man. R. 18 (1893); *Hancock v. Smith*, 41 Ch. D. 456 (1889).

If a person holds money in trust or in a representative capacity, and pays it into a bank in his own name, the person for whom he held it has a lien upon it if it is still in the hands of the bank. In such a case the presumption is that any money chequed out by him was his own, and that the trust money is still in the bank, if the balance equals the trust money: *In re Hallett's Estate*, 13 Ch. D. 696 (1880).

A company received trust moneys, and opened a new account with a bank in its own name. On its failure the bank claimed the right to set this off against the old account, which was overdrawn. It was held that as the bank had not notice of the trust before the failure it could do so: *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693.

Moneys were received by a banker to be placed to the credit of a customer's trust account. He had no trust account and they placed them in his ordinary account,

which was then overdrawn. He was then in good credit, but afterwards failed. Held, that the bank was not liable to the *cestui que trust*: *Coleman v. Bucks & Oxon Bank*, [1897] 2 Ch. 243.

3. [Deceased depositor—amount under \$500.—If a person dies, having a deposit with a bank not exceeding the sum of five hundred dollars, the production to the bank and the deposit with it of an authentic notarial copy of the will of the deceased depositor, if such will is in notarial form according to the law of the Province of Quebec, or of any authenticated copy of the probate of the will of the deceased depositor, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testamentary or testament dative expedé in Scotland, or, if the deceased depositor died out of Her Majesty's dominions, the production to and deposit with the bank of any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying such deposit, in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid.] 63-64 Vict. chap. 26, sec. 20.

This sub-section was added by section 20 of the Act of 1900, and will obviate the necessity of foreign executors or administrators taking out ancillary probate or administration, when the deceased depositor had not more than \$500 in the bank.

RETURNS BY THE BANK.

85. **Monthly returns to Government.**—Monthly returns shall be made by the bank to the Minister of Finance and Receiver-General in the form set forth in Schedule D to this Act, and shall be made up and sent in within the first fifteen days of each month, and shall exhibit the condition of the bank on the last

juridical day of the month next preceding; and such monthly returns shall be signed by the chief accountant and by the president, or vice-president, or the director or principal partner then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business: R. S. C. chap. 120, sec. 66, sub-sec. 1.

It may be difficult always to classify the transactions of the bank under the proper items in the schedule. Where, on a prosecution for making false returns, the Judge directed the jury, as a matter of law, that certain sums borrowed by the bank from other banks, and for which deposit receipts payable on time were granted, were improperly classified as deposits instead of loans, it was held that this was a misdirection, and that the question of such classification was one of fact for the jury. In the same case it was held that where the bank took demand notes to cover over-drafts, these were improperly classified as current loans: *Reg. v. Hincks*, 24 L. C. J. 116 (1879).

2. **Penalty for neglect.**—Every bank which neglects to make up and send in, as aforesaid, any monthly return required by this section within the time hereby limited, shall incur a penalty of fifty dollars for each and every day after the expiration of such time during which the bank neglects so to make up and send in such return; and the date upon which it appears by the post office stamp or mark upon the envelope or wrapper enclosing such return for transmission to the Minister of Finance and Receiver-General, that the same was deposited in the post office, shall be taken prima facie, for the purposes of this section, to be the date upon which such return was made up and sent in. R. S. C. chap. 120, sec. 66, sub-sec. 1.

The penalty of \$50 a day for not sending the monthly return required by this section, on or before the fifteenth of the following month is imposed on the bank itself, and not on the officers in default; and is to be recovered as laid down in section 98.

If the bank were compelled to pay this penalty, it would have a right to be indemnified by the officer or officers in default.

86. Special returns.—The Minister of Finance and Receiver-General may also call for special returns from any bank, whenever, in his judgment, they are necessary to afford a full and complete knowledge of its condition: R. S. C. chap. 120, sec. 67.

2. Penalty for default.—Such special returns shall be made and signed in the manner and by the persons specified in the next preceding section; and every bank which neglects to make and send in any such special return within thirty days from the date of the demand therefor by the Minister of Finance and Receiver-General shall incur a penalty of five hundred dollars for each and every day such neglect continues; and the provisions contained in the last preceding section as to the prima facie evidence of the date upon which returns are made up and sent in thereunder, shall apply to returns made under this section: Provided always, that the Minister of Finance and Receiver-General may extend the time for sending in such special returns for such further period, not exceeding thirty days, as he thinks expedient.

Special returns, when called for, are to be signed like the monthly returns by the chief accountant, the presiding officer, and the manager or cashier. The penalty of \$500 a day is imposed upon the bank itself and is to be recovered as laid down in section 98. The bank would have its recourse against the delinquent officers.

87. List of shareholders.—The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver-General, to be by him laid before Parliament, a certified list showing the names of the shareholders of the bank on the last day of such calendar year, with their additions and residences, the number of shares then held by them respectively, and the value at par of such shares: R. S. C. chap. 120, secs. 68 and 69, in part.

This list is published annually as a Parliamentary Blue Book.

Sub-section 2 simply provided for the mode of forwarding the list, and was repealed by section 23 of the Act of

1900, in view of the general provisions as to the transmission of returns contained in section 22 found on page 195.

3. **Penalty for neglect.**—Every bank which neglects to transmit such list in manner aforesaid within the time aforesaid shall incur a penalty of fifty dollars for each and every day during which such neglect continues. R. S. C. chap. 120, sec. 68, in part.

This penalty of \$50 a day also is payable by the bank and is to be recovered as laid down in section 98. The bank would have its recourse against the delinquent officers.

88. Statement of unclaimed moneys.—The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver-General, to be by him laid before Parliament, a return of all dividends which have remained unpaid for more than five years, and also of all amounts or balances in respect to which no transactions have taken place or upon which no interest has been paid during the five years prior to the date of such return: Provided always, that in case of moneys deposited for a fixed period, the period of five years above referred to shall be reckoned from the date of the termination of such fixed period:

2. **Details of return.**—Such return shall be signed in the manner required for the monthly returns under section eighty-five of this Act, and shall set forth the name of each shareholder or creditor, his last known address, the amount due, the agency of the bank at which the last transaction took place, and the date thereof; and if such shareholder or creditor is known to the bank to be dead, such return shall show the names and addresses of his legal representatives, so far as known to the bank:
3. **Penalty for neglect.**—Every bank which neglects to transmit or deliver to the Minister of Finance and Receiver-General the return above referred to, within the time hereinbefore limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues:

4. **Disposal of unclaimed moneys.**—If, in the event of the winding up of the business of the bank in insolvency, or under any general winding-up Act, or otherwise, any moneys payable by the liquidator, either to shareholders or depositors, remain unclaimed for the period of three years from the date of suspension of payment by the bank, or from the commencement of the winding up of such business, or until the final winding up of such business, if such takes place before the expiration of the said three years, such moneys and all interest thereon shall, notwithstanding any statute of limitations or other Act relating to prescription, be paid to the Minister of Finance and Receiver-General, to be held by him subject to all rightful claims on behalf of any person other than the bank; and in case a claim to any moneys so paid as aforesaid is thereafter established to the satisfaction of the Treasury Board, the Governor in Council shall, on the report of the Treasury Board, direct payment thereof to be made to the person entitled thereto, together with interest on the principal sum thereof at the rate of three per cent. per annum for a period not exceeding six years from the date of payment thereof to the said Minister of Finance and Receiver-General as aforesaid: Provided however, that no such interest shall be paid or payable on such principal sum, unless interest thereon was payable by the bank paying the same to the said Minister of Finance and Receiver-General: Provided also, that on payment to the Minister of Finance and Receiver-General as herein provided, the bank and its assets shall be held to be discharged from further liability for the amounts so paid.
5. **Outstanding notes.**—Upon the winding-up of a bank in insolvency or under any general winding-up Act, or otherwise, the assignees, liquidators, directors or other officials in charge of such winding-up, shall before the final distribution of the assets, or within three years from the commencement of the suspension of payment by the bank, whichever shall first happen, pay over to the Minister of Finance and Receiver-General a sum out of the assets of the bank equal to the amount then outstanding of the notes intended for circulation issued by the bank; and upon such payment being made, the bank and its assets

shall be relieved from all further liability in respect of such outstanding notes. The sum so paid shall be held by the Minister of Finance and Receiver-General and applied for the purpose of redeeming, whenever presented, such outstanding notes, without interest.

The whole of this section is new law. The publication by Parliament of the first return called for by sub-sections 1 and 2, shewed that a very large number of unclaimed balances, the greater part of the amounts being small, were lying in all the banks. Subsequent returns show that as a result of the publicity thus given, very many of the amounts have been claimed and withdrawn.

ADDITIONAL RETURNS.

The Act of 1900 by sections 21 and 22 provided for an additional annual return regarding drafts and bills of exchange remaining unpaid for more than five years.

21. [Return of unpaid drafts, etc. — The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver-General to be by him laid before Parliament, a return of all drafts or bills of exchange, issued by the bank to any person and remaining unpaid for more than five years prior to the date of such return.
2. Details of return.—Such return shall be signed in the manner required for the monthly returns under section 85 of the Bank Act, and shall set forth so far as known, the name of the person to whom, or at whose request, such draft or bill of exchange was issued, and his address, the payee thereof, the amount and date thereof, and where the same was payable, and the agency of the bank from which the same was issued.
3. Penalty for neglect.—Every bank which neglects to transmit or deliver to the Minister of Finance and Receiver-General the return referred to, within the time above limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues.]

22. [Evidence of transmission.—If the certified list or the return required by section 87 or by section 88 of the Bank Act, or by the next preceding section of this Act, to be transmitted or delivered to the Minister of Finance and Receiver-General, is transmitted by mail, then and in such case the date upon which it appears, by the post office stamp or mark upon the envelope or wrapper enclosing the list or return received by the Minister of Finance and Receiver-General, that it was deposited in the post office of the place in which the chief office of the bank was situated, shall be taken *prima facie* for the purpose of the said sections to be the day upon which such list or return was transmitted to the Minister of Finance and Receiver-General.]

89. Double liability.—In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares. R. S. C. chap. 120, sec. 70.

This liability of each shareholder to pay an amount equal to the par value of the stock held by him is commonly called the double liability. It applies to all the banks now doing business in Canada, except the Bank of British North America: secs. 5 and 6.

Where a savings bank holds shares as pledgee, but appears as owner in the books of the bank, it is not a shareholder within the meaning of this section, and not subject to the double liability. The bank is presumed to know that a savings bank cannot acquire bank shares or hold them except as pledgee: *Exchange Bank v. C. & D. Savings Bank*, M. L. R. 6 Q. B. 196 (1887). But see now the Savings Bank Act, *post*.

A director who has drawn dividends on stock standing in his name cannot set up irregularities in the issue of the stock to him to escape the double liability: *Court v. Waddell*, 4 L. N. 78 (1881).

A loan company which by its charter is authorized to lend money on bank shares, and which advances money on

shares transferred to it, and accepted by it in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower: *Re Central Bank, Home Savings & Loan Co.'s Case*, 18 Ont. A. R. 489 (1891).

A director who had acted as such, was placed on the list of contributories for the number of shares required to qualify directors, although, as a fact, no shares had ever been allotted to him, nor had he applied for any: *In re Bread Supply Association*, [1893] W. N. 14.

90. No prescription or limitation.—As a condition of the rights and privileges conferred by this Act or by any Act in amendment thereof, the following provision shall have effect: The liability of the bank, under any law, custom or agreement to repay moneys deposited with it and interest (if any) and to pay dividends declared and payable on its capital stock, shall continue notwithstanding any statute of limitations or any enactment or law relating to prescription:

2. **Section retroactive.**—This section applies to moneys heretofore or hereafter deposited, and to dividends heretofore or hereafter declared.

The provisions of this section are enacted for the first time. The relation between the bank and its customers being that of debtor and creditor, the ordinary limitation or prescription would but for this section run in favor of the bank, so that in the Province of Quebec the claim of a depositor would be extinct in five years, and in the other provinces in six years: *Pott v. Clegg*, 16 M. & W. 321 (1847).

The same rule would apply to dividends.

91. What constitutes insolvency.—Any suspension by the bank of payment of any of its liabilities as they accrue, in specie or Dominion notes, shall, if it continues for ninety days, consecutively, or at intervals within twelve consecutive months, constitute the bank insolvent and operate a forfeiture of its charter or Act of incorporation, so far as regards all further banking operations; and the charter or Act of incorporation shall remain in force only for the purpose of enabling the directors or other lawful authority to make and enforce the calls mentioned in

the next following sections of this Act and to wind up its business. R. S. C. chap. 120, sec. 71.

This section, with the others from 89 to 96 inclusive, does not apply to the Bank of British North America, nor did it ever apply to La Banque du Peuple or to the Bank of British Columbia. La Banque du Peuple suspended payment from July 16th, 1895, to November 4th, 1895, but its charter was not thereby forfeited. At a meeting of shareholders and creditors on the 10th of January, 1896, it was decided to go into voluntary liquidation, and it was wound up under the provisions of the Dominion Statutes 60-61 Vict. chap. 75 and 62-63 Vict. chap. 123.

In former Acts only a suspension for ninety consecutive days constituted the bank insolvent. The day on which the bank suspends is reckoned as the first day of the ninety: *Mechanics' Bank v. St. Jean*, 9 R. L. 555 (1879).

A creditor of the bank for not less than \$1,000 may, under the Winding-up Act, apply for a winding-up order at the expiration of the ninety days, or sooner, if the bank comes under any of the provisions of sec. 5 of R. S. C. chap. 129.

If no such application is made by a creditor the directors must proceed to wind up the business of the bank, and pay its debts.

A creditor of an incorporated bank, which has suspended payment, may, before the expiration of the ninety days, sue the bank and get judgment for his debt: *Senecal v. Exchange Bank*, M. L. R. 2 S. C. 107 (1884).

A deposit of money made in a bank on the day and at the very hour when it suspended payment may be lawfully returned to the depositor: *Exchange Bank v. Montreal Coffee House*, M. L. R. 2 S. C. 141 (1886).

A person who deposits in a bank after its suspension cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit: *Ontario Bank v. Chaplin*, M. L. R. 5 Q. B. 407 (1889); affirmed in the Supreme Court, 20 S. C. Can. 152 (1891).

A depositor, five days after the suspension of a bank, drew cheques upon it which were accepted. These he handed to different persons, who some days later got them cashed by the suspended bank. It was held that no action lay against the depositor; the right of action, if any, was against the persons who drew the money: *Exchange Bank v. Hall*, M. L. R. 2 Q. B. 409 (1886).

A bank at Stratford received a deposit of \$1,000 of the Mechanics' Bank bills, and later in the day learned that the Mechanics' Bank had suspended. That evening it forwarded the bills to Montreal, and three days later charged the amount to the depositor. It was held that the bills should have been tendered back the day they were deposited or the next day, and that the bank was liable: *Conn v. Merchants' Bank*, 30 U. C. C. P. 380 (1879).

92. Double liability calls.—If any suspension of payment in full in specie or Dominion notes of all or any of the notes or other liabilities of the bank continues for three months after the expiration of the time which, under the preceding section, would constitute the bank insolvent, and if no proceedings are taken under any general or special Act for the winding up of the bank, the directors shall make calls on the shareholders thereof, to the amount they deem necessary to pay all the debts and liabilities of the bank, without waiting for the collection of any debts due to it or the sale of any of its assets or property. R. S. C. chap. 120, sec. 72, sub-sec. 1.

Under the law as it stood in 1869 it was held that a bill would lie in equity at the suit of a creditor, on behalf of all the creditors, to enforce the double liability of the shareholders of an insolvent bank: *Brooke v. Bank of Upper Canada*, 16 Grant, 249 (1869).

2. Calls and their enforcement.—Such calls shall be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which such call shall be payable, and any number of such calls may be made by one resolution; any such call shall not exceed twenty per cent. on each share; and

payment of such calls may be enforced in like manner as payment of calls on unpaid stock may be enforced; and the first of such calls may be made within ten days after the expiration of the said three months. R. S. C. chap. 120, sec. 72, sub-sec. 2.

The provision as to making any number of such calls by one resolution is not contained in section 31, sub-section 2, which regulates calls on unpaid stock. There no call is to exceed ten per cent.; on the double liability it may be twenty per cent. The directors must sue for unpaid calls; in proceedings under the Winding-up Act the Court may make an order placing shareholders on the list of contributories and directing the manner in which they should pay. R. S. C. chap. 129, secs. 42, 48. See *Cloyes v. Darling*, 16 R. L. 649 (1884).

3. **Punishment for refusal.**—Every director who refuses to make or enforce, or to concur in making or enforcing any call under this section, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding two years, and shall further be personally responsible for any damages suffered by such default.

93. **Calls in winding up.**—In the event of proceedings being taken under any general or special winding-up Act, in consequence of the insolvency of the bank, the said calls shall be made in the manner prescribed for the making of such calls in such general or special winding-up Act. R. S. C. chap. 120, sec. 73.

The general "Winding-up Act" is chapter 129 of the Revised Statutes of Canada, and will be found in the latter part of this work. The Maritime Bank, the Exchange Bank, the Central Bank and the Commercial Bank of Manitoba have been wound up under its provisions, and the liquidation of the Banque Ville Marie is proceeding under it, while the Banque du Peuple is being wound up under the special Acts, 60-61 Vict. chap. 75, and 62-63 Vict. chap. 123.

Under section 44 of the Winding-up Act shareholders may be placed on the list of contributories, and the Court may order the payment of the double liability without observing the restrictions named in section 92, sub-section 2

of this Act, as to the interval of thirty days between calls, and each call being limited to twenty per cent. Certain sections of the Winding-up Act, 97 to 104 inclusive, apply to banks alone.

94. Forfeiture for non-payment.—Any failure on the part of any shareholder liable to any such call to pay the same when due, shall operate a forfeiture by such shareholder of all claim in or to any part of the assets of the bank,—such call and any further call thereafter being nevertheless recoverable from him as if no such forfeiture had been incurred. R. S. C. chap. 120, sec. 74.

95. Liability of directors.—Nothing in the six sections next preceding contained shall be construed to alter or diminish the additional liabilities of the directors as hereinbefore mentioned and declared. R. S. C. chap. 120, sec. 75.

The additional liabilities of the directors referred to are for declaring a dividend or bonus so as to impair the paid-up capital: sec. 48; or for pledging or hypothecating the notes of the bank: sec. 52.

96. Liability of ex-shareholders.—Persons who, having been shareholders of the bank, have only transferred their shares, or any of them, to others, or registered the transfer thereof within sixty days before the commencement of the suspension of payment by the bank, and persons whose subscriptions to the stock of the bank have been cancelled in manner hereinbefore provided within the said period of sixty days before the commencement of the suspension of payment by the bank, shall be liable to all calls on the shares held or subscribed for by them, as if they held such shares at the time of such suspension of payment, saving their recourse against those by whom such shares were then actually held. R. S. C. chap. 120, sec. 77.

The time mentioned in the former Bank Act was a month instead of sixty days. The provision relating to cancelled stock is new. The reference is to section 30, which provides that the directors may cancel stock on which

the subscriber has not paid at least ten per cent. The liability in question is for the unpaid portion, if any, of the amount subscribed for and the double liability.

If the stock has passed through several hands within the sixty days preceding the suspension, they are all liable; the prior holders having their recourse against those who held the stock subsequent to themselves: *Re Central Bank, Baines' Case*, 16 Ont. A. R. 237 (1889); *Re Central Bank, Henderson's Case*, 17 O. R. 110 (1889); *Humby's Case*, 26 L. T. N. S. 936 (1872).

The owner of certain shares in the Central Bank authorized his broker to sell them, and transferred them to him for that purpose. The latter sold them on the Toronto Stock Exchange to a firm of brokers who did not then disclose the name of their principal. The selling broker signed the transfer in the books of the bank, leaving the name of the transferee blank, but noting in the margin that they were subject to the order of the purchasing brokers. The latter a few days later made another marginal note giving the name of their principal, who accepted the transfer, his name being filled in the blank space as transferee. Within a month (the time limited by section 77 of the then Bank Act, R. S. C. chap. 120) from the original transfer to the seller's broker the bank failed. The seller was held for the double liability. He obtained a judgment of indemnity against his broker, which was assigned to him and the purchasing brokers were in turn held liable to him, their principal being worthless: *Boulbee v. Gzowski*, 29 S. C. Can. 54 (1898).

OFFENCES AND PENALTIES.

97. **President, etc., giving a preference.** — Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who, being the president, vice-president, director, principal partner *en commandite*, manager, cashier or other officer of the bank, wilfully gives or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over other creditors, by giving security to such creditor or by changing the nature of his claim

or otherwise howsoever, and shall further be responsible for all damages sustained by any person in consequence of such preference. R. S. C. chap. 120, sec. 80.

The Exchange Bank, Montreal, suspended payment on the 17th of September, 1883. Mr. Buntin, a director, had over \$13,000 standing to his credit. Within a few days after the suspension the president of the bank paid him sums aggregating \$10,000. A creditor of the bank laid an information against Mr. Buntin, who returned the money. He was, however, convicted and sentenced to imprisonment for ten days: *Regina v. Buntin*, 7 L. N. 395 (1884).

“Other officers” in this section would probably be construed to mean some superior officers of the bank of a rank corresponding to those named, on the principle of the doctrine of *ejusdem generis*.

98. Recovery of penalties.—The amount of all penalties imposed upon a bank for any violation of this Act shall be recoverable and enforceable with costs, at the suit of Her Majesty, instituted by the Attorney-General of Canada, or the Minister of Finance and Receiver-General, and such penalties shall belong to the Crown for the public uses of Canada; but the Governor in Council, on the report of the Treasury Board, may direct that any portion of any penalty be remitted or paid to any person, or applied in any manner deemed best adapted to attain the objects of this Act and to secure the due administration thereof.

As will be seen from the several sections in which these penalties are imposed, they are recoverable from the bank in the first instance. As in every case it would be for the neglect of a director or officer of the bank, it would have its recourse against the officer or officers in default.

The directors of banks are *quasi* trustees for the general body of stockholders, and if any loss should accrue to the bank through their violating the provisions of the Act, they would be liable individually to make good the loss to the bank: *Drake v. Bank of Toronto*, 9 Grant, 116 (1862).

99. Making false statements.—The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanor punishable by imprisonment for a term not exceeding five years; and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier or other officer of the bank, who prepares, signs, approves or concurs in such statement, return, report, or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by any person in consequence thereof. R. S. C. chap. 120, sec. 81.

Complaints under this section, as a rule, either come under the statement submitted by the directors at the annual meeting: sec. 45; or under the monthly returns to the Government, section 85.

In an indictment under this section in the former Act for having unlawfully and wilfully made a wilfully false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return was one required by law to be made by the accused, or that any use was made by him of such return, or to specify in what particulars it was false. The enumeration in the indictment of several alleged false statements constitute but one count, and a general verdict is sufficient if the statement is shown to be false in any one of the particulars alleged. It is not necessary to allege in the indictment that the false statement was made with intent to deceive or mislead: *The Queen v. Cotte*, 22 L. C. J. 141 (1877).

Where the Judge charged the jury that wilful intent to make a false return might be inferred from all the circumstances of the case proved to their satisfaction, this was held to be a proper instruction: *Reg. v. Hincks*, 24 L. C. J. 116 (1879).

It is not necessary that the information should be laid by a shareholder or creditor of the bank; it may be done by any citizen, even though he is a debtor of the bank: *Molleur v. Loupret*, 8 L. N. 305 (1885).

Directors may be held personally responsible for losses incurred through a statement which they know to be untrue, or where they are guilty of such gross negligence as to amount to fraud: *Parker v. McQuesten*, 32 U. C. Q. B. 273 (1872); *McDonald v. Rankin*, M. L. R. 7 S. C. 44 (1890).

An innocent director, however, is not liable for the fraud of his co-directors in issuing to the shareholders false and fraudulent reports and balance sheets, if the books and accounts have been kept and audited by duly appointed and responsible officers, and he has no ground for suspecting fraud: *In re Denham & Co.*, 25 Ch. D. 752 (1883). See the Criminal Code, 1892, sec. 365.

100. Using unauthorized name.—Every person assuming or using the title of “bank,” “banking company,” “banking house,” “banking association” or “banking institution,” without being authorized so to do by this Act, or by some other Act in force in that behalf, is guilty of an offence against this Act.

Up to the 1st of July, 1880, any person was at liberty to use the word “bank,” or any of the expressions mentioned in this section. It was enacted by 43 Vict. chap. 22, sec. 10, that any one who used the word “bank” after that date without being authorized to do so, should be guilty of a misdemeanor. The Act of 1883, 46 Vict. chap. 8, added the other expressions of this section, and required the addition of the words “not incorporated.” In the present Act the use of the words is absolutely forbidden.

The punishment for a violation of this section is a fine not exceeding \$1,000, or imprisonment not exceeding five years, or both: sec. 101.

In accordance with the provisions of the Interpretation Act, R. S. C. chap. 1, sec. 7, “person” would include a body corporate or a partnership.

101. Penalty for offence.—Every person, committing an offence declared to be an offence against this Act, shall be liable to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding five years, or to both, in the discretion of the court before which the conviction is had.

The offences declared to be offences against the Act are: (1) Commencing business before getting a certificate from the Treasury Board: sec. 14; (2) Selling shares by a false number, or shares of which the proposed transferrer is not the registered owner: sec. 37; and (3) Using the word "bank," etc., improperly: sec. 100.

PUBLIC NOTICES.

- 102. How to be given.**—The several public notices by this Act required to be given shall, unless otherwise specified, be given by advertisement in one or more newspapers published at the place where the head office of the bank is situate, and in the Canada Gazette.

DOMINION GOVERNMENT CHEQUES.

- 103. To be paid at par.**—The bank shall not charge any discount or commission for cashing any official cheque of the Government of Canada, or of any department thereof, whether drawn on itself or on another bank.

COMMENCEMENT OF ACT AND REPEAL.

- 104.** This Act shall come into force on the first day of July, in the year one thousand eight hundred and ninety-one; and from that day chapter one hundred and twenty of the Revised Statutes of Canada, intituled "An Act respecting Banks and Banking," the Act passed in the fifty-first year of Her Majesty's reign, chapter twenty-seven, in amendment thereof, the Act passed in the session held in the thirty-third year of Her Majesty's reign, chapter twelve, intituled "An Act to remove certain restrictions with respect to the issue of bank notes in Nova Scotia," the Act passed in the session held in the fiftieth and fifty-first years of Her Majesty's reign, chapter forty-seven, intituled "An Act respecting the defacing of counterfeit notes, and the use of imitations of notes," and chapter one hundred and twenty of the Revised Statutes of New Brunswick, "Of Banking," and the Act passed by the Legislature of the Province of New Brunswick in the nineteenth year of Her Majesty's reign, chapter forty-seven, intituled "An Act to explain chapter 120, Title

XXXI., of the Revised Statutes 'Of Banking,' shall be repealed, except as to rights theretofore acquired or liabilities incurred in regard to any matter or thing done or contract or agreement made or entered into or offences committed under the said chapters or Acts, and nothing in this Act shall affect any action or proceedings then pending under the said chapter or Acts then repealed, but the same shall be decided as if such chapters and Acts had not been repealed.

SCHEDULE A.

BANKS WHOSE CHARTERS ARE CONTINUED.

1. The Bank of Montreal.
2. The Quebec Bank.
3. The Molsons Bank.
4. The Bank of Toronto.
5. The Ontario Bank.
6. The Eastern Townships Bank.
7. La Banque Nationale.
8. La Banque Provinciale du Canada.¹
9. The Merchants' Bank of Canada.
10. The Union Bank of Canada.
11. The Canadian Bank of Commerce.
12. The Dominion Bank.
13. The Royal Bank of Canada.²
14. The Bank of Nova Scotia.
15. The Bank of Yarmouth, Nova Scotia.
16. The Standard Bank of Canada.
17. The Bank of Hamilton.
18. The Halifax Banking Company.
19. La Banque d'Hochelega.
20. The Imperial Bank of Canada.
21. La Banque de St. Hyacinthe.
22. The Bank of Ottawa.
23. The Bank of New Brunswick.
24. The Exchange Bank of Yarmouth.
25. The Union Bank of Halifax.

¹ Formerly La Banque Jacques Cartier. Name changed July 3rd, 1900, under 63-64 Vict. chap. 102.

² Formerly The Merchants' Bank of Halifax. Name changed January 2nd, 1901, under 63-64 Vict. chaps. 103 and 104.

26. The People's Bank of Halifax.
27. La Banque de St. Jean.
28. The Commercial Bank of Windsor.
29. The Western Bank of Canada.
30. The Traders' Bank of Canada.
31. The People's Bank of New Brunswick.
32. The St. Stephen's Bank.
33. The Summerside Bank.
34. The Merchants' Bank of Prince Edward Island.

SCHEDULE B.

FORM OF ACT OF INCORPORATION OF NEW BANKS

An Act to incorporate the Bank.

Whereas the persons hereinafter named have, by their petition, prayed that an Act be passed for the purpose of establishing a bank in , and it is expedient to grant the prayer of the said petition:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The persons hereinafter named, together with such others as become shareholders in the corporation by this Act created, are hereby constituted a corporation by the name of , hereinafter called "the Bank."
2. The capital stock of the bank shall be dollars.
3. The chief office of the bank shall be at
4. shall be the provisional directors of the bank.
5. This Act shall, subject to the provisions of section sixteen of "The Bank Act," remain in force until the first day of July, in the year one thousand nine hundred and eleven.

SCHEDULE C.

FORM OF SECURITY UNDER SECTION 74 OF THE BANK ACT.

In consideration of an advance of _____ dollars made by the _____ Bank to A. B., for which the said bank holds the following bills or notes: (*describe the bills or notes, if any*). [*or, in consideration of the discounting of the following bills or notes by the _____ Bank for A. B.: (describe the bills or notes),*] the goods, wares and merchandise mentioned below are hereby assigned to the said bank as security for the payment on or before the _____ day of _____ of the said advance, together with interest thereon at the rate of _____ per cent. per annum from the _____ day of _____ (or, of the said bills or notes, or renewals thereof, or substitutions therefor, and interest thereon, *or as the case may be*).

This security is given under the provisions of section seventy-four of *The Bank Act*, and is subject to the provisions of the said Act.

The said goods, wares and merchandise are now owned by _____, are now in the possession of _____ and are free from any mortgage, lien or charge thereon (*or as the case may be*), and are in (*place or places where the goods are*), and are the following (*description of goods assigned*).

Dated, etc.

(*N.B.—The bills or notes and the goods, etc., may be set out in schedules annexed.*)

SCHEDULE D.

Return of the liabilities and assets of the _____ bank
on the _____ day of _____, A.D.

Capital authorized	\$
Capital subscribed	\$
Capital paid-up	\$
Amount of rest or reserve fund	\$
Rate per cent. of last dividend declared	per cent.

LIABILITIES.

1. Notes in circulation \$
2. Balance due to Dominion Government, after deducting advances for credits, pay-lists, etc.
3. Balances due to Provincial Governments.
4. Deposits by the public, payable on demand, in Canada
5. Deposits by the public, payable after notice or on a fixed day, in Canada
6. Deposits elsewhere than in Canada.
7. Loans from other banks in Canada, secured, including bills rediscounted
8. Deposits made by, and balances due to, other banks in Canada
9. Balances due to agencies of the bank, or to other banks or agencies, in the United Kingdom
10. Balances due to agencies of the bank, or to other banks or agencies, elsewhere than in Canada and the United Kingdom
11. Liabilities not included under foregoing heads

 \$

ASSET .

1. Specie \$
2. Dominion notes
3. Deposits with Dominion Government for security of note circulation
4. Notes of and cheques on other banks.
5. Loans to other banks in Canada, secured, including bills rediscounted.
6. Deposits made with, and balances due from, other banks, in Canada
7. Balances due from agencies of the bank, or from other banks or agencies, in the United Kingdom
8. Balances due from agencies of the bank, or from other banks or agencies, elsewhere than in Canada and the United Kingdom
9. Dominion and Provincial Government securities

10. Canadian municipal securities, and British, or foreign, or colonial public securities other than Canadian
11. Railway and other bonds, debentures and stocks
12. Call and short loans on stocks and bonds, in Canada
13. Call and short loans elsewhere than in Canada.
14. Current loans in Canada
15. Current loans elsewhere than in Canada...
16. Loans to the Government of Canada ...
17. Loans to Provincial Governments.
18. Overdue debts
19. Real estate other than bank premises
20. Mortgages on real estate sold by the bank..
21. Bank premises
22. Other assets not included under the foregoing heads

\$

Aggregate amount of loans to directors, and firms of which they are partners, \$

Average amount of specie held during the month, \$

Average amount of Dominion Notes held during the month, \$

Greatest amount of notes in circulation at any time during the month, \$

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F.,

Chief Accountant.

We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shows truly and clearly the financial position of the bank; and we further declare that the bank has never, at any time during the period to which the said return relates, held less than forty per cent. of its cash reserves in Dominion notes.

(Place)

this

day of

A. B., *President.*

C. D., *General Manager.*

THE BANK ACT AMENDMENT ACT,

1900,

63-64 VICTORIA, CHAPTER 26.

An Act to amend the Bank Act.

[Assented to 7th July, 1900.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as the Bank Act Amendment Act, 1900.

CONSTRUCTION AND INTERPRETATION.

2. The Bank Act, chapter 31 of the statutes of 1890, as amended by any subsequent Act, shall be read and construed as if the provisions of this Act were incorporated therein and formed a part thereof.

3. The expression "warehouse receipt," defined by subsection (*d*) of section 2 of the Bank Act, includes receipts given by any person in charge of logs or timber in transit from timber limits, or other lands, to their place of destination.

2. The word "manufacturer," defined by paragraph (*f*) of section 2 of the said Act, includes a manufacturer of logs, timber or lumber.

These additions have been made to the definitions as found in the Bank Act, *ante* pp. 7 and 10.

APPLICATION OF THE ACT.

4. Schedule A to this Act is substituted for schedule A to the Bank Act, and when "La Banque Jacques Cartier"

changes its name to "La Banque Provinciale du Canada," and "The Merchants Bank of Halifax" changes its name to "The Royal Bank of Canada," under the provisions of Acts of this session of Parliament, such banks shall be deemed to be included in schedule A to this Act under their new names.

The new schedule A will be found *ante* p. 206, where it has been substituted for the old one, with the new names of the two banks above mentioned. La Banque Jacques Cartier under the statute 63-64 Vict. chap. 102, changed its name on the 3rd of July, 1899. The Merchants Bank of Halifax under the Statutes 63-64 Vict. chaps. 103 and 104, changed its name on the 2nd January, 1901.

5. The provisions of the Bank Act and of any amendment thereof shall continue to apply to any bank which is included in schedule A to the Bank Act and not in schedule A to this Act, but such provisions shall continue to apply to any such bank only in so far as may be necessary to wind up the business thereof, and the charter or Act of incorporation of such bank, and any Act in amendment thereof, or any Act in relation to such bank, now in force, shall continue in force for such purpose and for such purpose only.

The banks included in schedule A to the Bank Act of 1890, and not included in the schedule to this Act are, La Banque-du Peuple, La Banque Ville Marie, and the Commercial Bank of Manitoba. The first of these was wound up under the special Acts, 60-61 Vict. chap. 75, and 63-64 Vict. chap. 123; the two latter under the general Winding-up Act.

6. **Charters continued to 1911.**—The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in schedule A to this Act are continued in force, so far as regards the incorporation and corporate name, the amount of capital stock (as authorized at the time of the passing of this Act), the amount of each share of such stock and the chief place of business of each bank, until the first day of July, in the year one thousand nine hundred and eleven, subject to the right of each bank to increase or reduce its capital stock in the manner provided by the Bank Act; and as to all other particulars the provisions of all such charters, Acts of incorporation, and Acts in amendment thereof are repealed, and the Bank Act and any amendment thereof and this Act form and are the charter of each of the said banks until the said first day of July, in the year one thousand nine

hundred and eleven: Provided always, that the said charters or Acts of incorporation and Acts in amendment thereof, are hereby continued in force only in so far as they, or any of them, are not forfeited or rendered void under the terms thereof, or of the Bank Act, or of this Act, or of any other Act passed or to be passed, by reason of the non-performance of the conditions thereof, or by insolvency, or otherwise.

7. The provisions of this Act, with the exception of those contained in sections 4, 5, 6, 8 and 9, apply to the Bank of British North America and to the Bank of British Columbia respectively.

The Bank of British Columbia having been merged in the Canadian Bank of Commerce, the Bank of British North America is the only one now in the above exceptional position.

TRUST ESTATES.

8. Section 44 of the Bank Act is repealed and the following is substituted therefor:—

“44. No person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator of or for any estate, trust or person named in the books of the bank as being so represented by him, shall be personally subject to any liability as a shareholder, but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such estate and funds would be, if living and competent to hold the stock in his own name; and if the trust is for a living person, such person shall also himself be liable as a shareholder; but if such estate, trust or person so represented is not so named in the books of the bank, the executor, administrator, guardian, trustee, tutor or curator shall be personally liable in respect of such stock as if he held it in his own name as owner thereof.”

This section with notes will be found *ante* p. 72.

STATEMENTS.

9. Section 45 of the said Act is amended by adding thereto the following sub-section:—

“2. The directors shall also submit to the shareholders such further statements of the affairs of the bank, other

than statements with reference to the account of any person dealing with the bank, as the shareholders require by by-law passed at the annual general meeting, or at any special general meeting of the shareholders called for the purpose, and the statements so required shall be submitted at the annual general meeting, or at any special general meeting called for the purpose, or at such time and in such manner as is set forth in the by-law of the shareholders requiring such statements."

This sub-section has been inserted *ante* p. 74.

NOTE ISSUE.

10. Not to issue during suspension.—The bank shall not, during any period of suspension of payment of its liabilities, issue or reissue its notes payable to bearer on demand and intended for circulation, and if, after any such suspension, the bank resumes business without the consent in writing of the curator hereinafter provided for, it shall not issue or reissue any of such notes until authorized by the Treasury Board so to do, and every person who, being president, vice-president, director, general manager, manager, clerk or other officer of the bank, issues or reissues, or authorizes or is concerned in the issue or reissue of such notes, and every person who accepts, receives or takes, or authorizes or is concerned in the acceptance, receipt or taking of such notes from the bank, or from such president, vice-president, director, general manager, manager, clerk, or other officer of the bank, in payment, or part payment, or as security for the payment, of any amount due or owing to such person by the bank, is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years, or a fine not exceeding two thousand dollars, or to both.

11. Interest reduced.—The rate of interest payable, under the provisions of sub-section 7 of section 54 of the Bank Act on the notes of a bank in the event of the suspension by such bank of payment in specie or Dominion notes of any of its liabilities as they accrue, is hereby reduced from six per cent. per annum to five per cent. per annum.

Section 54, *ante* p. 90, has been amended in accordance with this action.

12. Sub-section 8 of section 54 of the said Act is amended by striking out the following words in the eighth and

ninth lines thereof, that is to say, "which each bank has at that time contributed to the fund," and by substituting in lieu thereof the following words, namely, "which each bank had or should have contributed to the fund at the time of the suspension of the bank in respect of whose notes the payments are made."

The foregoing amendments have been inserted in sec. 54. sub-sec. 8, *ante* p. 91.

13. When notes bear interest. — Notwithstanding anything to the contrary contained in section 54 of the said Act, all notes of a bank which has suspended payment, and all interest on such notes, which are paid by the Minister of Finance and Receiver-General out of "The Bank Circulation Redemption Fund" after the amount at the credit of such bank in the fund, adding thereto all interest due or accruing due on such amount, has been exhausted, shall bear interest at the rate of three per cent. per annum from the time such notes and interest are paid until such notes and interest are repaid to the Minister of Finance and Receiver-General by or out of the assets of such bank.

BUSINESS AND POWERS OF THE BANK.

14. Section 70 of the said Act is repealed and the following section is substituted therefor:—

"**70.** The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, and may purchase and acquire any prior mortgage or charge on such property.

"**2.** No bank shall hold any real or immovable property, howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof, or any extension of such period as hereinafter provided, but such property shall be absolutely sold or disposed of so that the bank shall no longer retain any interest therein unless by way of security: Provided that the Treasury Board may direct that the time for the sale or disposal thereof be extended for a further period, or periods, not to exceed five years, the whole period during which the bank may so hold such property under the provisions of this sub-section not to exceed twelve years.

"3. Any real or immovable property, not within the exception aforesaid, held by the bank for a longer period than authorized by the preceding sub-section, shall be liable to be forfeited to Her Majesty for the use of the Dominion of Canada, but no such forfeiture shall take effect until the expiration of at least six calendar months after notice in writing to the bank by the Minister of Finance and Receiver-General of the intention of Her Majesty to claim such forfeiture, and the bank may, notwithstanding such notice, before the forfeiture is effected, sell or dispose of such property free from liability to forfeiture."

2. The provisions of this section shall apply to any real or immovable property heretofore acquired by the bank and held by it at the time of the coming into force of this Act.

The foregoing section has been substituted for the original section 70 in the Bank Act, *ante* p. 146.

15. Section 73 of the Bank Act is amended by adding after the word "favour" in the third line of the first sub-section thereof the words "or as security for any liability incurred by it for any person," and by adding after the word "debt," in the fifth line of the second sub-section thereof, the words "or liability."

Section 73 has been amended accordingly, *ante* pp. 149 and 156.

16. The bank may lend money upon the security of standing timber and the rights or licenses held by persons to cut or remove such timber.

This section has been inserted in the Bank Act, *ante* p. 160.

17. Sub-section 2 of section 74 of the Bank Act is repealed and the following is substituted therefor:—

"2. The bank may also lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof. The bank may allow the goods, wares and merchandise covered by such security to be removed and other goods, wares and merchandise mentioned in this sub-section to be substituted therefor, and those so substituted shall be covered by such security as if

originally covered thereby: Provided always, that such goods, wares and merchandise so substituted are of substantially the same character and of substantially the same value as, or of less value than, those for which they have been so substituted."

This sub-section has been substituted for the original one, *ante* p. 162.

18. Section 75 of the said Act is amended by adding the words "or liability" after the word "debt" where it occurs in the third, fourth and eighth lines of the first sub-section thereof, and in the seventh and eleventh lines of the fourth sub-section thereof.

This amendment is embodied in section 75, *ante* pp. 166 and 172.

19. Section 78 of the said Act is amended by adding after the word "debt" in the second line thereof the words "or liability."

This amendment is embodied in section 78, *ante* p. 175.

20. Section 84 of the said Act is amended by adding hereto the following sub-section:—

"3. If a person dies, having a deposit with a bank not exceeding the sum of five hundred dollars, the production to the bank and the deposit with it of an authentic notarial copy of the will of the deceased depositor, if such will is in notarial form according to the law of the Province of Quebec, or of any authenticated copy of the probate of the will of the deceased depositor, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testamentary or testament dative expedite in Scotland, or, if the deceased depositor died out of Her Majesty's dominions, the production to and deposit with the bank of any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying such deposit, in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid."

This section has been incorporated in the Bank Act, *ante* p. 189.

RETURNS BY THE BANK.

21. Unpaid drafts.—The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver-General to be by him laid before Parliament, a return of all drafts or bills of exchange, issued by the bank to any person and remaining unpaid for more than five years prior to the date of such return.

2. Such return shall be signed in the manner required for the monthly returns under section 85 of the Bank Act, and shall set forth so far as known the name of the person to whom, or at whose request, such draft or bill of exchange was issued, and his address, the payee thereof, the amount and date thereof, and where the same was payable, and the agency of the bank from which the same was issued.

3. Every bank which neglects to transmit or deliver to the Minister of Finance and Receiver-General the return referred to, within the time above limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues.

22. Proof of transmission.—If the certified list or the return required by section 87 or by section 88 of the Bank Act, or by the next preceding section of this Act, to be transmitted or delivered to the Minister of Finance and Receiver-General, is transmitted by mail, then and in such case the date upon which it appears, by the post office stamp or mark upon the envelope or wrapper enclosing the list or return received by the Minister of Finance and Receiver-General, that it was deposited in the post office of the place in which the chief office of the bank was situated, shall be taken *prima facie* for the purpose of the said sections to be the day upon which such list or return was transmitted to the Minister of Finance and Receiver-General.

23. Sub-section 2 of section 87 of the Bank Act is repealed.

CURATOR IN CASE OF SUSPENSION OF BANK.

24. "The Canadian Bankers' Association," incorporated by Act passed during the present session of Parliament, (hereinafter referred to as "the Association,") shall, if a bank suspends payment in specie or Dominion notes of any

of its liabilities as they accrue, forthwith appoint some competent person (hereinafter referred to as the curator) to supervise the affairs of such bank, and the Association may at any time remove the curator, and may appoint another person to act in his stead.

The Act incorporating the Association is G3-G4 Viet. chap. 93, and will be found *post*.

25. Manner of appointment.—The appointment of the curator shall be made in the manner provided for in the by-law of the Association in that behalf made as hereinafter provided, but in default of such by-law such appointment shall be made in writing by the president of the Association, or by the person acting as president.

26. Powers and duties.—The curator shall assume supervision of the affairs of the bank, and all necessary arrangements for the payment of the notes of the bank issued for circulation then outstanding and in circulation shall be made under his supervision; and generally he shall have all powers and shall take all steps and do all things necessary or expedient to protect the rights and interests of the creditors and shareholders of the bank, and to conserve and ensure the proper disposition according to law of the assets of the bank, and for the purpose aforesaid he shall have full and free access to all books, accounts, documents and papers of the bank; and the curator shall continue to supervise the affairs of the bank until he is removed from office, or until the bank resumes business, or until a liquidator is duly appointed to wind up the business of the bank.

27. Curator to be assisted.—The president, vice-president, directors, general manager, managers, clerks and officers of the bank shall give and afford to the curator all such information and assistance as he requires in the discharge of his duties; but no by-law, regulation, resolution or act, touching the affairs or management of the bank, passed, made or done by the directors during the time the curator is in charge of the bank, shall be of any force or effect until approved in writing by the curator.

28. Returns by curator.—The curator shall make all returns and reports, and shall give all information to the Minister of Finance and Receiver-General, touching the affairs of the bank, that the Minister of Finance and Receiver-General requires of him.

29. Remuneration of curator.—The remuneration of the curator for his services, and his expenses and disbursements in connection with the discharge of his duties, shall be fixed and determined by the Association, and shall be paid out of the assets of the bank, and in case of the winding-up of the bank shall rank on the estate equally with the remuneration of the liquidator.

BY-LAWS BY CANADIAN BANKERS' ASSOCIATION.

30. Making and approval.—The Association may, at any meeting thereof, with the approval of two-thirds in number of the banks represented at such meeting, (the banks so approving having at least two-thirds in par value of the paid-up capital of the banks so represented,) make by-laws, rules and regulations respecting—

(a) All matters relating to the appointment or removal of the curator, and his powers and duties;

(b) The supervision of the making of the notes of the banks which are intended for circulation, and the delivery thereof to the banks;

(c) The inspection of the disposition made by the banks of such notes;

(d) The destruction of notes of the banks; and

(e) The imposition of penalties for the breach or non-observance of any by-law, rule or regulation made by virtue of this section.

2. No such by-law, rule or regulation, and no amendment or repeal thereof, shall be of any force or effect until approved by the Treasury Board.

3. Before any such by-law, rule or regulation, or any amendment or repeal thereof is so approved, the Treasury Board shall submit it to every bank which is not a member of the Association, and give to each such bank an opportunity of being heard before the Treasury Board with respect thereto.

31. Enforcement of by-laws.—The Association shall have all powers necessary to carry out, or to enforce the carrying out of, any by-law, rule or regulation, or any amendment thereof, so approved by the Treasury Board.

32. Submission to Treasury Board.—The Association shall, on or before the first day of January, in the year one thousand nine hundred and one, submit for the approval of the Treasury Board by-laws, rules and regulations for the purposes aforesaid.

The by-laws, adopted by the Association and approved by the Treasury Board, will be found *post*.

PURCHASE OF ASSETS OF A BANK.

33. Bank may sell its assets.—Any bank may sell the whole or any portion of its assets to any other bank which may purchase such assets, and the selling and purchasing banks may, for such purposes, enter into an agreement of sale and purchase, which agreement shall contain all the terms and conditions connected with the sale and purchase of such assets.

It is generally understood that this and the following sections were passed in consequence of the proposed purchase of the assets of the Bank of British Columbia by the Canadian Bank of Commerce, the negotiations for which had been going on for some time before passing of the present Act.

34. Consideration.—The consideration for any such sale and purchase may be as agreed upon between the selling and purchasing banks, and if such consideration, or any portion thereof, is shares of the capital stock of the purchasing bank, then and in such case the agreement shall provide for the amount of the shares of such purchasing bank to be paid to the selling bank: Provided that until such shares so paid to the selling bank have been sold by such bank or have been distributed among and accepted by the shareholders of such bank, they shall not be considered issued shares of the purchasing bank for the purposes of its note circulation.

The consideration in the case above referred to was \$2,000,000 stock in the purchasing bank, and \$312,000 in cash. This raised the stock of the Canadian Bank of Commerce from \$6,000,000 to \$8,000,000.

35. Shareholders to approve.—The agreement of sale and purchase shall be submitted to the shareholders of the selling bank, either at the annual general meeting of such bank or at a special general meeting thereof called for the purpose, and a copy of the agreement shall be mailed to each shareholder of such bank to his last known address at

least four weeks previous to the date of the meeting at which such agreement is to be submitted, together with a notice of the time and place of holding such meeting.

A special general meeting requires six weeks' public notice: Bank Act, sec. 24. Public notices are given by advertisement in one or more newspapers published at the place where the head office of the bank is situate, and in the Canada Gazette: Bank Act, sec. 102.

36. Two-thirds required.—If at such meeting the agreement is approved by resolution carried by the votes of shareholders (present in person or represented by proxy) representing not less than two-thirds of the amount of the subscribed capital stock of the bank, then and in such case the agreement may be executed under the seals of the banks entering thereinto, and application may be made to the Governor in Council, through the Minister of Finance and Receiver-General, for approval thereof, but until it is approved by the Governor in Council the agreement shall not be of any force or effect.

The voting is by ballot; one vote for each share he'd for at least thirty days: Bank Act, sec. 25. Fully paid up and partly paid up shares count equally: *Purdom v. Ontario Loan and Debenture Co.*, 22 O. R. 597 (1892).

37. Approval by purchasing bank.—If the agreement provides for the payment of the consideration for such sale and purchase, in whole or in part, in shares of the capital stock of the purchasing bank, and for such purpose it is necessary to increase the capital stock of such bank, then and in such case the agreement shall not be executed on behalf of the purchasing bank, unless and until it is approved by the shareholders thereof at the annual general meeting or at a special general meeting of such shareholders.

No particular proportion of the stock of the purchasing bank requires to be represented at this meeting, or to vote in favor, as is required by section 36 in the case of the selling bank. A simple majority of the shares at the meeting is sufficient. In the case of the purchase of the assets of the Bank of British Columbia, the agreement was approved unanimously at a special general meeting held on the 11th of December, 1900, by a vote representing 61,342 shares of the Canadian Bank of Commerce or \$3,071,000 out of its capital of \$6,000,000.

38. Approval of increase.—The Governor in Council may, on the application for his approval of the agreement,

approve of the increase of the capital stock of the purchasing bank, which is necessary to provide for the payment of the shares of such bank to the selling bank as provided in the said agreement, and the provisions of sections 26 and 27 of the Bank Act shall not apply to such increase of stock.

Section 26 requires that the increase shall be determined by by-law passed by the shareholders, and that four weeks' notice of the application be published in the *Canada Gazette* and one or more newspapers. Section 27 relates to the allotment of the stock and the premium upon it. The provisions of these sections are substantially required by the preceding and succeeding sections of this Act.

39. Conditions of approval.—The approval of the Governor in Council shall not be given to the agreement, unless the approval thereof is recommended by the Treasury Board, nor unless the application for approval thereof is made by or on behalf of the banks executing it within three months from the date of the execution of such agreement, nor unless it appears to the satisfaction of the Governor in Council that all the requirements of this Act in connection with the approval of such agreement by the shareholders of such banks have been complied with, and that notice of the intention of the banks to apply to the Governor in Council for the approval of the agreement had been published for at least four weeks in the *Canada Gazette* and in one or more newspapers published in the places where the chief offices or places of business of the banks are situate: Provided always, that such banks shall afford all information that the Minister of Finance and Receiver-General requires, and that nothing herein contained shall be construed to prevent the Governor in Council or the Treasury Board from refusing to approve of the agreement or to recommend its approval.

40. [Further conditions.—The agreement shall not be approved of unless it appears—

(a) That proper provisions have been made for the payment of the liabilities of the selling bank;

(b) That the agreement provides for the assumption and payment by the purchasing bank of the notes of the selling bank issued and intended for circulation, outstanding and in circulation; and

(c) That the amount of the notes of both the purchasing and selling banks, issued for circulation, outstanding

and in circulation, as shown by the then last monthly returns of the banks, do not together exceed the then paid-up capital of the purchasing bank, or, if the amount of such notes does exceed such paid-up capital, that an amount in cash equal to the excess of such notes over such paid-up capital has been deposited by the purchasing bank with the Minister of Finance and Receiver-General.

2. The amount so deposited as aforesaid shall be held by the Minister of Finance and Receiver-General as security for the redemption of said excess of notes, and when such excess, or any portion thereof, has been redeemed and cancelled, the amount so deposited, or an amount equal to the amount of excess so redeemed and cancelled, shall from time to time be repaid by the Minister of Finance and Receiver-General to the purchasing bank, but without interest, on the application of such bank and on the production of such evidence as the Minister of Finance and Receiver-General may require to show that the notes in regard to which such payment is asked have been redeemed and cancelled.] 63-64 Vict. chap. 27.

Section 40 of this Act as passed on the 7th of July, 1900, did not provide for the case of the issue of notes being in excess of the capital, and on the 9th of July, 1900, an amending Act, chapter 27, was passed substituting the foregoing for the original section 40.

41. Purchasing bank liable for notes.—The notes of the selling bank so assumed and to be paid by the purchasing bank shall, on the approval of the agreement, be deemed to be for all intents and purposes notes of the purchasing bank issued for circulation, and the purchasing bank shall be liable in the same manner and to the same extent as if it had issued them for circulation, and the amount at the credit of the selling bank in "The Bank Circulation Redemption Fund" shall, on the approval of the agreement, be transferred to the credit of the purchasing bank: Provided that such notes of the selling bank shall not be reissued, but shall be called in, redeemed and cancelled as quickly as possible.

42. Evidence of approval.—The approval by the Governor in Council of the agreement shall be evidenced by a certified copy of the Order in Council approving thereof, and such certified copy shall be conclusive evidence in all courts and proceedings of the approval of the agreement therein referred to and of the regularity of all proceedings in connection therewith.

43. Assets vest in purchasing bank.—On the agreement being approved of by the Governor in Council, the assets therein referred to as sold and purchased shall, in accordance with and subject to the terms thereof, and without any further conveyance, become vested in the purchasing bank, but the selling bank shall from time to time, subject to the terms of the agreement, execute such formal and separate conveyances, assignments and assurances, for registration purposes or otherwise, as are reasonably required to confirm or evidence the vesting in the purchasing bank of the full title or ownership of the assets referred to in the agreement.

44. Selling bank to cease business.—As soon as the agreement is approved of by the Governor in Council, the selling bank shall cease to issue or reissue notes for circulation, and shall cease to transact any business, except such as is necessary to enable it to carry out the agreement, and to realize upon any assets not included in the agreement, and to pay and discharge its liabilities, and generally to wind up its business, and its charter or Act of incorporation and any Acts in amendment thereof then in force shall continue in force only for the purposes in this section specified.

SCHEDULES.

45. Schedule B to the Bank Act is amended by substituting the word "eleven" for the word "one" in the last line of the said schedule.

Schedule B will be found in the amended form *ante* p. 207.

46. Schedule C to this Act is hereby substituted for Schedule C to the Bank Act.

The new schedule C will be found *ante* p. 208, in place of the old schedule.

47. Schedule D to this Act is hereby substituted for schedule D to the Bank Act.

The new schedule D will be found *ante* p. 208, in place of the old schedule.



CHEQUES ON A BANK.

BILLS OF EXCHANGE ACT, 1890, CANADA.

53 VICT. CHAP. 33. PART III.

The law of Canada on the subject of Cheques is found in the Third Part of the Bills of Exchange Act, which consists of ten sections, 72 to 81, inclusive. The first three of these relate to Cheques generally, and the remaining seven to Crossed Cheques. They are taken from the Imperial Bills of Exchange Act, 1882, with the single change that the word "bank" has been substituted for "banker." The reason is that in England the banking business is carried on largely by individuals and incorporated companies, while in Canada the Bank Act and the Bills of Exchange Act recognize only incorporated banks.

Although the language of the Imperial and Canadian Acts is thus substantially identical, there are two marked differences between the law and the practice in the two countries. The first is in section 60 of the Imperial Act, which provides that when a bill payable to order on demand is drawn on a banker, and he pays it in good faith, he is not responsible even if the indorsements are forged. This rule applies to a cheque, which is a bill of exchange drawn on a banker payable on demand. An effort was made by the banks to have this clause embodied in the Canadian Act, but the House of Commons was unwilling to make the change. The use of crossed cheques in England has been adopted largely to overcome the danger arising from such forged indorsements. Under the Canadian

law there is not the same necessity, and although the Act has introduced the English statute as to the crossing of cheques, the practice has been adopted to a very limited extent.

The other great difference arises from the fact that the practice of getting cheques marked or accepted, so general in Canada, is almost unknown in England. Byles says in his work on Bills, that cheques are not accepted, and that to issue them accepted would probably be an infringement of the Bank Charter Acts.

A cheque drawn upon a private banker would not be a cheque within the meaning of the Bills of Exchange Act, and would not be subject to the special rules contained in this part of the Act, such as crossing and the like. It would be simply a bill of exchange, payable on demand, and subject to such provisions of the Act as apply to an instrument of that kind.

In the following notes the reference is to the Bills of Exchange Act, when the word "Act" or "section" is used without any more particular designation.

72. Cheque defined.—A cheque is a bill of exchange drawn on a bank, payable on demand: Imp. Act, sec. 73.

Reading this definition in connection with that of a bill of exchange in section 3 of this Act, a cheque is an "unconditional order in writing addressed by a person to a bank, signed by the person giving it, requiring the bank to pay on demand a sum certain in money to, or to the order of a specified person, or to bearer."

According to the definition in section 2 (c), "bank" means "an incorporated bank or savings bank carrying on business in Canada"; that is, one of the banks to which the Bank Act, 53 Vict. chap. 31, as amended, applies; or the City and District Savings Bank of Montreal, or La Caisse d'Economie de Notre Dame de Quebec: 53 Vict. chap. 32; or a bank under an old provincial charter.

In Quebec, under the Code, a cheque might be drawn upon a private banker as well as upon an incorporated bank: Art. 2349. And this was the law before the Act in the other provinces.

A cheque should be addressed to the bank by its proper corporate name, and not to the "cashier," "manager" or "agent" of the bank. An instrument addressed to one of these would not, strictly speaking, be a cheque within the meaning of the Act, and if marked or accepted it might be claimed that the bank was not liable, as it would not be the drawee of the instrument and consequently could not become liable by acceptance.

The words "on demand" need not be on the cheque, as they are understood when no time for payment is expressed: sec. 10 (b).

A cheque is not invalid because it is not dated, nor because it does not specify the place where it is drawn: sec. 4; nor because it is antedated, or postdated or bears date on a Sunday or other non-judicial day: sec. 13, subsec. 2; *Wood v. Stephenson*, 16 U. C. Q. B. 419 (1858); and the fact that it is postdated is not an irregularity: *Hitchcock v. Edwards*, 60 L. T. N. S. 636 (1889); *Carpenter v. Street*, 6 T. L. R. 410 (1890). But a cheque dated seven days after delivery is in substance a bill of exchange at seven days' date: *Forster v. Mackreth*, L. R. 2 Ex. 163 (1867). A bank should not pay a cheque before the day of its date: *DaSilva v. Fuller*, cited in *Morley v. Culverwell*, 7 M. & W. 178 (1840).

In the United States there has been a conflict as to whether a cheque may be made payable on a day subsequent to its date. The weight of authority is in favor of what is law under our Act, that such an instrument is not a cheque, and has three days' grace. See *Bowen v. Newell*, 13 N. Y. 290 (1855); *Morrison v. Bailey*, 5 Ohio St. 13 (1855); *Harrison v. Nicollet Bank*, 41 Minn. 488 (1889); 2 Daniel, sec. 1574. But see contra *Re Brown*, 2 Story, C. C. 502 (1843); *Westminster Bank v. Wheaton*, 4 R. I. 30 (1856); *Champion v. Gordon*, 70 Penn. St. 474 (1872); *Way v. Towle*, 155 Mass. 374 (1892).

When a cheque is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit: sec. 20.

A cheque is "issued" when it is in the hands of a person who is entitled to demand cash for it: *Ex parte Bignold*, 22 Beav. 143 (1856).

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: sec. 9, sub-sec. 2.

A material alteration of a cheque makes it void. If the alteration is not apparent a holder in due course may avail himself of it as if it had not been altered, and may enforce payment of it according to its original tenor: sec. 63. The following alterations are material:

1. Alteration of the date or of the sum payable: sec. 63, sub-sec. 2; even though it be to change it to a later date: *Boulton v. Langmuir*, 24 Ont. A. R. 618 (1897).

2. Changing "order" to bearer: *re Commercial Bank*, 10 Man. 171 (1894); *Booth v. Power*, 56 N. Y. 22 (1874).

A customer drew a cheque for \$5 and had it "marked." He altered it to \$500 and deposited it with another bank and drew the money. The cheque was sent through the Clearing House, and was charged against the former bank as \$500. The following morning the forgery was discovered and notice given, and \$490 claimed. The claim was maintained on the ground that the notice was in time and the latter bank had not altered its position in the meantime: *Bank of Hamilton v. Imperial Bank*, 27 Ont. A. R. 590 (1900). Affirmed in the Supreme Court, May 21st, 1901.

The Act does not make it a part of the definition that the drawer should be a customer of the bank; but if a person gets goods or money on the strength of a cheque when he has no account he is guilty of obtaining the goods or money by false pretences, and is liable to three years' imprisonment: Criminal Code, 1892, sec. 359; *Rex v. Jackson*, 3 Camp. 370 (1813); *Reg. v. Hazelton*, L. R. 2 C. C. 134 (1874).

2. **Provisions as to bills to apply.**—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. Imp. Act, sec. 73.

The exceptions are, (1) that failure to present a cheque for payment within a reasonable time does not discharge the drawer, except in so far as he is damaged thereby: sec. 73; (2) that the bank should not pay after notice of the customer's death: sec. 74; and (3) the provisions relating to crossed cheques: secs. 75 to 81, inclusive.

The chief provisions of the Act relating to bills payable on demand, which also apply to cheques, are the following: (1) There are no days of grace: sec. 14; (2) when they appear on their face to have been in circulation for an unreasonable length of time they are deemed to be overdue, so as to prevent a holder from acquiring them free from defects of title: sec. 36, sub-sec. 3; (3) they must be presented for payment within a reasonable time after indorsement to charge an indorser: sec. 45, sub-sec. 2 (*b*).

A cheque being a bill of exchange does not operate as an assignment of funds in the hands of the bank available for the payment thereof, and until it accepts a cheque the bank is not liable on it: sec. 53. The holder of an unaccepted cheque, consequently, cannot sue the bank upon it, except under the circumstances mentioned in section 73 (*c*). Under the Code it was held in Quebec that a cheque was an assignment of so much of the drawer's funds: *Marler v. Molsons Bank*, 23 L. C. J. 293 (1879). This is the law in Scotland: sec. 53, sub-sec. 2 of the Imperial Act; and also in France: Nougner, secs. 392, 431.

ILLUSTRATIONS.

1. The production of a cheque is not even *prima facie* evidence of money lent by the drawer: *Foster v. Fraser*; Rob. & Jos. Dig. 652 (1840); *Nichols v. Ryan*, 2 R. L. 111 (1868); *Dufresne v. St. Louis*, M. L. R. 4 S. C. 310 (1888).

2. A cheque may be postdated, and is then payable on the day of its date without grace: *Wood v. Stephenson*, 16 U. C. Q. B. 419 (1858).

3. Where plaintiffs accepted from defendant a cheque of a third party in part payment of goods, and presented it at the bank the next day, and also applied several times to the drawer, but did not notify the defendant for a week, held that the latter was not liable: *Redpath v. Kolfage*, 16 U. C. Q. B. 433 (1858).

4. Plaintiff deposited in defendant's bank the cheque of a third party on another bank in the same town. Defendants credited it in his pass-book as cash and stamped it as their property. They presented it the next business day when it was dishonored. If they had presented it the same day it would have been paid. Held, that the bank was not liable: *Owens v. Quebec Bank*, 30 U. C. Q. B. 382 (1870).

5. A cheque operates as payment until it has been dishonored. It may be received either as conditional or as absolute payment: *Hughes v. Canada Permanent L. & S. S.*, 39 U. C. Q. B. 221 (1876).

6. Where a bank paid cheques on forged indorsements, the receipt given by the plaintiffs at the end of the month was, at most an acknowledgment that the balance was correct on the assumption that the cheques had been paid to the proper parties. Where the names of the payees had also been forged on an application for a loan to plaintiffs, the cheques were not payable to fictitious payees: *Agricultural S. & L. Association v. Federal Bank*, 6 Ont. A. R. 192 (1881).

7. The bank of Montreal allowed a private banker at London to put on his cheques "payable at Bank of Montreal, Toronto, at par." Held, that these words simply meant that there would be no charge for cashing the cheques, and not that the Bank of Montreal would pay them if there were no funds of the drawer to meet them: *Rose-Belford Printing Co. v. Bank of Montreal*, 12 O. R. 544 (1886).

8. The payee of a cheque took it to the bank on which it was drawn the same day as he received it from the drawer, and had it marked "good," the amount being charged to the drawer's account; but he did not demand payment. The bank suspended payment that evening, and the next day the cheque was presented for payment and dishonored. Held, that the drawer was discharged from all liability thereon: *Boyd v. Nasmith*, 17 O. R. 40 (1888); *Legare v. Arcand*, Q. R. 9 S. C. 122 (1895); *Banque Jacques Cartier v. Corporation de Limoilou*, Q. R. 17 S. C. 211 (1899); *Merchants Bank v. State Bank*, 10 Wall (U.S.) 647 (1870); *First National Bank v. Leach*, 52 N. Y. 350 (1873).

9. The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. chap. 124, sec. 3, sub-sec. 1: *Armstrong v. Hemstreet*, 22 O. R. 336 (1892). (Overruled by No. 10 below.)

10. Indorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favor is not a payment of "money" within the meaning of section 3 of R. S. O. chapter 124: *Davidson v. Fraser*, 23 Ont. A. R. 439 (1896); affirmed, 28 S. C. Can. 272 (1897).

11. An insolvent trader sold his stock to a *bona fide* purchaser. Both were customers of the same bank which had a mortgage on the stock. The purchaser gave the bank his cheque in payment. This was held to be a "payment of money": *Gordon Mackay & Co. v. Union Bank*, 26 Ont. A. R. 155 (1899).

12. A bank was held liable for the amount of a cheque it had lost, which the drawer disputed, although the latter had been guilty of negligence in not objecting earlier when it was entered in his pass-book: *Fournier v. Union Bank*, 2 Stephens' Que. Dig. 99 Cons. Que. Dig. 185 (1873).

13. Where an account bears interest, it ceases on the amount of a cheque drawn on the account when the cheque is marked, although the money is not actually drawn out until long after: *Wilson v. Banque Ville Marie*, 3 L. N. 71 (1880).

14. A bank was held liable to the holder of a marked cheque: *Banque Nationale v. City Bank*, 17 L. C. J. 197 (1873); even when marked good only on a future day by the president and cashier: *Exchange Bank v. Banque du Peuple*, M. L. R. 3 Q. B. 232 (1886). Items of claim older than a cheque cannot properly be set up in compensation against it: *Dorion v. Dorion*, 5 L. N. 130 (1882).

15. An instrument in the form of a cheque is none the less a cheque because not drawn against money on deposit, but because an overdraft or advance by the bank: *Bank of Montreal v. Rankin*, 4 L. N. 302 (1881).

16. A cheque should be presented the day after delivery and notice of dishonor given to charge the indorser: *Lord v. Hunter*, 6 L. N. 310 (1883); *Boddington v. Schlenker*, 4 B. & Ad. 752 (1833).

17. A cheque is a commercial matter, especially when given by a trader, and payment of it may be proved by parol in the Province of Quebec, even when above \$50: *Baril v. Tetraull*, 29 L. C. J. 208 (1885).

18. A bank acting as agent for another bank is not authorized, in the absence of an express agreement, to cash a cheque drawn upon the principal bank, but not accepted by it: *Maritime Bank v. Union Bank*, M. L. R. 4 S. C. 244 (1888).

19. A cheque payable to C. M. & S., or bearer, was indorsed by them and stamped for deposit to their credit in the bank where they kept their account. Their clerk, instead of depositing it, took it to the bank on which it was drawn, and the teller paid it without noticing the writing on the back. It was held that such a cheque could not

be restrictively indorsed, and the bank so paying it was not liable: *Exchange Bank v. Quebec Bank*, M. L. R. 6 S. C. 10 (1890).

20. Where a person for accommodation lends his cheque to another person he cannot refuse to pay the same to a third party who in good faith has given value for it: *Kenny v. Price*, 20 R. L. 1 (1890).

21. A person receiving a cheque seven months after its date, and after it was drawn, has no greater right against the drawer than the previous holder, in whose hands it was void as having been given for illegal expenditure at an election: *Dion v. Boulanger*, Q. R. 4 S. C. 358 (1893); confirmed in Review, 31st October, 1893.

22. A third party, who is the holder in good faith, of a cheque given in settlement of a gambling debt can recover the amount. The fact that the cheque was not presented at the bank until a month after it was drawn does not prevent recovery against the drawer: *Dion v. Lachance*, Q. R. 14 S. C. 77 (1898).

23. Cheques and other negotiable instruments are presumed to have been given for value although this is not expressed. The evidence to rebut this presumption must be clear and convincing: *Larraway v. Harvey*, Q. R. 14 S. C. 97 (1898).

24. L. gave an agent A. a cheque payable to the order of M., marked "deposit," to be used as a deposit on a purchase from the latter through his intervention. M. indorsed and applied the cheque on an old account against A. Held, that M. was, under the circumstances, bound to account to L. for the amount of the cheque: *Leipschitz v. Montreal Street Ry. Co.*, Q. R. 9 Q. B. 518 (1899).

25. The initialling of a cheque by the cashier does not amount to an acceptance. A cheque so initialled received by the defendant only a few days before the trial, when it was more than four years old, could not be used by him

as a set-off to the bill of exchange on which he was sued: *Commercial Bank v. Fleming*, 1 Stevens' N. B. Dig. 294 (1872).

26. H. owed defendant \$500, and induced him to indorse his (H.'s) cheque for \$1,000 on a bank at N., out of the proceeds of which the debt was to be paid. The two went to a bank at W. to get cash for the cheque. H. alone went into the manager's room, and on his return told defendant he had given the cheque to the manager to forward it to N. for collection. H. in fact retained the cheque and the same day transferred it to plaintiff for value. Held, that defendant was liable on the cheque: *Arnold v. Caldwell*, 1 Man. L. R. 81 (1884).

27. Where a bank certified a cheque at the request of the drawer, who afterwards altered it, making it payable to bearer instead of to order; this is a material alteration, and the bank is not liable on the cheque to the drawer or his assigns: *Re Commercial Bank, Banque d'Hochelega's Case*, 10 Man. L. R. 171 (1894).

28. A banker paid a cheque where the amount had been raised, but in such a way that it could not be easily detected. He was held liable to the customer for the difference between the genuine and the altered cheque: *Hall v. Fuller*, 5 B. & C. 750 (1826).

29. Where a cheque was so carelessly drawn as to be easily altered by the holder to a larger sum, so that the bankers, when they paid it, could not distinguish the alteration: Held, that the loss must fall on the drawer, as it was caused by his negligence: *Young v. Grote*, 4 Bing. 253 (1827).

30. Filling in a blank cheque with a larger sum than that authorized is forgery: *Reg. v. Wilson*, 2 C. & K. 527 (1847).

31. The holder of an unaccepted cheque has no right of action against a bank even if it has improperly refused to honor the cheque, as there is no privity of contract between him and the bank: *Malcolm v. Scott*, 5 Exch. 601 (1850).

32. If there are not sufficient funds to meet a cheque, the bank should not give any more than the information of the fact; it should not disclose the actual balance: *Foster v. Bank of London*, 3 F. & F. 214 (1862).

33. An authority to draw cheques does not necessarily include an authority to draw bills: *Forster v. Mackreth*, L. R. 2 Ex. 163 (1867).

34. The cheque of a third party may be the subject of a valid *donatio mortis causa*: *Veal v. Veal*, 27 Beav. 303 (1859); *Clement v. Cheeseman*, 27 Ch. D. 631 (1884). The cheque of the donor, not presented until after his death, is not: *Hewitt v. Kaye*, L. R. 6 Eq. 198 (1868); *Beak v. Beak*, L. R. 13 Eq. 489 (1872). It is, if presented, even though not paid: *Bromley v. Brunton*, L. R. 6 Eq. 275 (1868).

35. A cheque is not an equitable assignment of so much of the drawer's funds in the hands of his banker, or of a chose in action: *Hopkinson v. Forster*, L. R. 19 Eq. 74 (1874); *Schroeder v. Central Bank*, 34 L. T. N. S. 735 (1876).

36. A cheque sent as being "in full of all demands" was retained and cashed and a receipt sent as on account. The drawer of the cheque demanded its return. The creditor sued for the balance of his claim. It was held that the keeping of the cheque was not conclusive that there was accord and satisfaction, but that it was a question of fact on what terms the cheque was sent, and plaintiff recovered judgment for the balance: *Day v. McLea*, 22 Q. B. D. 619 (1889).

37. Where a person pays a postdated cheque into his bank in order that the amount may be placed to the credit of his account, and the amount is so placed, the bank are holders for value of the cheque: *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715.

38. A cheque is drawn in favor of a person who does not really exist, although the drawer supposes that he does. This does not prevent the cheque being really payable to

bearer, under section 7, sub-section 3, of the Bills of Exchange Act, as being payable to a fictitious or non-existing person: *Clutton v. Attenborough*, [1895] 2 Q. B. 707; affirmed [1897] A. C. 90.

39. A solicitor who is authorized to accept a tender of mortgage money on behalf of his client is not at liberty to accept a banker's cheque, and the tender of a cheque is insufficient: *Blumberg v. Life Interests & R. S. Corporation*, [1898] 1 Ch. 27.

40. Where a cheque was given in payment of bets on horse races, and indorsed for value to the plaintiff who was aware of the consideration, it was held that he could not recover, as the consideration was illegal under 5 & 6 William IV. ch. 41: *Woolf v. Hamilton*, [1898] 2 Q. B. 337.

41. The only effect of a drawee bank initialling a cheque is to certify that it has funds of the drawer to meet it. Where a certified cheque is deposited and credited to the depositor, the presumption is that the bank accepted it as agent of the depositor to cash it, and not as acquiring title and guaranteeing its payment: *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281.

42. Defendant, who was not a party to a cheque, at the request of the payee wrote his name on the back of it, adding the words *sans recours*. It was held that under section 16 of the Bills of Exchange Act, he could thus negative his liability as an indorser: *Wakefield v. Alexander*, 17 T. L. R. 217 (1901).

43. A marked cheque is "cash" within the meaning of the land regulations: *Russell v. Sealy*, 2 N. Z. R. (A. C.) 498 (1874).

44. If the drawer of a cheque gets it accepted and then delivers it to the payee, the drawer is not discharged; and if the payee before delivery requests the drawer to send it to the bank and gets it accepted, the rule is the same: *Randolph Bank v. Hornblower*, 160 Mass. 401 (1894).

45. The holder of an unaccepted cheque has no action against the bank, and it does not operate as an assignment *pro tanto* of the funds of the drawer in the bank: *Fourth Street Bank v. Yardley*, 165 U. S. 634 (1897).

73. Presentment for payment.—Subject to the provisions of this Act—

- (a) 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 bank, 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 bank to a larger amount than he would have been had such cheque been paid. Imp. Act, s. 74 (1).

The provisions of the Act to which this section is subject, are those in section 46 relating to excuses for non-presentment and delay in presentment.

As regards the drawer, the effect of not presenting a cheque for payment within a reasonable time differs from that relating to other bills payable on demand. In the case of the latter the drawer as well as the indorsers are wholly discharged by the failure to present it for payment within a reasonable time: sec. 45. This part of the Act relating to cheques does not modify the rule as regards the indorsers; but the present section lays down a different rule as regards the drawer, who is only discharged to the extent to which he actually suffers damage by the delay.

Chalmers says, p. 247: "This section is new law. It was introduced in the Lords by Lord Bramwell to mitigate the rigor of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until, at any rate, six years had elapsed, and in this respect the common law appears to be unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, *e.g.*, by the failure of

the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound." The section is substantially the law of Quebec before the Act, the Code placing the indorsers in the same position:—"If the cheque be not presented for payment within a reasonable time, and the bank fail between the delivery of the cheque and such presentment, the drawer or indorser will be discharged to the extent of the loss he suffers thereby": Art. 2352. See also *Re Oullon*, 15 N. B. (2 Pugs.) 333 (1874).

When the drawer or other person is thus discharged, the holder is a creditor to the bank to the extent of such discharge: clause (c).

The law as to the presentation of a cheque differs from that respecting a bill of exchange¹ payable on demand. In suing on a cheque it is not necessary to allege or prove presentment within a reasonable time, or to protest for non-payment. These are matters of defence. It is for the drawer to allege and prove damage: *De Serres v. Euard*, Q. R. 17 S. C. R. 199 (1899).

- (b) **Reasonable time.**—In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case. Imp. Act, sec. 74 (2).

The following are said to embody the rules as to what is a reasonable time for the presentment of cheques in England:—

1. If the person who receives a cheque and the bank on whom it is drawn are in the same place, the cheque must, in the absence of special circumstances, be presented for payment on the day after it is received: *Alexander v. Burchfield*, 7 M. & Gr. 1061 (1842); *Firth v. Brooks*, 4 L. T. N. S. 467 (1861).

2. If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the

agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it: *Hare v. Henty*, 10 C. B. N. S. 65 (1861); *Prideaux v. Criddle*, L. R. 4 Q. B. 455 (1869); *Heywood v. Pickering*, L. R. 9 Q. B. 428 (1874).

3. In computing time, non-business days must be excluded; and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is excused: sec. 91.

These rules are substantially those that have been recognized in Canada. See *Redpath v. Kolfage*, 16 U. C. Q. B. 433 (1858); *Owens v. Quebec Bank*, 30 *ibid.* 382 (1870); *Boyd v. Nasmith*, 17 O. R. 40 (1888); *Bluckley v. McCabe*, 16 Ont. A. R. 295 (1889); *Sawyer v. Thomas*, 18 Ont. A. R. 129 (1890); *Marler v. Stewart*, Cons. Que. Dig. 212 (1878); *Campbell v. Riendeau*, Q. R. 2 Q. B. 604 (1892).

A cheque is deemed to be stale or overdue when it appears on its face to have been in circulation an unreasonable time: sec. 36, sub-sec. 3. A bank is not justified in paying such a cheque without inquiry: *Serle v. Norton*, 2 M. & Rob. 401 (1841).

Whether a cheque is presented within a reasonable time is a question for the jury. In this case they found the delay to be unreasonable: *Wheeler v. Young*, 13 T. L. R. 468 (1877).

As to what is a reasonable time where a cheque is drawn on a bank that is understood to be about to suspend payment, see *Legare v. Arcand*, Q. R. 9 S. C. 122 (1895).

It has been held that a delay of six days is not necessarily an unreasonable time: *Rothschild v. Corney*, 9 B. & C. 388 (1829); and the same as to eight days: *London & County Bank v. Groome*, 8 Q. B. D. 288 (1891); but that two months is an unreasonable time: *Serrell v. Derbyshire Ry. Co.*, 9 C. B. 811 (1850).

Where the holder of a cheque presents it for acceptance instead of for payment, and the accepting bank fails, the

drawer and indorsers are discharged: *Boyd v. Nasmith*, 17 O. R. 40 (1888); *Legare v. Arcand*, Q. R. 9 S. C. 122 (1895); *Banque Jacques Cartier v. Limouilou*, Q. R. 17 S. C. 211 (1899); *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 647 (1870); *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350 (1873).

- (c) **Holder a creditor.**—The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it. Imp. Act, sec. 74 (2), (3).

This is, to a certain extent, a modification of the rule in section 53. In England it introduced partially the Scotch principle of sub-section 2 of that section, and in Canada it recognizes in this particular case the principle laid down in Quebec in *Marler v. Molsons Bank*, 23 L. C. J. 293 (1879). These countries adopted it from the civil law.

74. Revocation of authority.—The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by—

- (a) Countermand of payment;
(b) Notice of the customer's death. Imp. Act, sec. 75.

A bank having sufficient funds of the drawer of a cheque in its hands is bound to pay it, and in case of refusal is liable to an action of damages: *Marzetti v. Williams*, 1 B. & Ad. 415 (1830); *Whitaker v. Bank of England*, 6 C. & P. 700 (1835); *Foley v. Hill*, 2 H. L. Cas. 28 (1848); *Rolin v. Steward*, 14 C. B. 595 (1854); *Todd v. Union Bank*, 4 Man. R. 204 (1887); *Fleming v. Bank of New Zealand*, 16 T. L. R. 469 (1900). The damages recoverable by a non-trader for the wrongful refusal of a bank to allow him to withdraw a special deposit, are nominal or limited to interest on the money: *Henderson v. Bank of Hamilton*, 25 O. R. 641 (1894); *Bank of New South Wales v. Milvain*, 10 Vict. R. (Law) 3 (1884).

A bank may, without special instructions, pay any bills or notes, of which the customer is acceptor or maker, and which are payable at the bank: *Jones v. Bank of Montreal*, 29 U. C. Q. B. 448 (1869); *Kymer v. Laurie*, 18 L. J. Q. B. 218 (1849); *Robarts v. Tucker*, 16 Q. B. 560 (1851); *Vagliano v. Bank of England*, [1891] A. C. 107.

A bank refusing to pay such instruments incurs the same liability as in refusing to pay a cheque: *Hill v. Smith*, 12 M. & W. 618 (1844); *Bell v. Carey*, 8 C. B. 887 (1849).

Cheques are payable in the order in which they are presented, irrespective of their dates, provided the date is not subsequent to the presentment: *Kilsby v. Williams*, 5 B. & Ald. 815 (1822).

Where a customer keeps his account at one branch of the bank, other branches are not bound to honor his cheques: *Woodland v. Fear*, 7 E. & B. 519 (1857). But if he has accounts in two or more branches the bank may combine them against him, provided they are all in the same right: *Garnett v. McKewan*, L. R. 8 Ex. 10 (1872); *Prince v. Oriental Bank*, 3 A. C. 325 (1878).

If, however, the course of dealing was such that the customer was allowed to draw upon one account irrespective of the state of the other, the bank cannot combine them against him without a reasonable notice that the former course of dealing would be discontinued: *Buckingham v. London & Midland Bank*, 12 T. L. R. 70 (1895).

Entries made in a customer's pass book are *prima facie* evidence against the bank: *Commercial Bank v. Rhind*, 3 Macq. H. L. 643 (1860); *Couper's Trustees v. National Bank of Scotland*, 16 Sess. Cas. 412 (1889).

Countermand.—A customer may stop payment of a cheque before it is accepted, but not after: *Cohen v. Hale*, 3 Q. B. D. 371 (1878); *McLean v. Clydesdale Bank*, 9 A. C. 95 (1883).

When a cheque is handed to a person on a condition which the drawer finds is to be broken or eluded, he has the right to stop the payment of the cheque: *Wienholt v. Spitta*,

3 Camp. 376 (1813); *Spincer v. Spincer*, 2 M. & Gr. 295 (1841).

It has also been held that a bank is not bound to honor a customer's cheques after a garnishee order is served on it, even although the balance exceed the judgment: *Rogers v. Whiteley*, [1892] A. C. 118.

Death of a customer.—Payment after the death but before notice is valid: *Rogerson v. Ladbrooke*, 1 Bing. 93 (1822). It has been held in England that after the death of a partner, the surviving partner may draw cheques upon the partnership account: *Backhouse v. Charlton*, 8 Ch. D. 444 (1878). In Quebec the death of a partner terminates the partnership, and also the right of the survivors to act for the firm, in the absence of a special agreement to the contrary: C. C. 1892, 1897.

A cheque given as a *d.natio mortis causa* must be presented or negotiated before notice of the death of the donor in order to charge his estate: *Hewitt v. Kaye*, L. R. 6 Eq. 198 (1868); *Beak v. Beak*, L. R. 13 Eq. 489 (1872); *Rolls v. Pearce*, 5 Ch. D. 730 (1877). But see *Colville v. Flanagan*, 8 L. C. J. 225 (1864); and *Clement v. Cheesman*, 27 Ch. D. 631 (1884).

CROSSED CHEQUES

Sections 75 to 81, inclusive, treat of crossed cheques. They are copied from the Imperial Act, with the substitution of "bank" for "banker," as private bankers are not recognized by the Canadian Act. The practice of crossing cheques did not prevail in Canada before the Act, and it is not likely to be generally adopted now, as the drawer can protect himself by making a cheque payable to order, since our Parliament refused to adopt section 60 of the Imperial Act, which relieves a bank from responsibility for the genuineness or authorization of the indorsement on cheques drawn upon it.

The practice is a comparatively modern one in England, and is another illustration of the elasticity of the law merchant by which a custom obtains for itself judicial sanction or legislative recognition. From the report of *Stewart v. Lee*, 1 M. & M. at p. 161 (1828) it would appear that the effect of crossing was not then fully settled. It is described in *Boddington v. Schlenker*, 4 B. & Ad. 752 (1833); and in *Bellamy v. Majoribanks*, 7 Ex. at p. 402 (1852). Baron Parke there gives a history of its origin and growth.

The practice originated at the London clearing house, the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the clearing house clerks to make up the accounts. It afterwards became a common practice to cross cheques which were not intended to go through the clearing house at all. Baron Parke held that this had nothing to do with the restriction of negotiability, and formed no part of the cheque, and in no way altered its effect; but was a protection and safeguard to the owner, as, if a banker paid it otherwise than through another banker, the circumstance of his so paying would be strong evidence of negligence in an action against him. See also *Carlton v. Ireland*, 5 E. & B. 765 (1856).

The first Imperial Statute recognizing crossings was passed in 1856. In *Simmons v. Taylor*, 2 C. B. N. S. 528 (1857), it was held that the crossing was not a material part of the cheque and a holder might erase it. The Act of 1858 was passed to overcome the effect of this decision. In *Smith v. Union Bank of London*, 1 Q. B. D. 31 (1875), a cheque crossed to a certain bank was stolen, and coming into the hands of a *bona fide* holder, he got it cashed through his own bank. The Court held that the Act of 1858 did not affect the negotiability of the cheque which had been indorsed by the payee. In *Bobbett v. Pinkett*, 1 Ex. D. 368 (1876), where the indorsement of the payee was forged, the banker was held liable for paying it otherwise than through the banker to whom it was specially indorsed. Then

came the Act of 1876, which introduced the "not negotiable" crossing, which has been substantially reproduced in the Act of 1882 and the present Act.

Although the crossing of cheques was not recognized in practice or in legislation in Canada, yet the Imperial Act, making the obliteration or alteration of the crossing a felony, was copied into our Forgery Act of 1869, and became section 31 of R. S. C. chap. 165. Even the words "and company" and "banker" were retained. In the Criminal Code, 1892, by section 423 (A) (*r*), the forgery of a cheque renders the person found guilty liable to imprisonment for life, but oblitterating or altering the crossing is not made a special offence.

The practice of crossing cheques has not been adopted in the United States.

75. General crossing.—Where a cheque bears across its face an addition of—

- (a) The word "bank" between two parallel transverse lines, either with or without the words "not negotiable"; or—
- (b) Two parallel transverse lines simply, either with or without the words "not negotiable";

That addition constitutes a crossing, and the cheque is crossed generally:

2. **Special crossing.**—Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank: Imp. Act, sec. 76.

As already stated, this part of the Act does not apply to cheques on private bankers, nor can a cheque on an incorporated bank be crossed in favor of a private banker, or if crossed generally, be presented through him.

Where the drawer of a cheque made it payable to the order of M., and crossed it "Account of M., National Bank,"

and gave it to M., who indorsed it to the National Bank, it was held that the bank could recover from the drawer, for these words, even assuming that section 8 of the Bills of Exchange Act applies to cheques, do not prohibit transfer, or indicate an intention that it should not be transferred; and that probably the only way to make a cheque not transferable would be to comply with the provisions of this section: *National Bank v. Silke*, [1891] 1 Q. B. 435.

76. Crossing by drawer, etc.—A cheque may be crossed generally or specially by the drawer:

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:"
5. Where a cheque is crossed specially the bank to which it is crossed may again cross it specially, to another bank for collection:
6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself: Imp. Act, sec. 77.

The "holder" of a cheque is the payee or indorsee if it is payable to order, provided he is in possession of it. If it is payable to bearer, it is the person who is in possession of it. Bank here means an incorporated bank doing business in Canada.

7. A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines, and initialling the same, the words "pay cash."

This is not in the Imperial Act, but is in accordance with English custom: Chalmers, p. 256. It is the drawer alone who can obliterate the crossing. See the next section.

77. Crossing is material.—A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing. Imp. Act, sec. 78.

A material alteration voids a cheque except as to a party who has made, authorized or assented to it, and except as to indorsers subsequent to the alteration: sec. 63.

In England an unauthorized obliteration or alteration is forgery: 24-25 Viet. chap. 98, secs. 25 and 39. This was copied in our Canadian criminal law, and became R. S. C. chap. 165, sec. 31, but it is the English crossing that is there referred to, and declared to be a felony. That section is not applicable to the crossing authorized by the Canadian Act.

If the obliteration, addition or alteration does not amount to forgery, it would come under section 138 of the Criminal Code, 1892, which makes any person who, without lawful excuse, disobeys an Act of Parliament, guilty of an offence, and liable to one year's imprisonment.

78. Duties of a bank.—Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof:

2. Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid: Provided, that where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having

been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be. Imp. Act, sec. 79.

The first clause would prevent the thief or finder of a specially crossed cheque, or any holder subsequent to him, from crossing the cheque a second time and so getting paid through another bank.

Before acceptance there is no privity between the holder of a cheque and the bank upon which it is drawn: but subsection 2 gives a remedy to the true owner against a bank which improperly pays a crossed cheque.

79. Protection to bank and drawer.—Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. Imp. Act, s. 80.

This section gives to a bank on which a cheque is drawn the protection, in the case of a crossed cheque, which our Parliament refused to give it as to demand bills and ordinary cheques by striking out of the bill the clause corresponding to section 60 of the Imperial Act. On the other hand, it furnishes to the other parties to a cheque a strong reason for objecting to the crossing of a cheque. If a crossed cheque which has not been made "not negotiable" is lost or stolen before it reaches the hands of the payee, and the bank pays it in good faith and without negligence even upon a forged indorsement, the drawer has no recourse against the bank which has paid or the bank which has collected, but can only look to the guilty party or some subsequent holder. See *Ogden v. Benas*, L. R. 9 C. P. 513 (1874); *Patent Safety Gun Colton Co. v. Wilson*, 49 L. J.

C. P. 713 (1880); sec. 81. If it is lost or stolen after reaching the hands of the payee, and is paid in like manner, the drawer is released, but the payee, indorsee, or holder who has lost the bill, or from whom it has been stolen, is in the same position as the drawer in the case just mentioned.

The payee of a crossed cheque specially indorsed it to plaintiffs and posted it to them. A stranger having obtained possession of it during transmission obliterated the indorsement to plaintiffs, and having specially indorsed it to himself, presented it at defendants' bank and requested them to collect it for him. They did so and handed him the money. In an action for conversion defendants were held liable for the amount of the cheque: *Kleinwort v. Comptoir National d'Escompte*, [1894] 2 Q. B. 157.

A cheque on defendants' bank in London in favor of plaintiff was crossed generally. The indorsement was forged, and a person purporting to be the last indorsee, and not a customer of the bank, presented it at defendants' branch in Paris and was paid. It was forwarded to London and credited to the Paris branch. It was held that English law governed, and that the bank was liable to plaintiff: *Lacave v. Credit Lyonnais*, [1897] 1 Q. B. 148.

80. Effect on holder.—Where a person takes a crossed cheque which bears on it the words “not negotiable,” he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. Imp. Act, sec. 81.

Making a cheque “not negotiable” puts it on the same footing as an overdue bill, so that any holder takes it subject to the equities attaching to it, and no person can become a holder in due course. If such a cheque should be lost or stolen the person receiving the money from the collecting bank would be liable in any event.

Where a cheque crossed “not negotiable” was drawn in favor of a firm, and one partner S., in fraud of plaintiff, his co-partner, indorsed it to defendant, who got it cashed for S., defendant was held liable to the co-partner, who

under the partnership articles was entitled to the cheque: *Fisher v. Roberts*, 6 T. L. R. 354 (1890). See *National Bank v. Silke*, [1891] 1 Q. B. 435.

81. When bank not liable.—Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment. Imp. Act, sec. 82.

Section 79 relieves the bank on which the crossed cheque is drawn; this section, the bank which collects it. If it be indorsed "per proc." and the banker makes no inquiry as to the authority to so indorse, this may be negligence: *Bissel v. Fox*, 53 L. T. N. S. 193; 1 T. L. R. 452 (1885). See *Mathiessen v. London & County Bank*, 5 C. P. D. 7 (1879); *Bennett v. London & County Bank*, 2 T. L. R. 765 (1886). For an illustration of negligence disentitling a bank to the benefit of this section see *Hannan's Lake View Central v. Armstrong*, 16 T. L. R. 236 (1900).

Where a customer's account is overdrawn, a banker collecting a crossed cheque, and placing the proceeds to his credit is within the section: *Clarke v. London & County Banking Co.*, [1897] 1 Q. B. 552.

A railway company drew an order in the form of a cheque on a bank for £69, with this clause added, "Provided the receipt form at foot hereof is duly signed, stamped and dated." The order was crossed generally, and was stolen and plaintiff's name forged to the receipt and indorsement. Defendants received it in good faith from a customer and collected it. Held, that it was not a cheque, being conditional, and the bank was not protected: *Bavins v. South Western Bank*, 16 T. L. R. 61 (1899).

The word "customer" implies something of use and habit. Where the only transaction between an individual and a bank is the collection of a crossed cheque, such individual is not a customer of the bank, and if he has no

title the bank is not protected: *Matthews v. Brown*, 63 L. J. Q. B. 494 (1894); (reported as *Matthews v. Williams*, 10 R. 210); *Lacare v. Credit Lyonnais*, [1897] 1 Q. B. 148.

In order to constitute a person a "customer" of the bank, it is not necessary that he should have an account there. A rate collector had for years been in the habit of receiving cheques and cashing them at a bank where he was known, but had no account. By falsely pretending that a rate had been laid he got a cheque to his order crossed generally and marked "not negotiable." The bank cashed it for him in good faith and forwarded it for collection, and it was paid before the fraud was discovered. Held, that the bank was protected: *Great Western Ry. Co. v. London & County Banking Co.*, [1900] 2 Q. B. 464. The foregoing judgment of the Court of Appeal was, however, reversed by the House of Lords on the 22nd of July, 1901, where it was held that the rate collector was not a "customer" of the bank, that the bank had not received payment of the cheque for him; that as the cheque was marked "not negotiable," the bank had no title to it or to the money received, and was not protected by the Act: 17 T. L. R. 709 (1901), W. N. 1901, p. 156.

Plaintiff's clerk stole certain cheques made payable to the plaintiff and having forged the plaintiff's indorsement thereon, paid them into his account at the defendants' bank, which at once credited him with the amount. Most of the cheques were crossed, and some were drawn on defendants' bank. Some, however, which were drawn on bankers other than the defendants were not crossed. In an action for conversion the jury found that in collecting the cheques the defendants acted in good faith and without negligence. It was held that defendants had received all the cheques as agents for their customer; that as regards the crossed cheques they were protected either by section 60 or section 82 of the Bills of Exchange Act, 1882; but that they were not protected as regards the uncrossed cheques: *Gordon v. London City and Midland Bank*, 17 T. L. R. 176 (1900). It is to be noted that section 60 of the Imperial Act has been omitted from our Canadian Act.

SAVINGS BANK ACT, CANADA.

53 VICTORIA, CHAPTER 32, AS AMENDED BY 63-64
VICTORIA, CHAPTER 28.

An Act respecting certain Savings Banks in the Province of Quebec.

The Savings Bank Act was passed in 1890, having been assented to on the 16th of May, and came into force on the 1st day of July, 1891. Previous to that time the two savings banks to which it applies were regulated by R. S. C. c. 122, which applied not only to them but to all the savings banks in Ontario and Quebec which existed under the Savings Bank Act of 1871, 34 Vict. chap. 7.

This latter Act provided that the savings banks then existing might either transfer their assets and liabilities to the Dominion Government, or to a chartered bank, or the Governor-General might grant them new charters under that Act. These charters were granted for ten years, and they were subsequently extended by 44 Vict. chap. 8, to the first of July, 1891. The only savings banks which have continued their separate existence are the City and District Savings Bank, of Montreal, and La Caisse d'Economie, of Quebec.

The Act of 1890 was amended in 1897, but this latter Act was repealed in 1900, when the Act of 1890 was further amended, and the charters of these two savings banks extended to the first of July, 1911.

It will be seen that a number of the provisions of this Act are similar to those in the Bank Act. For notes and authorities on these points the reader is referred to the corresponding sections of the Bank Act in the preceding part of this work.

INTERPRETATION.

1. In this Act, unless the context otherwise requires, the expression "the bank" means either of the savings banks to which this Act applies.

CHARTERS CONTINUED.

2. [The charters of the Montreal City and District Savings Bank, and of La Caisse d'Economie de Notre Dame de Quebec are hereby continued and shall remain in force until the first day of July in the year one thousand nine hundred and eleven, except in so far as they, or either of them, are or become forfeited or void under the terms thereof, or of this Act, or of any other Act heretofore or hereafter passed relating to the said savings banks, by non-performance of the conditions of such charters or Acts respectively, or by insolvency, or otherwise.] 63-64 Vict. chap. 28, sec. 1.

INTERNAL REGULATIONS.

3. Public notice shall be given by the directors of the bank of the holding of annual or other meetings, by publishing the same for at least four weeks in a newspaper at the place where the head office of the bank is situate; and such notice shall be given in both the English and French languages. 44 Vict. chap. 8, sec. 3, in part.

4. The qualification of a director shall be the holding of twenty-five shares of stock; and the directors shall be elected annually at a general meeting of the shareholders, and shall be eligible for re-election.

2. Each shareholder shall, on every occasion on which the votes of the shareholders are taken, have one vote for each share held by him for at least three months before the time of voting;

3. Shareholders may vote by proxy, but no person but a shareholder shall vote or act as such proxy;

4. No cashier, clerk, or other officer of the bank shall vote, either in person or by proxy, or hold a proxy for that purpose;

5. Every director of the bank who becomes insolvent, or assigns his estate and effects for the benefit of his creditors, or absents himself, without the consent of the board, for twelve consecutive months from the meetings of the directors, or is convicted of any felony, shall thereupon, *ipso facto*, cease to be a director, and the vacancy so created shall forthwith be filled up in the manner provided by the charter. 34 Vict. chap. 7, secs. 7 and 27.

5. No failure to elect directors of the bank shall operate any dissolution of the corporation, but in case of such failure to elect, the required election shall be made as soon thereafter as possible, at a special meeting of the shareholders, which the directors are hereby authorized to call for that purpose; and until such subsequent election takes place, the official acts of the directors holding office shall be valid. 34 Vict. chap. 7, sec. 26.

CALLS.

6. The directors may call up the stock subscribed for and remaining unpaid, by calls not exceeding five per cent., made at intervals of not less than three months, whenever it is, in their opinion, necessary or expedient to make such calls; and all amounts paid upon stock, and all accumulated profits thereon after deduction of dividends as hereinafter provided, shall be invested or lent in the manner hereinafter provided as to the investment or loan of moneys deposited with the bank: Provided, that the limitation of the amount of any call, or of the intervals at which calls may be made, shall not apply to the case of deficiency of the funds of the bank to meet the claims of depositors and other liabilities hereinafter provided for. 34 Vict. chap. 7, sec. 9; 36 Vict. chap. 72, sec. 1, in part.

7. The amount of every such call, if not paid when due, may be recovered with interest by the directors, in the name of the bank, in any court having jurisdiction to the amount; and in any action for the recovery thereof it shall be sufficient to allege and prove the charter, and that the calls were made under this Act, and that the defendant is the holder of a share or shares in respect of which the

amount is due, without alleging or proving any other matter or thing whatsoever; and the evidence of any officer of the bank, cognizant of any fact required to be proved, shall be sufficient proof thereof; and any copy of the charter, purporting to be certified as a true copy thereof by the Secretary of State of Canada, shall be deemed authentic and shall be *prima facie* evidence of the charter and of the contents thereof. 34 Vict. chap. 7, sec. 10.

LIABILITY OF SHAREHOLDERS.

8. The shareholders of the bank shall, in the event of its funds in money and assets immediately convertible into money becoming insufficient to satisfy its debts and liabilities, be liable for the deficiency, so far as that each shareholder shall be liable to an amount equal to the amount, if any, not paid up, of his shares, and no more; and the directors may and shall make calls on the stock not paid up to the full amount not paid up, or to such less amount as they deem necessary to pay all such claims and other liabilities, without waiting for the collection of any debts due to the bank, or the sale of any of its assets or property.

2. Such calls shall be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which the call is payable;

3. No such call shall exceed twenty per centum on each share, and payment thereof may be enforced in the manner hereinbefore provided as to calls on unpaid-up stock;

4. The first of such calls shall be made within ten days after such deficiency is ascertained;

5. Failure on the part of any shareholder liable to such call to pay the same when due shall operate a forfeiture by such shareholder of all claim in or to any part of the assets of the bank; but such call and any further call thereafter shall nevertheless be recoverable from him as if no such forfeiture had been incurred.

6. Every director who refuses to make or enforce, or to concur in making or enforcing any call under this section, is guilty of a misdemeanor and shall be personally responsible for any damages suffered by reason of such default; and every liquidator or other officer or person appointed to wind up the affairs of the bank, in case of

its insolvency, shall have the powers of the directors with respect to such calls. 34 Vict. chap. 7, sec. 11 and sec. 12, in part.

See section 89 of the Bank Act and notes on the double liability.

9. Persons who, having been shareholders in the bank, have only transferred their shares or any of them to others, or registered the transfer thereof, within two months before the commencement of the failure of the bank to meet the claims of its creditors on demand, shall be liable to calls on such shares under the next preceding section, as if they had not transferred them, saving their recourse against those to whom they were transferred. 34 Vict. chap. 7, sec. 12, in part.

See section 96 of the Bank Act and notes thereon.

DIVIDENDS.

10. The directors of the bank shall make half-yearly dividends of so much of the profits of the bank as to the majority of them seems advisable, and as is not inconsistent with the provisions of this Act, and they shall give public notice of the payment of such dividends at least thirty days previously, in the manner herein provided as to notices of meetings. 44 Vict. chap. 8, sec. 4.

TRANSFER OF SHARES AND DEPOSITS.

11. The shares in the bank shall be transferable in the manner provided by the by-laws and regulations made as prescribed by the charter; and the transferee shall have the rights and shall be subject to the liabilities of the original holder;

2. No share shall be divided, and if any share is held by several persons jointly, one of them shall be appointed by letter of attorney by the others to vote thereon, to receive dividends and to do all things that require to be done in respect thereof; and such letter of attorney shall be lodged with the bank. 34 Vict. chap. 7, sec. 13.

12. If the interest in any deposit or share in the bank becomes transmitted in consequence of the death or insolvency of any depositor or shareholder, or in consequence of the marriage of a female depositor or shareholder, or

by any other lawful means than by a transfer upon the books of the bank, or by deed served upon the bank, such transmission shall be authenticated by a declaration in writing,—which declaration shall distinctly state the manner in which and the person to whom such deposit or share has been transmitted, and shall be, by such person, made and signed; and every such declaration shall be, by the person making and signing the same, sworn to before a judge or justice of a court of record or chief magistrate of a city, town, borough or other place, or before a notary public, where the same is made and signed; and every such declaration, so signed and sworn to, shall be left with the manager or other officer or agent of the bank, who shall thereupon enter the name of the person, so entitled to such deposit or share under such transmission, as proprietor thereof, in the books of the bank; and until such transmission is so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive such deposit or share, or any part thereof, or any interest or dividend thereon:

2. Every such declaration and instrument as by this and the next following section of this Act are required to perfect the transmission of a deposit or share in the bank, made in any other country than Canada or some other of the British colonies or the United Kingdom of Great Britain and Ireland, shall be further authenticated by the British consul or vice-consul, or other accredited representative of the British Government in the country where the declaration is made, or shall be made directly before such British consul or vice-consul, or other accredited representative;

3. Nothing in this Act contained shall prevent the directors, manager or other officer or agent of the bank from requiring corroborative evidence of any facts alleged in any such declaration;

4. If payment is made to any depositor of any deposit or of any interest thereon, or of any dividend on any share, after transmission thereof by any of the means mentioned in this section, but before such declaration is made and authenticated as aforesaid, such payment shall be valid and shall discharge the bank. 34 Vict. chap. 7, sec. 28.

See section 39 of the Bank Act and notes thereon.

13. If the transmission of any deposit or share is by virtue of the marriage of a female depositor or shareholder, the declaration shall be accompanied by a copy of the register of such marriage, and shall declare the identity of the wife with the holder of such deposit or share; and if the transmission has taken place by virtue of any testamentary instrument or by intestacy, or by the vacancy of the estate of a deceased depositor or shareholder, the probate of the will, or, if it is notarial, an authentic copy thereof, or the letters of administration, or act of tutorship or curatorship, or authentic certificates of birth, as the case may be, shall, together with such declaration, be produced and left with the manager or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under such transmission in the books of the bank. 34 Vict. chap. 7, sec. 29.

See sections 40, 41 and 42 of the Bank Act and the notes thereon.

DEPOSITS AND LOANS.

14. The bank may receive deposits of money for the benefit of persons depositing the same, and may invest the same as hereinafter provided, and may accumulate the revenues and profits derived from the investment of so much thereof as is not required to meet ordinary demands by the depositors, and out of such accumulation may allow and pay to the depositors thereof such rate of interest on such deposits as is from time to time fixed by the Governor in Council, not being more than five per centum per annum. 34 Vict. chap. 7, sec. 14; 44 Vict. chap. 8, sec. 2.

15. Every depositor, on making his first deposit in the bank, shall disclose and declare his name, residence, addition and occupation. 34 Vict. chap. 7, sec. 15.

16. The bank may receive deposits from any person, whatever is his status or condition of life, and whether such person is qualified by law to enter into ordinary contracts or not; and the bank may pay the principal or any part thereof, and the whole or any part of the interest thereon, to such person, without the authority, aid, assistance or intervention of any person or official being required: Provided always, that if the person making any deposit in the bank is not, by the laws of the Province of Quebec, authorized so to do, the total amount of deposits made by such person shall not exceed the sum of two thousand dollars. 34 Vict. chap. 7, sec. 16.

17. Any payment of interest or dividend, or of the whole or any part of any deposit, made in good faith to any person who appears *prima facie* to be entitled to such interest, dividend or deposit, by the production of a declaration in writing and of the documents herein mentioned in support thereof, shall be valid; and the discharge of such person shall be sufficient, and shall discharge the bank from all or any further claim by any person for such interest, dividend or deposit. 34 Vict. chap. 7, sec. 31.

18. [The bank shall always hold at least twenty per cent. of the moneys deposited with it:

(a) In public securities of the Dominion of Canada, or of any of the provinces thereof, or of the United Kingdom, or of any British colony or possession, or of the United States, or of any state thereof;

(b) In deposits in chartered banks in Canada;

(c) In Canadian municipal bonds or securities;

(d) In school bonds or debentures issued in the Province of Quebec, provided they are secured by the school municipality in which the schools are situate;

(e) In any other security approved by the Treasury Board.] 63-64 Vict. chap. 28, sec. 2.

19. [The bank may, subject to the provisions contained in the next preceding section, invest any moneys deposited with it—

(a) In any of the securities mentioned in the next preceding section;

(b) In the purchase of bonds or debentures of any building society, loan or investment company, water-works company, gas company, street railway company, electric light or power company, electric railway or street railway company, telegraph or telephone company, water power company, navigation company, or heat and light company; Provided such society or company is incorporated in Canada and has a paid-up capital of at least five hundred thousand dollars;

(c) In the purchase of the bonds or debentures of any telegraph cable company having a paid-up capital of at least five hundred thousand dollars.

2. The bank may continue to hold any stock of any now existing chartered bank held by it before it received its charter, and may sell and dispose of such stock.] 63-64 Vict. chap. 28, sec. 2.

20. [The bank may lend any of such moneys upon the personal security of individuals or to corporate bodies; Provided that collateral securities of the nature mentioned in the two sections next preceding, or foreign public securities, or stock of some chartered bank in Canada, or bonds or debentures or stock of an incorporated institution or company are taken the market value whereof is not less than the amount lent, in addition to such personal or corporate security, with authority to sell such securities if the loan is not paid.

2. The bank may lend any of such moneys without collateral security:

(a) To the Government of Canada or to the Government of any province of Canada;

(b) To the corporation of any municipality in Canada with a population of at least two thousand inhabitants;

(c) To any *fabrique de paroisse*, or to *syndics pour l'erection d'églises*, specially authorized by Act of the Legislature of Quebec to issue bonds binding on the taxable property of the parish;

(d) Upon a resolution of their respective boards of directors, to incorporated companies, or incorporated institutions, within the limits of their borrowing powers, and not exceeding in any case their paid-up capital, provided such company or institution has a paid-up capital of not less than five hundred thousand dollars, and has paid continuously for the previous five years a dividend at the rate of at least five per cent. per annum.] 63-64 Vict. chap. 28, sec. 2.

A comparison of this and the preceding section with section 64 of the Bank Act will show the main differences between the two classes of banks. It is contemplated that the chief business of the other banks shall be a discounting of commercial paper and dealing in exchange while the chief business of these savings banks shall be a non-commercial lending and investing business. Other banks are prohibited from taking security on bank shares; savings banks may take them as collateral. Other banks may take as additional

security chattel mortgages, mortgages on vessels, warehouse receipts, bills of lading and securities under section 74; these are not among the securities which savings banks may take. Both classes of banks may take mortgages on real estate as additional security subsequent to a loan, and may buy in mortgaged lands and hold them for seven years.

A savings bank can only hold bank shares as pledgee, so that it is not the owner or subject to the double liability, and the bank whose shares it holds must know that it is not the owner although registered in the transfer book as such: *Exchange Bank v. City and D. Savings Bank*, M. L. R. 6 Q. B. 196 (1887). But now see last clause of sec. 22, sub-sec. 4.

A savings bank may, by virtue of its ordinary corporate powers, make loans of its own monies, not being prohibited by the Act from doing so. A party that receives money from a savings bank on a contract that is *ultra vires*, is bound to return it under Art. 1047 C. C., which provides that he "who receives what is not due to him through error of law or of fact, is bound to restore it: *Re Langlois & La Caisse d'Economie & Arcaud*, Q. R. 4 S. C. 65 (1883).

A savings bank made a loan on the security of letters of the Quebec Government. The borrower failed and the bank filed a claim on his estate, which was contested by the curator on the ground that the transaction was illegal, the bank not being authorized to lend on such security. It was held that if the bank had no right to take such a security, this did not affect the lending of the money or the obligation of the borrower and his estate to return it: *Rolland v. La Caisse d'Economie*, 24 S. C. Can. 405 (1895).

The collaterals mentioned in this section should be taken when the loan is made, and on every loan except to the Dominion or a Provincial Government, or to cities of over 20,000.

21. The bank shall not make any loan, directly or indirectly, upon the security of real or immovable property, or with any reference to the security of real or immovable property; but nothing herein contained shall prevent the bank from taking security upon real or immovable property in addition to such collateral securities, subsequently to the making of the loan and subsidiary to the security originally taken therefor: 34 Vict. chap. 7, sec. 18, in part.

See section 68 of the Bank Act. A savings bank cannot take a chattel mortgage as security; nor can it take a mortgage on real estate at the time a loan is made.

22. In the event of the non-payment of any loan within thirty days after such loan becomes due and payable, or

within such shorter delay as shall be fixed by any agreement made between the bank and the borrower at the time such loan is contracted, the bank may sell in manner herein provided the collateral securities, other than real estate, held by it as security for such loan, or so much thereof as will suffice to pay the amount of such loan and all interest thereon and the costs and expenses of sale, returning the surplus, if any, to the borrower, or person or corporation depositing such securities;

2. Except as hereinafter provided, no such sale shall be made except by public auction, after notice thereof by advertisement stating the time and place of such sale, in at least two newspapers published in or nearest to the place where the sale is to be made, of which newspapers one at least shall be published in the English language and one other in the French language; and notice of the time and place of such sale shall be given to the person depositing such collateral security, by addressing and mailing to the last address of such person, a letter containing such notice;

3. Nothing herein contained shall prevent the bank from collecting or realizing such debt, or any balance due thereon, out of such collateral securities, in any way which has been agreed upon with the person depositing the same;

4. The president or vice-president, manager, cashier or other officer of the bank, thereunto authorized by the directors, may transfer and convey any security so sold to the purchaser, in whom the property in such security shall become vested by such conveyance or transfer, but without any warranty from the bank, or from any officer thereof: Provided always that the bank at any such sale may become the purchaser of any of the securities held by it. 34 Vict. chap. 7, sec. 19, altered.

In this way a savings bank may now become the owner of bank shares, and subject to the double liability; or it may become the holder of partly paid up stock in an incorporated company.

23. The bank may purchase any lands or immovable property offered for sale under execution at the suit of the bank, or exposed for sale by the bank under a power of sale given to it for that purpose, in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may acquire a title thereto, as any individual purchasing at sheriff's sale or under a power of

sale, in like circumstances, could do, and may take, have, hold and dispose of the same at pleasure. 31 Vict. chap. 7, sec. 20.

See section 69 of the Bank Act.

24. The bank may acquire and hold an absolute title in or to land mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, or may purchase and acquire any prior mortgage or charge on such land: Provided always, that the bank shall not hold any real or immovable property, howsoever acquired, except such as is required for its own use for any period exceeding seven years from the date of the acquisition thereof; and for each violation of the provisions of this section the bank shall incur a penalty not exceeding five hundred dollars, which shall be recoverable with costs in any court of competent jurisdiction by any person who sues for the same, and one-half thereof shall be paid to the Minister of Finance and Receiver-General for the public uses of Canada, and the other half thereof to the person suing for the same. 34 Vict. chap. 7, sec. 21.

See sections 70 and 79 of the Bank Act.

25. Nothing in any charter, Act, or law shall be construed as having prevented or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged lands, whatever the value thereof may be, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any lands so mortgaged. 34 Vict. chap. 7, sec. 22.

See section 71 of the Bank Act.

26. Nothing herein contained shall prevent the bank from depositing money in any of the chartered banks carrying on the general business of banking within the Province of Quebec. 34 Vict. chap. 7, sec. 24, in part.

GENERAL PROVISIONS.

27. The directors of the bank shall continue to distribute to charitable institutions yearly, as heretofore, the interest accruing on the amounts invested for that purpose:

2. The principal of the Poor Fund of the City and District Savings Bank of Montreal, which has been ascertained and settled at one hundred and eighty thousand dollars, shall continue invested and shall be held by the said bank in the city and municipal debentures in which the same is now invested and held, with power to change the investment of the same or of any part thereof, from time to time, with the approval and permission of the Treasury Board, but not otherwise:

This bank was organized under the general Act of the old province of Canada relating to Savings Banks with the Roman Catholic Bishop of Montreal as patron and a large list of Honorary Directors, the profits being devoted to charities. In 1862 a special Act, 25 Vict. chap. 66 was passed, creating a reserve fund and making other changes. It received a special charter under 34 Vict. chap. 7. This was amended by 36 Vict. chap. 72, the Poor Fund being fixed at \$180,000 the interest thereon being distributed among the incorporated charitable institutions of Montreal.

3. The principal of the Charity Fund of La Caisse d'Economie de Notre-Dame de Québec, which has been ascertained and settled at eighty-three thousand dollars, shall continue invested and shall be held by the said bank in debentures of the city of Quebec, with power to change the investment of the same or of any part thereof, from time to time, with the approval and permission of the Treasury Board, but not otherwise. 34 Vict. chap. 7, sec. 25, in part; 36 Vict. chap. 72, secs. 3 and 4.

This bank was organized in a similar way with the Archbishop of Quebec as patron. It came under the special Act, 29 & 30 Vict. chap. 130, and the general Act of 1871. By 36 Vict. chap. 72 the Poor Fund was fixed at \$83,000, the interest of which is distributed among the charities of the city of Quebec.

28. The shareholders may authorize the directors to establish guarantee and pension funds for the officers and employees of the bank and their families, and to contribute thereto out of the funds of the bank. New.

29. The bank shall not issue any bank note, or note intended to circulate as money or as a substitute for money, or be deemed a bank within the meaning of "the Bank Act." 34 Vict. chap. 7, sec. 35.

30. The bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to

which any deposit or share therein is subject; and the receipt of the person in whose name any such deposit or share stands in the books of the bank, or, if it stands in the name of more persons than one, the receipt of one of the persons shall be a sufficient discharge to the bank for such deposit or share, interest or dividend thereon, or for any other sum of money payable in respect of such deposit or share, unless express notice to the contrary has been given to the bank, or such deposit is made upon express conditions as to the person or persons to whom such deposit shall be paid, in which case such deposit shall be governed by such conditions, notwithstanding any trust to which such deposit is then subject, and whether or not the bank has had notice of such trust; and the bank shall not be bound to see to the application of the money paid on such receipt, whether given by one of such persons or by all of them. 34 Vict. chap. 7, sec. 30.

See secs. 43 and 84, sub-sec. 2 of the Bank Act.

31. Monthly returns shall be made, by the bank, to the Minister of Finance and Receiver-General, and shall be made up within the first ten days of each month, and shall exhibit the condition of the bank on the last juridical day of the month next preceding; and such monthly returns shall be signed by the president or vice-president, or the director then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business, and shall be published in the *Canada Gazette*; and such monthly returns shall be in the form set forth in the schedule to this Act. 36 Vict. chap. 72, sec. 2, in part.

32. The bank shall furnish annually to the Minister of Finance and Receiver-General, to be laid before Parliament, certified lists of the shareholders, with their additions and residences, and the number of shares they respectively hold and the amounts paid up thereon. 44 Vict. chap. 8, sec. 6.

33. The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver-General, to be laid by him before Parliament, a return of all dividends which have remained unpaid for more than five years, and also of all amounts or balances in respect to which no transactions have taken place, or upon which no interest has been paid during the five years prior to the date of such return. Provided, always, that in case of moneys deposited for a fixed period, the

period of five years above referred to, shall be reckoned from the date of the termination of such fixed period.

(2) Such return shall be signed in the manner required for the monthly returns under section thirty-one of this Act, and shall set forth the name of each shareholder or creditor, his last known address, the amount due, the agency of the bank at which the last transaction took place, and the date thereof; and if such shareholder or creditor is known to the bank to be dead, such return shall show the names and addresses of his legal representatives, so far as known to the bank;

(3) If the bank neglects to transmit or deliver to the Minister of Finance and Receiver-General the return above referred to, within the time hereinbefore limited, it shall incur a penalty of fifty dollars for each and every day during which such neglect continues;

(4) Upon the winding up of the bank in insolvency or under any general winding-up Act or otherwise, and before the final distribution of the assets, or within three years from the commencement of the suspension of payment by the bank, or the commencement of the winding up thereof whichever shall first happen, the assignees, liquidators, directors or other officials in charge of such winding up shall, notwithstanding any Statute of Limitations, or other enactment or law relating to prescription, pay to the Minister of Finance and Receiver-General out of the assets of the bank any moneys payable either to shareholders or depositors, which may then remain unclaimed, and upon such payment being made the bank and its assets shall be relieved from all further liability in respect to the amount so paid;

(5) The moneys paid to him as aforesaid shall be held by the Minister of Finance and Receiver-General, subject to all rightful claims on behalf of any person other than the bank, and in case a claim to any moneys so paid as aforesaid should be thereafter established to the satisfaction of the Treasury Board, the Governor in Council shall, on the report of the Treasury Board, direct payment thereof to be made to the parties entitled thereto, together with interest on the principal sum thereof at the rate of three per centum per annum for a period not exceeding six years from the date of payment thereof to the said Minister of

Finance and Receiver-General as aforesaid: Provided, however, that no such interest shall be paid or payable on such principal sum, unless interest thereon was payable by the bank paying the same to the said Minister of Finance and Receiver-General:

(6) As a condition of the rights and privileges conferred by this Act or by any Act in amendment thereof, the following provision shall have effect, namely:—The liability of the bank under any law, custom or agreement to repay moneys deposited with it, and interest, if any, and to pay dividends declared and payable on its capital stock shall continue, notwithstanding any Statute of Limitations or any enactment or law relating to prescription:

2. This section applies to moneys heretofore or hereafter deposited and to dividends heretofore or hereafter declared. New.

OFFENCES AND PENALTIES.

34. Every officer, clerk, or servant, who is employed under the provisions of this Act, and who defaces, alters, erases, or in any manner or way whatsoever, changes the effect of the books of account kept under the provisions of this Act, or any entry in the said books of account, for any fraudulent purpose, and every such officer, clerk or servant, who secretes, appropriates or embezzles any bond, obligation, bill or note, or any security for money, or any money or effects intrusted to him, or in his custody, or to which he has obtained access as such agent, officer, clerk or servant, to whomsoever the said property belongs, is guilty of felony, and, on conviction thereof, shall be liable to imprisonment for life: Provided always, that nothing herein contained, nor the conviction or punishment of the offender, shall prevent, lessen or impair any remedy which Her Majesty or the Minister of Finance and Receiver-General, or any other person, would otherwise have against any other person whatsoever. 34 Vict. chap. 7, sec. 32.

See the Criminal Code, 1892, sec. 423, as to forgery; sec. 305 as to theft and sec. 366 as to false entries.

35. Every person who, with intent to defraud, falsely pretends to be the owner of any deposit made under this Act, or of the interest upon such deposit, and who is not such owner, and who demands or claims from the bank

with which such deposit has been made, or from any person employed under this Act, the payment of such deposit or interest, or of any portion thereof, as the case may be, and whether he does or does not thereby obtain any part of such deposit or interest, is guilty of a misdemeanor, and shall be punishable accordingly. 34 Vict. chap. 7, sec. 33, in part.

See the Criminal Code, 1892, secs. 368 and 359.

36. The making of any wilfully false or deceptive statement in any account, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanor punishable by imprisonment for a term not exceeding five years, and every president, vice-president, director, auditor, manager, cashier or other officer of the bank, who prepares, signs approves or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such person in consequence thereof. 34 Vict. chap. 7, sec. 34.

See the Criminal Code, sec. 365.

COMMENCEMENT OF ACT.

37. This Act shall come into force on the first day of July in the year one thousand eight hundred and ninety-one, and from the last mentioned day chapter one hundred and twenty-two of the Revised Statutes of Canada, intituled "An Act respecting certain Savings Banks in the Provinces of Ontario and Quebec," shall be repealed, except as to rights theretofore acquired or liabilities incurred in regard to any matter or thing done, or contract or agreement made or entered into, or offence committed thereunder, and nothing in this Act shall affect any action then pending under the said chapter, but the same shall be decided as if the said chapter had not been repealed.

SCHEDULE.

Return of the amount of liabilities and assets of the
(name of the bank) on the day of

CAPITAL STOCK, \$ CAPITAL PAID UP, \$

LIABILITIES.

- | | \$ | cts. |
|---|----|------|
| 1. Dominion Government deposits, payable on demand | | |
| 2. Provincial Government deposits, payable on demand | | |
| 3. Other deposits, payable on demand | | |
| 4. Dominion Government deposits, payable after notice or on a fixed day | | |
| 5. Provincial Government deposits, payable after notice or on a fixed day | | |
| 6. Other deposits, payable after notice or on a fixed day | | |
| 7. Special Poor Fund or Charity Fund Trust. | | |
| 8. Liabilities not included under the foregoing heads | | |

ASSETS.

1. Dominion, Provincial and other public securities
2. Cash in hand and on deposit in chartered banks
3. Canadian municipal bonds or securities, school bonds or debentures, and securities approved by Treasury Board
4. Other bonds, debentures and securities
5. Loans to governments, municipal corporations, *fabriques de paroisses, syndics pour l'erection d'eglises*, and corporations on resolutions of their boards of directors.
6. Loans for which bank stocks are held as collateral security
7. Loans for which stocks, bonds, debentures or securities, other than bank stocks, are held as collateral security

- | | | |
|--|---|----|
| | § | c. |
| 8. Special poor fund or charity fund investments | | |
| 9. Investments in bank stock made previous to the incorporation of the bank..... | | |
| 10. Bank premises. | | |
| 11. Other assets not included under the foregoing heads | | |

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F.,

Accountant (or Inspector).

We declare that the foregoing return is made up from the books of the bank, and that it is correct, to the best of our knowledge and belief, and shows truly and clearly the financial position of the bank.

(Place) this day of

A. B., *President.*

C. D., *Cashier.*

SAVINGS BANK AMENDMENT ACT

63-64 VICTORIA, CHAPTER 28.

An Act to amend the Acts respecting certain Savings Banks in the Province of Quebec.

[Assented to 7th July, 1900.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section 2 of chapter 32 of the Statutes of 1890 is repealed and the following section is substituted therefor:—

(This section will be found in place of the repealed section, *ante* p. 254.)

2. The sections substituted for sections 18, 19 and 20 of the said Act by section 1 of chapter 9 of the statutes of 1897 are repealed and the following sections are substituted therefor:—

(These sections are substituted in the Act of 1890 as sections 18, 19 and 20, *ante* pp. 261 and 262.)

3. Section 2 of chapter 9 of the statutes of 1897 is repealed.

4. The Guarantee and Pension Fund established by *La Caisse d'Economie de Notre-Dame de Quebec*, after the passing but prior to the coming into force of chapter 32 of the statutes of 1890, is confirmed.

5. The schedule to chapter 32 of the statutes of 1890 is repealed and the schedule to this Act is substituted therefor.

(The new schedule will be found *ante* p. 270.)

6. This Act shall be read and construed as if it were incorporated with and formed part of the said chapter 32 of the statutes of 1890.

CANADIAN BANKERS' ASSOCIATION.

63-64 VICTORIA, CHAPTER 93.

An Act to Incorporate the Canadian Bankers' Association.

[Assented to 7th July, 1900.]

Whereas the voluntary association now existing under the name of the Canadian Bankers' Association has, by its petition, prayed that it may be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. There is hereby created and constituted a corporation under the name of "The Canadian Bankers' Association," hereinafter called "the Association."

2. The Association shall consist of members and associates;

(a) The members, hereinafter referred to as members, shall be the banks named in the schedule to this Act, and such new banks hereafter incorporated by or under the authority of the Parliament of Canada as become entitled to carry on the business of banking in Canada, and to which the Bank Act in force at the time of its incorporation applies. Any bank to which the Bank Act applies, carrying on business in Canada, and not named in the schedule to this Act, shall on its own application at any time be admitted as a member of the Association by resolution of the executive council hereinafter named;

(b) The associates, hereinafter referred to as associates, shall be the bank officers who are associates of the

voluntary association mentioned in the preamble at the time this Act is passed, and such other officers of the banks which are members of the association as may be elected at a meeting of the executive council hereinafter named or at an annual meeting of the association. An associate may at any time by written notice to the president of the Association withdraw from the association.

3. Upon the suspension of payment of a bank being a member of the Association, such bank shall cease to be a member. Provided, however, that if and when such bank resumes the carrying on of its business in Canada it may again become a member of the Association.

4. Upon an associate ceasing to be an officer of a bank carrying on business in Canada, he shall at the end of the then current calendar year, cease to be an associate.

5. The objects and powers of the Association shall be, to promote generally the interests and efficiency of banks and bank officers, and the education and training of those contemplating employment in banks and for such purposes, among other means, to arrange for lectures, discussions, competitive papers and examinations on commercial law and banking, and to acquire, publish and carry on the "Journal of The Canadian Bankers' Association."

6. **Sub-sections.**—The Association may from time to time establish in any place in Canada a sub-section of the association under such constitution and with such powers (not exceeding the powers of the association) as may be thought best.

7. **Clearing houses.**—The Association may from time to time establish in any place in Canada a clearing house for banks, and make rules and regulations for the operations of time establish in any place in Canada a clearing house for or become a member of such clearing house except with its own consent, and a bank may after becoming such member at any time withdraw therefrom.

2. **Regulations.**—All banks, whether members of the Association or not, shall have an equal voice in making from time to time the rules and regulations for the clearing house; but no such rule or regulation shall have any force or effect until approved of by the Treasury Board.

8. Voting powers.—Members of the Association shall vote and act in all matters relating to the Association through their chief executive officers. For the purposes of this Act the chief executive officer of a member shall be its general manager or cashier, or in his absence the officer designated for the purpose by him, or in default of such designation the officer next in authority. Where the president or vice-president of a member performs the duties of a general manager or cashier he shall be the chief executive officer, and in his absence the officer designated for the purpose by him, and in default of such designation the officer next in authority to him. At all meetings of the association each member shall have one vote upon each matter submitted for vote. The chairman shall, in addition to any vote he may have as chief executive officer or proxy, have a casting vote in case of a tie. Associates shall have only such powers of voting and otherwise taking part at meetings as may be provided by by-law.

9. Officers.—There shall be a president and one or more vice-presidents and an executive council of the Association, of which council five shall form a quorum unless the by-laws otherwise provide.

10. Officers continued.—The persons who are the president, vice-presidents and executive council of the voluntary association mentioned in the preamble at the time this Act is passed shall be the president, vice-presidents and executive council respectively of the Association until the first general meeting of the Association or until their successors are appointed.

11. General meetings.—The first general meeting of the Association shall be held during the present calendar year at such time and place and upon such notice as the executive council may decide. Subsequent general meetings shall be held as the by-laws of the association may provide, at least once in each calendar year.

12. Election of officers.—At the first general meeting and at each annual meeting thereafter the members of the Association shall elect a president, one or more vice-presidents and an executive council, all of whom shall hold office until the next annual general meeting or until their successors are appointed.

13. Executive officers.—The president, vice-presidents and executive council shall be chosen from among the chief executive officers of members of the Association.

14. Executive council.—Unless the by-laws otherwise provide, the executive council shall consist of the president and vice-presidents of the Association and fourteen chief executive officers, and five shall form a quorum for the transaction of business.

15. Dues.—Each member and associate shall from time to time pay to the association for the purposes thereof such dues and assessments as shall from time to time be fixed in that behalf by the association at any annual meeting, or at any special meeting called for the purpose, by a vote of not less than two-thirds of those present or represented by proxy.

16. By-laws.—The objects and powers of the Association shall be carried out and exercised by the executive council, or under by-laws, resolutions, rules and regulations passed by it, but every such by-law, rule and regulation, unless in the meantime confirmed at a general meeting of the association called for the purpose of considering the same, shall only have force until the next annual meeting, and in default of confirmation thereat shall cease to have force. Provided always, that any by-law, rule or regulation, passed by the executive council may be repealed, amended, varied or otherwise dealt with by the association at any annual general meeting or at a special general meeting called for the purpose.

2. Power of executive.—For greater certainty, but not so as to restrict the generality of the foregoing, it is declared that the executive council shall have power to pass by-laws, resolutions, rules and regulations, not contrary to law or to the provisions of this Act, respecting—

(a) Lectures, discussions, competitive papers, examinations;

(b) The journal of the Association;

(c) The sub-sections of the Association;

(d) Clearing houses for banks;

(e) General meetings, special and annual, of the Association and of the executive council, and the procedure and quorum thereat, including the part to be taken by associates and their powers of voting;

(f) Voting by proxy at meetings of the Association and of the executive council;

(g) The appointment, functions, duties, remuneration and removal of officers, agents and servants of the Association.

3. No by-law, resolution, rule or regulation respecting clearing houses, and no repeal, amendment, or variation of or other dealing with any such by-law, resolution, rule or regulation shall have any force or effect until approved of by the Treasury Board.

17. The provisions of the Companies Clauses Act, being chapter 118 of the Revised Statutes, shall not apply to the Association.

SCHEDULE.

Banks being members of the Association:—

The Bank of Montreal.
The Quebec Bank.
The Molsons Bank
The Bank of Toronto.
The Ontario Bank.
The Eastern Townships Bank.
La Banque Nationale.
La Banque Provinciale.
The Merchants' Bank of Canada.
The Union Bank of Canada.
The Canadian Bank of Commerce.
The Dominion Bank.
The Royal Bank of Canada.
The Bank of Yarmouth, Nova Scotia.
The Standard Bank of Canada.
The Bank of Hamilton.
The Halifax Banking Company.
La Banque d'Hochelega.
The Imperial Bank of Canada.
La Banque de St. Hyacinthe.

The Bank of Ottawa.
The Bank of New Brunswick.
The Exchange Bank of Yarmouth.
The Union Bank of Halifax.
The People's Bank of Halifax.
La Banque de St. Jean.
The Commercial Bank of Windsor.
The Western Bank of Canada.
The Traders' Bank of Canada.
The People's Bank of New Brunswick.
The Saint Stephen's Bank.
The Summerside Bank.
The Bank of British North America.
The Bank of British Columbia.

BY-LAWS
OF THE
Canadian Bankers' Association.

(By-laws Nos. 13, 14, 15 and 16 were approved by the Dominion Treasury Board in May, 1901, in accordance with section 30 of the Bank Act Amendment Act, 1900, and sections 7 and 16 of the Act of 1900, incorporating the Canadian Bankers' Association.)

1. General meetings. — The annual general meetings of the association shall be held on the second Thursday of the month of November in each year, at such hour and place as may be decided upon by the executive council of the association from time to time. Special general meetings of the association may be called at any time by the said executive council, and shall be called by the president or secretary-treasurer on the written requisition of at least five members of the association.

The requisition (if any) for, and the notice calling any special general meeting shall specify therein the general nature of the business to be considered or transacted thereat. Special general meetings shall be held at such time, hour and place as shall be mentioned in the notice calling the same. Thirty days' notice shall be given of every general meeting of the association whether annual or special. At any annual or special general meeting of the association seven persons, duly representing members of the association, shall form a quorum.

At any annual general meeting of the association any business may be transacted thereat.

At any special general meeting of the association only such business shall be transacted as is mentioned in the notice calling such special general meeting.

2. Election of officers.—At every annual general meeting, the members of the association, through their representatives or proxies, shall elect from among the chief executive officers (as defined by charter of incorporation) of members of the association, a president, four vice-presidents, and fourteen councillors, all of whom shall hold office until the next annual general meeting, or until their successors are appointed, and may also elect honorary presidents of the association, not exceeding three in number, who shall also hold office until the next annual general meeting after their election.

3. Executive council.—The executive council of the association shall consist of the president and vice-presidents, and the said fourteen councillors aforesaid, and five shall form a quorum for the transaction of business.

The honorary presidents shall also have seats at the executive council, but shall have no vote thereat.

4. Voting at general meetings.—At all meetings of the association each member shall have one vote upon each matter submitted for vote. The chairman shall, in addition to any vote he may have as chief executive officer or proxy, have a casting vote in case of a tie.

Each associate shall also have one vote on all subjects except the following, on which members only shall be permitted to vote:—

1. Election of officers.
2. Action relating to proposed legislation.
3. By-laws.
4. Adding to, or amending the charter.
5. All other subjects on which general action by the banks is contemplated.

5. Meetings of council.—The executive council may meet together for the despatch of business, adjourn and otherwise regulate its meetings, as it by resolution or otherwise may determine from time to time.

The secretary-treasurer shall at any time at the request of the president or any vice-president or any other member of the executive council convene a meeting of the council. Provided however that no business shall be transacted at a

meeting called at the request of a member unless the notice calling the meeting specifies in some general terms that such business will be transacted thereat, but this provision shall not apply to any meeting called at the request of the president or any vice-president.

On all questions arising at any meeting of the executive council each member shall have one vote in addition to any vote he may have as proxy, and the chairman shall have in addition a casting vote.

6. Chairman.—At all meetings of the association and of the executive council, the president, when present, shall be chairman, and in his absence one of the vice-presidents chosen by the members of the council then present; and in the absence of the president and vice-presidents, the members of the council then present may choose some one of their number to be chairman of such meeting.

7. Voting by proxy.—Any member, not represented at a meeting of the association by one of the officers named in section 8 of the charter of incorporation may vote by proxy, provided such proxy is held by an associate who is an assistant general manager, or assistant cashier, inspector or manager of any bank, or any branch thereof.

Any member of the executive council, when not present at any meeting thereof, may be represented thereat by proxy, provided such proxy is held by such an associate as is before mentioned in this by-law. Proxies shall be in writing.

8. By-laws.—The executive council may from time to time repeal, amend or add to any of the by-laws of the association, except those relating to dues, to the clearing house, to the curator and his duties, and to the circulation, but every such repeal, amendment or addition shall only have force until the next annual general meeting of the association, and if not confirmed thereat shall thereupon cease to have force.

9. Secretary-treasurer and solicitor.—The said executive council shall have power from time to time to appoint a secretary-treasurer, who shall be an officer or ex-officer of a bank, and to remove him from office, and to fix his remuneration and the terms of his engagement.

The executive council shall also have power from time to time to appoint a solicitor or solicitors and to fix their remuneration for either general or special services, and also to engage counsel where such services may be needed.

10. Sub-sections.—Existing sub-sections of the voluntary association are hereby continued as, and constituted, sub-sections of the association as incorporated. Sub-sections hereby or hereinafter constituted may pass by-laws for their guidance, subject always to the provisions of the charter of incorporation, and the by-laws of the association.

The bankers' section of the Boards of Trade in the cities of Montreal and Toronto respectively, shall be empowered respectively to represent the association in all matters connected with legislation in the Legislatures of Quebec and Ontario, respectively—it being understood that the respective sections will, as fully as possible, keep the president and the executive council of the association advised on all points that may arise in connection with the matters referred to, and will not make representations in the name of the association contrary to the views of the executive council after such views have been expressed.

11. Journal, lectures, etc.—An editing committee appointed by the association shall supervise the publication of the "Journal of the Canadian Bankers' Association," and the executive council shall appoint such other officers as it may deem necessary; and shall also make such provisions and arrangements from time to time as it deems proper, for lectures, discussions, competitive papers, and examinations.

12. Annual dues.—The dues or subscriptions payable to the association by the members thereof shall be as follows:—

For banks with a paid-up capital stock of under \$1,000,000...	\$100
For banks with a paid-up capital stock of \$1,000,000 and under \$2,000,000	200
For banks with a paid-up capital stock of \$2,000,000 and under \$3,000,000	300
For banks with a paid-up capital stock of \$3,000,000 and over.	400

The dues or subscriptions payable to the association by the associates thereof shall be one dollar annually. Members' and associates' subscriptions shall be payable on or before the 1st February and 1st July respectively in each year.

CIRCULATION.

13. (a) **Monthly return.**—A monthly return shall be made to the president of the Canadian Bankers' Association by all banks doing business in Canada, whether members of the Canadian Bankers' Association or not, in the form hereinafter set forth; said return shall be made up and sent in within the first fifteen days of each month, and shall exhibit the condition of the bank's note circulation on the last juridical day of the month next preceding; and every such monthly return shall be signed by the chief accountant or acting chief accountant and by the president or vice-president, or by any director of the bank, and by the general manager, cashier, or other chief executive officer of the bank at its chief place of business. Every such monthly return which shows therein notes destroyed during such month, shall be accompanied by a certificate or certificates in the form hereinafter set forth, covering all the notes mentioned as destroyed in such return, signed by at least three of the directors of the bank, and by the chief executive officer or some officer of the bank acting for him, stating that the notes mentioned in such certificate or certificates have been destroyed in the presence of and under the supervision of the persons respectively signing such certificate or certificates respectively.

FORM OF MONTHLY RETURN OF CIRCULATION ABOVE MENTIONED.

CIRCULATION STATEMENT OF THE

(Here state name of bank)

for the month of	190..
Credit Balance of Bank Note Accounts on last day of preceding month (inclusive of unsigned notes)	\$
Add notes received from printers during month, viz:	
From	\$
"	\$
	\$
Less notes destroyed during month (as per certificate herewith)	\$
Balance of Bank Note Accounts on last day of month ..	\$
Less notes on hand, viz:	
Signed	\$
Unsigned	\$
Notes in circulation on last day of month	\$

.....
Chief Accountant.

We declare that the foregoing return, to the best of our knowledge and belief, is correct, and shows truly and clearly the state and position of the Note Circulation of said Bank during and on the last day of the period covered by such return.

.....this.....day of.....190..

.....
President.

.....
General Manager.

FORM OF CERTIFICATE OF DESTRUCTION OF NOTES
ABOVE MENTIONED.

Certificate of Destruction of Notes of the (here mention name of bank) accompanying monthly Circulation Statement for month of.....A.D., 190..

We, the undersigned, hereby certify that we have examined bank notes of this Bank amounting to \$.....consisting of the following, viz.: (here set out the denominations) and have burned and destroyed the same, and that the said notes so burned and destroyed by us are not included in any other Certificate of Destruction of Notes signed by us or any of us, or to the best of our knowledge and belief, by any other person to accompany the present or any monthly circulation statement made or to be made to the President of The Canadian Bankers' Association.

.....this.....day of.....190..

.....
.....
.....
Directors of said Bank.

.....
General Manager.

(b) **Bank of British North America.**—For all purposes of this by-law, the chief place of business of the Bank of British North America shall be the chief office of the said bank at the city of Montreal, in the Province of Quebec.

And in the case of the said Bank of British North America the said monthly circulation return shall be signed by the general manager's clerk, or acting general manager's clerk, and by the general manager or the acting general manager of the said bank; and the said certificate of destruction of notes shall be signed by the general manager or acting general manager, the inspector or assistant inspector, and the local manager of the Montreal branch,

or the acting local manager of the Montreal branch of the said bank, instead of by the persons respectively hereinbefore directed to sign the said returns respectively.

(c) **Penalty for neglect.**—Every bank which neglects to make up and send in as aforesaid any monthly return required by this by-law within the time by this by-law limited, shall incur a penalty of fifty dollars for each and every day after the expiration of such time during which the bank neglects so to make up and send in such return.

(d) **Inspection.**—The executive council of the association shall have power, by resolution, at any time, to direct that an inspection shall be made of the circulation accounts of any bank by an officer or officers to be named in such resolution, and such inspection shall be made accordingly.

(e) **Inspection and report.**—Some person or persons appointed from time to time by the executive council of the association shall during the year 1901 and during every year thereafter make inspection of the circulation accounts of every bank doing business in Canada, whether members of the association or not, and shall report thereon to the council; and upon every such inspection all and every the officers of the bank whose circulation account shall be so inspected shall give and afford to the officer or officers making such inspection, all such information and assistance as he or they may require to enable him or them fully to inspect said circulation account, and to report to the council upon the same, and upon the means adopted for the destruction of the notes.

(f) **Collection of penalties.**—The amount of all penalties imposed upon a bank for any violation of this by-law shall be recoverable and enforceable with costs, at the suit of the Canadian Bankers' Association, and such penalties shall belong to the Canadian Bankers' Association for the uses of the association.

(g) **Statement of circulation.**—The president of the Canadian Bankers' Association shall each month have printed and forwarded to the chief executive officer of every bank of Canada subject to the Bank Act, whether a member of the association or not, a statement of the circulation returns of all the banks in Canada for the last preceding month, as received by him.

(h) **Association defined.**—In this by-law it is declared for greater certainty that the Canadian Bankers' Association herein mentioned and referred to is the association incorporated by special Act of Parliament of Canada, 63 and 64 Vict. chap. 93.

CURATOR.

14. Appointment, powers, etc.—Whenever any bank suspends payment, a curator, as mentioned in section 24 of the Bank Act Amendment Act, 1900, shall be appointed to supervise the affairs of such bank. Such appointment shall be made in writing by the president of the association or by the person who, during a vacancy in the office of, or in the absence of, the president, may be acting as president of the association.

If a curator so appointed dies, or resigns, another curator may be appointed in his stead in the manner aforesaid.

The executive council may, by resolution, at any time remove a curator from office and appoint another person curator in his stead.

A curator so appointed shall have all the powers and subject to the provisions of By-law No. 15, shall perform all the duties imposed upon the curator by the said Bank Act Amendment Act; he shall also furnish all such returns and reports, and give all such information touching the affairs of the suspended bank as the president of the association or the executive council may require of him from time to time.

The remuneration of the curator for his services and his expenses and disbursements in connection with the discharge of his duties shall be fixed and determined from time to time by the executive council.

15. Advisory board.—Whenever a bank suspends payment and a curator is accordingly appointed, the president shall also appoint a local advisory board consisting of three members, selected generally as far as possible from among the general managers, assistant-general managers, cashiers, inspectors or chief accountants or branch managers of any bank at the place where the head office of such suspended bank is situated, and the curator shall advise from time to time with such advisory board, and it shall be his duty, before taking any important step in connection with his duties as curator, to obtain the approval of

such advisory board thereto. With the sanction of such advisory board, he may employ such assistants as he may require for the full performance of his duties as curator.

CLEARING HOUSES.

16. Rules and regulations.—The rules and regulations contained in this by-law are made in pursuance of the powers contained in the Act to Incorporate the Canadian Bankers' Association, 63 & 64 Vict. chap. 93 (1900), and shall be adopted by, and shall be the rules and regulations governing all clearing houses now existing and established, or that may be hereafter established.

RULES AND REGULATIONS RESPECTING CLEARING HOUSES.

MADE IN PURSUANCE OF THE POWERS CONTAINED IN THE ACT TO INCORPORATE THE CANADIAN BANKERS' ASSOCIATION.

1. Formation.—The chartered banks doing business in any city or town, or such of them as may desire to do so, may form themselves into a Clearing House. Chartered banks thereafter establishing offices in such city or town may be admitted to the Clearing House by a vote of the members.

2. Objects.—The Clearing House is established for the purpose of facilitating daily exchanges and settlements between banks. It shall not either directly or indirectly be used as a means of obtaining payment of any item, charge or claim disputed, or objected to. It is expressly agreed that any bank receiving exchanges through the Clearing House shall have the same rights to return any item, and to refuse to credit any sum which it would have had were the exchanges made directly between the banks concerned, instead of through the Clearing House; and nothing in these or any future rules, and nothing done, or omitted to be done thereunder, and no failure to comply therewith shall deprive a bank of any rights it might have possessed had such rules not been made, to return any item or refuse to credit any sum; and payment through the Clearing House of any item, charge or claim shall not deprive a bank of any right to recover back the amount so paid.

3. Meetings.—The Annual Meeting of the members shall be held on such day in each year, and at such time and place as the members may fix by by-law. Special meetings may be called by the Chairman or Vice-Chairman whenever it may be deemed necessary, and the Chairman shall call a special meeting whenever requested to do so in writing by three or more members.

4. Voting.—At any meeting each member may be represented by one or more of its officers, but each bank shall have one vote only.

5. Board of Management.—At every Annual Meeting there shall be elected by ballot a Board of Management who shall hold office until the next Annual Meeting, and thereafter until their successors are appointed. They shall have the general oversight and management of the Clearing House. They shall also deal with the expenses of the Clearing House, and the assessments made therefor. In the absence of any member of the Board of Management he may be represented by another officer of the bank of which he is an officer.

6. Officers.—The Board of Management shall at their first meeting after their appointment, elect out of their own number a Chairman, a Vice-Chairman, and a Secretary-Treasurer, who shall perform the duties customarily appertaining to these offices.

The officers so selected shall be respectively the Chairman, Vice-Chairman, and Secretary-Treasurer of the Clearing House.

Should the bank of which the Chairman is an officer be interested in any matter, his powers and duties shall, with respect to such matter, be exercised by the Vice-Chairman, who shall also exercise the Chairman's duties and powers in his absence.

7. Meetings.—Meetings of the Board may be held at such times as the members of the same may determine. A special meeting shall be called by the Secretary-Treasurer on the written requisition of any member of the Clearing House for the consideration of any matter submitted by it, of which meeting 24 hours notice shall be given, but if such meeting is for action under Rules 15 or 16, it shall be called immediately.

8. Expenses.—The expenses of the Clearing House shall be met by an equal assessment upon the members, to be made by the Board of Management.

9. Withdrawal.—Any bank may withdraw from the Clearing House by giving notice in writing to the Chairman or Secretary-Treasurer between the hours of 1 and 3 o'clock p.m., and paying its due proportion of expenses and obligations then due. Said retirement to take effect from the close of business of the day on which such notice is given. The other banks shall be promptly notified of such withdrawal.

10. Clearing Bank.—The Board of Management shall arrange with a bank to act as clearing bank for the receipt and disbursement of balances due by and to the various banks, but such bank shall be responsible only for the moneys and funds actually received by it from the debtor banks, and for the distribution of the same amongst the creditor banks, on the presentation of the Clearing House certificates properly discharged. The clearing bank shall give receipts for balances received from the debtor banks. The Board of Management shall also arrange for an officer to act as Manager of the Clearing House from time to time, but not necessarily the same officer each day.

11. Payment of Balances.—The hours for making the exchanges at the Clearing House, for payment of the debit balances to

the clearing bank, and for payment out of the balances due the creditor banks, shall be fixed by by-law under clause 17. On completion of the exchanges, the balances due to or by each bank shall be settled and declared by the Clearing House Manager, and if the clearing statements are readjusted under the provisions of these rules, the balances must then be similarly declared settled, and the balances due by debtor banks must be paid into the clearing bank, at or during the hours fixed by by-law as aforesaid, provided that no credit balance, or portion thereof, shall be paid until all debit balances have been received by the clearing bank. At Clearing Houses where balances are payable in money they shall be paid in legal tender notes of large denominations.

At Clearing Houses where balances are payable by draft, should any settlement draft given to the clearing bank not be paid on presentation, the clearing bank shall at once notify in writing all the other banks of such default; and the amount of the unpaid draft shall be repaid to the clearing bank by the banks whose clearances were against the defaulting bank on the day the unpaid draft was drawn, in proportion to such balances. The clearing bank shall collect the unpaid draft, and pay the same to the other banks in the above proportion. It is understood that the clearing bank is to be the agent of the associated banks, and to be liable only for moneys actually received by it.

Should any bank make default in paying to the clearing bank its debit balance, within the time fixed by this rule, such debit balance and interest thereon shall then be paid by the bank so in default to the Chairman of the Clearing House for the time being, and such Chairman and his successor in office from time to time shall be a creditor of and entitled to recover the said debit balance, and interest thereon from the defaulting bank. Such balances, when received by the said Chairman or his successor in office, shall be paid by him to the clearing bank for the benefit of the banks entitled thereto.

12. Objections to Statements.—In order that the clearing statements may not be unnecessarily interfered with, it is agreed that a bank objecting to any item delivered to it through the Clearing House, or to any charge against it in the exchanges of the day, shall, before notifying the Clearing House Manager of the objection, apply to the bank interested for payment of the amount of the item or charge objected to, and such amount shall thereupon be immediately paid to the objecting bank. Should such payment not be made the objecting bank may notify the Clearing House Manager of such objection and non-payment, and he shall thereupon deduct the said amount from the settling sheets of the banks concerned, and readjust the clearing statements and declare the correct balances in conformity with the changes so made, provided that such notice shall be given at least half an hour before the earliest hour fixed by by-law, as provided in clause 11, for payment of the balances due to the creditor banks. But notwithstanding that the objecting bank may not have so notified the Clearing House Manager, it shall be the duty under these rules of the bank interested to make such payment on demand therefor being made at any time up to 3 o'clock; provided, however, that if the objection is based on the absence from the deposit of any parcel or of any cheque or other item entered

on the deposit slip, notice of such absence shall have been given to the bank interested before 12 o'clock noon, the whole, however, subject to the provisions of Rule No. 2.

13. Items Received in Trust.—All bank notes, cheques, drafts, bills and other items (hereafter referred to as "items") delivered through the Clearing House to a bank in the exchanges of the day, shall be received by such bank as a trustee only, and not as its own property, to be held upon the following trust, namely, upon payment by such bank at the proper hour to the clearing bank of the balance (if any) against it, to retain such items freed from said trust; and in default of payment of such balance, to return immediately and before 12.30 p.m., the said items unmarked and un mutilated through the Clearing House to the respective banks, and the fact that any item cannot be so returned shall not relieve the bank from the obligation to return the remaining items, including the amount of the bank's own notes so delivered in trust.

Upon such default and return of said items, each of the other banks shall immediately return all items which may have been received from the bank so in default, or pay the amount thereof to the defaulting bank through the Clearing House. The items returned by the bank in default shall remain the property of the respective banks from which they were received, and the Clearing House Manager shall adjust the settlement of balances anew.

A bank receiving through the Clearing House such items as aforesaid, shall be responsible for the proper carrying out of the trust upon which the same are received as aforesaid, and shall make good to the other banks respectively all loss and damage which may be suffered by the default in carrying out such trust.

14. Provision for Default.—In the event of any bank receiving exchanges through the Clearing House making default in payment of its debit balance (if any) then in lieu of its returning the items received by it as provided by Rule 13, the Board of Management may require the banks to which the defaulting bank, or an account being taken of the exchanges of the day between it and the other banks, would be a debtor, in proportion to the amounts which, on such accounting, would be respectively due to them, to furnish the Chairman of the Clearing House for the time being with the amount of the balance due by the defaulting bank, and such amount shall be furnished accordingly, and shall be paid by the Chairman to the clearing bank, which shall then pay over to the creditor banks the balances due to them in accordance with Rule 11. The said funds for the Chairman shall be furnished by being deposited in the clearing bank for the purpose aforesaid. The defaulting bank shall repay to the Chairman for the time being, or to his successor in office, the amount of such debit balance and interest thereon, and the said Chairman, and his successor in office, shall be entitled to recover the same from the defaulting bank. Any moneys so recovered shall be held in trust for and deposited in the clearing bank for the benefit of the banks entitled thereto.

15. Re-adjustment of Balances.—If a bank neglects or refuses to pay its debit balance to the clearing bank, and if such default be made not because of inability to pay, the Board of Management may direct that the exchanges for the day between

the defaulting bank and each of the other banks be eliminated from the Clearing House Statements, and that the settlements upon such exchanges be made directly between the banks interested, and not through the Clearing House. Upon such direction being given the Clearing House Manager shall comply therewith and adjust the settlement of balances anew, and the settlements of the exchanges so eliminated shall thereupon be made directly between the banks interested.

16. Suspension of Clearings.—Should any case arise to which, in the opinion of the Board of Management, the foregoing rules are inapplicable, or in which their operation would be inequitable, the Board shall have power at any time to suspend the clearings and settlements of the day; but immediately upon such suspension the Board shall call a meeting of the members of the Clearing House to take such measures as may be necessary.

17. By-laws.—Every Clearing House now existing, or that may hereafter be established, may enact by-laws, rules and regulations for the government of its members, not inconsistent with these rules, and may fix therein among other things:—

1. The name of the Clearing House;
2. The number of members of the Board of Management and the quorum thereof;
3. The date, time and place for the Annual Meeting;
4. The mode of providing for the expenses of the Clearing House;
5. The hours for making exchanges, and for payment of the balances to or by the clearing bank;
6. The mode or medium in which balances are to be paid.

Any by-law, rule, or regulation passed or adopted under this clause may be amended at any meeting of the members, provided that not less than two weeks' notice of such meeting, and of the proposed amendments, has been given.

NOTICES.

17. How to be given.—Any notice of meeting or any other notice authorized or required to be given to any member of the association shall be deemed sufficiently given, if sent through the post office in a prepaid letter or by hand to the head office of any such member, addressed to such member or to the general manager, or cashier of such member, and in the case of the Bank of British North America through its chief office in the city of Montreal, addressed to it or to its general manager; and any notice sent by post shall be deemed to have been given on the day following that on which the same was mailed, and in proving the giving of such notice, it shall be sufficient to prove that the letter was properly prepaid, addressed and mailed.

Any notice authorized or required to be given to any member of the executive council may be sent by the secretary-treasurer by hand, or through the post office, or by telegraph, or in any other manner which the said council may prescribe.

Any notice authorized or required to be given to any associate as such shall be sufficiently given, if given by advertisement once in a newspaper in the cities of Montreal and Toronto.

18. Definitions.—In the foregoing by-laws, unless there be something in the subject or context inconsistent therewith, the words:

“The association” shall mean “the Canadian Bankers’ Association,” incorporated by special Act of the Parliament of Canada (63 and 64 Vict. chap. 93).

“The executive council,” or “the council” shall mean “the executive council of the Canadian Bankers’ Association.”

THE WINDING UP ACT.

REVISED STATUTES OF CANADA, CHAPTER 129, AS
AMENDED IN 1889, 1892, 1895 AND 1899.

An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations.

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

SHORT TITLE.

1. This Act may be cited as "The Winding Up Act."

This Act is *intra vires* the Dominion Parliament, being in the nature of an insolvency law: *Shoolbred v. Clarke*, 17 S. C. Can. 265 (1890).

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(a) The expression "company" includes any corporation subject to the provisions of this Act;

(b) The expression "insurance company" means a company carrying on, either as a mutual or a stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise;

(c) The expression "trading company" means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee

houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, share-brokers, shipowners, shipwrights, stock-brokers stock-jobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, or by persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the manufacture, workmanship or the conversion of goods or commodities or trees;

(d) The expression "court" means, in the Province of Ontario, the High Court of Justice for Ontario; in the Province of Quebec, the Superior Court for Lower Canada; in the Province of Nova Scotia, the Supreme Court; in the Province of New Brunswick, the Supreme Court; in the Province of Prince Edward Island, the Supreme Court; in the Province of British Columbia, the Supreme Court; in the Province of Manitoba, Her Majesty's Court of Queen's Bench for Manitoba; in the North-West Territories, the Supreme Court of the North-West Territories; and in the District of Keewatin, such court or magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council, published in the Canada Gazette;

In Quebec the court is the Superior Court for the district where the head office of the company is situate: *Dupont v. Compagnie de Moulin*, 11 L. N. 225 (1888).

(e) The expression "Official Gazette" means the Canada Gazette and the Gazette published under the authority of the Government of the Province, where the proceedings for the winding up of the business of the company are carried on, or used as the official means of communication between the Lieutenant-Governor and the people, and if no such Gazette is published, then it means any newspaper published in the Province, which is designated by the court for publishing the notices required by this Act;

(f) The expression "contributory" means a person liable to contribute to the assets of a company under this Act; it also, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, includes any person alleged to be a contributory;

(g) The expression "winding-up order" means an order granted by the court under this Act to wind up the business of the company, and includes any order granted by the court to bring within the provisions of this Act any company in liquidation or in process of being wound up. 45 Vict. chap. 23, secs. 3, 4, 5, 6, 8 and 13, part; 49 Vict. chap. 25, sec. 14.

APPLICATION OF THE ACT.

3. This Act applies to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, [*de jure* or *de facto*] and incorporated trading companies, doing business in Canada, wheresoever incorporated; and—

(a) Which are insolvent; or—

(b) Which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of this Act:

2. This Act does not apply to railway or telegraph companies or to building societies which have not a capital stock. 47 Vict. chap. 39, sec. 1; 62-63 Vict. chap. 43, sec. 5.

The Act applies to companies incorporated by a provincial legislature: *Shoolbred v. Clarke*, 17 S. C. Can. 265 (1890).—Where a Scotch company is being wound up in Scotland, a winding-up order ancillary to that in Scotland may, with the consent of the liquidator appointed there, be taken out in Canada: *Allen v. Hanson*, 18 S. C. Can. 667 (1890).—There is no clashing between this section and the Winding-up Amendment Act of 1889. The latter provides for the voluntary winding-up of companies at the instance of shareholders; this for their compulsory liquidation on the application of creditors. A company incorporated under an Ontario Act and doing business in Ontario come under this section: *Re Ontario Forge Co.*, 25 O. R. 407 (1894).—Where Canadian creditors of an Imperial company are proceeding to execute a judgment here, the English liquidator cannot have the assets removed to England for distribution there: *Quebec Bank v. Bryant*, Q. R. 3 S. C. 122 (1893).—The Act does not apply to a social club incorporated under R. S. Q. Art. 5487 *et seq.*: *In re Montreal City Club*, Q. R. 8 S. C. 527 (1895).

4. The provisions of sections eight to ninety-six, both inclusive, are, in the case of a bank other than a savings bank, subject to the provisions contained in sections ninety-seven to one hundred and four, both inclusive; and, in the

case of an insurance company, the provisions of sections eight to ninety-six, both inclusive, are subject to the provisions contained in sections one hundred and five to one hundred and twenty-three, both inclusive. 45 Vict. chap. 23, sec. 2.

WHEN COMPANY DEEMED INSOLVENT.

5. A company is deemed insolvent—

(a) If it is unable to pay its debts as they become due;

In a petition for an order against a company, the petitioner alleged that the company "is insolvent and utterly unable to pay your petitioner's said debts and its other debts." *Held*, that this was not equivalent to stating that the company was "unable to pay its debts as they became due" and was not a sufficient allegation of the company's insolvency: *Re Rapid City Farmers' Elevator Co.*, 9 Man. 571 (1894).—An affidavit of the president of the company alleging that it is insolvent, but not showing the assets and liabilities, is insufficient: *Re Lake Winnipeg Transportation, etc., Co.*, 7 Man. 255 (1891).

(b) If it calls a meeting of its creditors for the purpose of compounding with them;

(c) If it exhibits a statement showing its inability to meet its liabilities;

(d) If it has otherwise acknowledged its insolvency;

The non-appearance of the company to oppose a petition for a winding-up order is not an acknowledgment of insolvency: *Re Lake Winnipeg, etc., Co.*, 7 Man. 255 (1891). Where insolvency was admitted the company was ordered to be wound up, though a voluntary assignment had previously been made: *Re William Lamb Co.*, 32 O. R. 243 (1900).

(e) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(f) If, with such intent, it has procured its money, goods, chattels, lands or property to be seized, levied on or taken, under or by any process or execution;

(g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in

trade or assets, without the consent of its creditors, or without satisfying their claims;

A company unable to meet its liabilities in full, conveyed the main part of its assets to another company without the consent of its creditors and without satisfying their claims. *Held*, that a winding-up order might issue: *Re Qu'Appelle Valley Co.*, 5 Man. 160 (1888).

(h) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. 45 Vict. chap. 23, sec. 9.

The property of the company was seized under an execution and the sale was to take place January 3rd. The fact that the execution was not satisfied on December 30th made the company insolvent and liable to be wound up: *Re Lake Winnipeg Transportation, etc., Co.*, 7 Man. 255 (1891). It is not sufficient that an execution has been returned *nulla bona*: *Re Rapid City Farmers' Elevator Co.*, 9 Man. 574 (1894).

6. A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure, or compound for the same to the satisfaction of the creditor. 45 Vict. chap. 23, secs. 10 and 11.

It is not sufficient to show that several demands of payment have been made without success unless a demand in writing has been served as prescribed in this section. Sections 5 and 6 are exclusive, and a petitioner must strictly prove one or more of the circumstances therein set forth: *Re Rapid City Farmers' Elevator Co.*, 9 Man. 574 (1894).

PROCEEDINGS FOR WINDING-UP ORDER.

7. The winding up of the business of a company shall be deemed to commence at the time of the service of the

notice of presentation of the petition for winding up. 45 Vict. chap. 23, sec. 12.

Fuchs v. Hamilton Tribune Co., 10 Ont. Pr. R. 409 (1884).

8. When a company becomes insolvent, a creditor for the sum of at least two hundred dollars [or a shareholder, except in the case of banks and insurance corporations, holding shares in the capital stock, *de jure* or *de facto*, of the company to the amount of at least \$500] may, after four days' notice of the application to the company, apply by petition to the court in the Province where the head office of the company is situated, or if there is no head office in Canada, then in the Province where its chief place or one of its chief places of business is situated, for a winding-up order. 45 Vict. chap. 23, sec. 13, part; 62-63 Vict. chap. 43, secs. 4 and 5.

A petition based on a judgment obtained by a third party of which it was alleged the petitioner "is now a *bona fide* holder and owner" is sufficient: *Re Rapid City Farmers' Elevator Co.*, 9 Man. 571 (1894)

The petition on its face should make a sufficient case for the winding-up; and it should be supported by a sufficient affidavit filed before its presentation. Leave to file a supplementary affidavit refused: *Re Kootenay Breving, M. & D. Co.*, 6 B. C. R. 112 (1898).—A creditor whose debt is not yet due may petition: *Re Atlas Canning Co.*, 5 B. C. R. 661 (1897).—A person who is only an hypothecary and not a personal creditor of the company has no right to petition: *Leduc v. Kensington Land Co.*, Q. R. 16 S. C. 213 (1899).

A petition may be presented to a Judge in Chambers: *Re Toronto Brass Co.*, 18 Ont. P. R. 248 (1898).

9. The court may make the order applied for, may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order that it deems just. 45 Vict. chap. 23, sec. 14.

A wide discretion is given to the court by this section. It appeared that the company had made a voluntary assignment for the benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should proceed under the assignment, the application was refused: *Wakefield Rattan Co. v. Hamilton Whip Co.*, 24 O. R. 107 (1893).—A winding-up order will not be made when there are no assets, and the creditor would get nothing by the order: *In re Georgian Bay Ship Canal Co.*, 29 O. R. 358 (1898).—The court will not interfere with a voluntary winding-up by the shareholders unless it is shown that the

rights of the petitioner will be prejudiced by the voluntary winding-up: *Re Oro Fino Mines*, 7 B. C. R. 388 (1900).—The foregoing cases not followed, but held that where an assignment has been made, and most of the creditors are willing that the company should be wound up in that way, the court has no discretion to refuse an order to a creditor who has a substantial interest in the estate: *Re William Lamb Co.*, 32 O. R. 243 (1900).

10. If the company opposes the application, on the ground that it has not become insolvent within the meaning of this Act, or that its suspension or default was only temporary, and was not caused by any deficiency in its assets, and shows reasonable cause for believing that such opposition is well founded, the court, in its discretion, may, from time to time, adjourn the proceedings upon such application for a time not exceeding six months from the date of the application,—and may order an accountant, or other person, to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order. 45 Vict. chap. 23, sec. 15.

11. Upon the service on the company of an order made under the next preceding section, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the company and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control, respectively; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company; and any refusal on the part of the president, directors, officers or employees of the company to give such information, shall be a contempt of the court, and shall be punishable by fine or imprisonment, or by both, in the discretion of the court. 45 Vict. chap. 23, sec. 16.

12. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the court may either refuse the application or make the winding-up order. 45 Vict. chap. 23, sec. 17.

13. The Court may, upon the application of the company, or any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit. 45 Vict. chap. 23, sec. 18.

14. Any shareholder, creditor, assignee, receiver or liquidator of any company which was in liquidation or in process of being wound up on the seventeenth day of May, one thousand eight hundred and eighty-two, may apply, by petition, to the court, asking that the company may be brought within and under the provisions of this Act, and the court may make such order; and the winding up of such company shall thereafter be carried on under this Act:

2. The court, in making such order, may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under this Act, or may appoint some other person to be liquidator of the company. 47 Vict. chap. 39, secs. 2 and 3.

PROCEEDINGS AFTER WINDING-UP ORDER IS MADE.

15. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding up thereof:

2. All transfers of shares, except transfers made to or with the sanction of the liquidators, under the authority of the court, and every alteration in the status of the members of the company, after the commencement of such winding up, shall be void; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up. 45 Vict. chap. 23, sec. 19.

16. When the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes. 45 Vict. chap. 23, sec. 20.

The court will not allow its administration of the company's affairs to be interfered with by other proceedings affecting the estate:

and it is on the principle of allowing a creditor to bring his legal rights into the Master's office, that he is restrained from enforcing his rights at law: *Clarke v. Union Fire Ins. Co.*, 10 P. R. 339 (1884).—Where a case against a company had been argued and judgment was reserved, and a winding-up order was subsequently made, the delibere was discharged: *Molleur v. Pulp & Paper Co.*, M. L. R. 3 S. C. 273 (1887).—Permission was given an employee to sue the company for wages that he might proceed against the directors personally later: *Re Lake Winnipeg, etc., Co., Paulson's Claim*, 7 Man. 602 (1891).—After a winding-up order a judgment creditor cannot bring an action under sec. 61 of R. S. O. 1887 chap. 157 against a contributory for the payment of the amount unpaid on his shares: *Shaver v. Cotton*, 23 Ont. A. R. 426 (1896).

17. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. 45 Vict. chap. 23, sec. 21.

An injunction to restrain a resident of Ontario from proceeding against a vessel of the company in Michigan was refused on its appearing that residents of Michigan were also taking such proceedings there: *Re Lake Superior Co.*, 9 O. R. 277 (1885).—An injunction granted in Ontario to restrain a person residing in Montreal from proceeding with an action against the liquidators in their official capacity before the Quebec Courts: *Re Central Bank and Baxter*, 20 O. R. 214 (1890).—On January 4th a company's goods were under seizure by the sheriff, and the landlord gave notice of a claim for nine months' rent. Notice under section 7 of this Act had been given on December 31st, and on January 5th the liquidator took possession. On January 7th the landlord assumed to levy a distress for the overdue rent, and withdrew on the provisional liquidator undertaking to pay what was due. Held, that the distress was void, and the claim was not a preferential one under section 66: *Fuches v. Hamilton Tribune Co.*, 10 P. R. 409 (1884).—An attachment of the property of a foreign company which was being wound up under the supervision of the Supreme Court of New Brunswick is void: *Salter v. St. Lawrence Co.*, 28 N. S. R. 335 (1896).

18. The court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the court, that all proceedings in relation to the winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit. 45 Vict. chap. 23, sec. 22.

19. The court may, as to it seems just, as to all matters relating to the winding up, have regard to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court:

Creditors who do not attend after notice are presumed to be willing to be bound by the action of those who do attend: *Exchange Bank v. Campbell*, 15 R. L. 373 (1885). As to the action of the Court when there is a conflict between these different bodies, see *Re Central Bank*, 15 O. R. 309 (1887); *Re Alpha Oil Co.*, 12 P. R. 298 (1887); *Re Bank of Liverpool*, 22 N. S. 97 (1889); *Re Commercial Bank*, 9 Man. 342 (1893); *Cloyes v. Darling*, 16 R. L. 649 (1884); *Re Sun Lithographing Co.*, 24 O. R. 200 (1893).

2. In the case of creditors, regard shall be had to the amount of the debt due to each creditor, and in the case of shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company; and the court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting. 45 Vict. chap. 23, sec. 23.

LIQUIDATORS.

20. The court, in making the winding-up order, may appoint a liquidator or more than one liquidator of the estate and effects of the company; but no such liquidator shall be appointed unless a previous notice is given to the creditors, contributories, or shareholders or members in the manner and form prescribed by the court. 45 Vict. chap. 23, sec. 24; 47 Vict. chap. 39, sec. 4.

An appointment made without the notice prescribed by this section will be set aside: *Shoolbred v. Union Fire Ins. Co.*, 14 S. C. Can. 624 (1887). A bank may be appointed a liquidator: *Forsyth v. Bank of Nova Scotia*, 18 S. C. Can. 707 (1890). As to the rules which the Court will follow when the shareholders and creditors recommend different persons as liquidators, see notes under section 101 and the following cases: *Re Central Bank*, 15 O. R. 307 (1889); *Re Alpha Oil Co.*, 12 P. R. 298 (1887); *Re Bank of Liverpool*, 22 N. S. 97 (1889); *Forsyth v. Bank of Nova Scotia*, *supra*; *Re Commercial Bank*, 9 Man. 342 (1893); *Re Assiniboine Valley Co.*, 6 Man. 105 (1889).—

A shareholder may be appointed liquidator of a company: *Re New Westminster Gas Co.*, 5 B. C. R. 618 (1897).

2. [The court may also appoint at any time, when found advisable, one or more inspectors whose duty it shall be to assist and advise the liquidator in the liquidation of the company.] 62-63 Vict. chap. 42, sec. 11.

21. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the court. 45 Vict. chap. 23, sec. 25.

22. The court may, if it thinks fit, after the appointment of one or more liquidators, appoint additional liquidators. 45 Vict. chap. 23, sec. 26.

23. If more than one liquidator is appointed, the court may declare whether any act to be done by a liquidator is to be done by any or all or any one or one or more of the liquidators. 45 Vict. chap. 23, sec. 28.

24. The court may also determine what security shall be given by a liquidator on his appointment. 45 Vict. chap. 23, sec. 28.

The security need not be fixed by the winding-up order; it may be left to the Master: *Shoolbred v. Clarke*, 17 S. C. Can. 265 (1890).

25. If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the court. 45 Vict. chap. 23, sec. 29.

26. The court may, at any time after the presentation of the petition and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company. 45 Vict. chap. 23, sec. 30.

27. A liquidator may resign or may be removed by the court on due cause shown, and every vacancy in the office of liquidator shall be filled by the court. 45 Vict. chap. 23, sec. 31.

Where there is want of harmony between liquidators, the Court will remove one of them on the advice of the creditors: *Cloyes v. Darling*, 16 R. L. 649 (1884); *Exchange Bank v. Campbell*, 15 R. L. 373 (1885). See also *Re Assiniboine, etc., Co.*, 6 Man. 105 (1889).

28. The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members, as the court orders; and if there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the court directs. 45 Vict. chap. 23, sec. 32.

The remuneration of the liquidators cannot be fixed at the time of their appointment; but the Court adopted the suggestions of the meetings as to the proportions in which the several liquidators should share in the amount to be allowed: *Re Commercial Bank*, 9 Man. 342 (1893). The remuneration is not to be increased because three liquidators are to be paid instead of one. The recompense is usually a percentage based chiefly on the time occupied, the work done and the responsibility imposed. After being fixed it will be divided equitably if there are more than one liquidator: *Re Central Bank*, 15 O. R. 309 (1887). In fixing the compensation of the liquidator it is proper to take into account amounts adjusted or set off, but not actually received. A commission of two and a quarter per cent. having been allowed on the amount collected, a further commission of one and a quarter per cent. on \$231,000, adjusted or set off, was allowed. The compensation should be spread over the whole period of liquidation so as to ensure vigilance at all stages: *Re Central Bank, Lye's Claim*, 22 O. R. 247 (1892). The liquidator should furnish proof of the service rendered, work done, etc.: *Exchange Bank v. Campbell*, 15 R. L. 373 (1885); *Re Assiniboine Valley Co.*, 6 Man. 184 (1889). The Court decided to follow the principle followed under the English Winding-up Acts, but reduced the scale adopted there, and allowed \$5 a day for each day of 8 hours, and \$100 additional for preparing the report: *Re Saskatchewan Coal Co.*, 6 Man. 593 (1890).

2. [The court may also determine the remuneration, if any be deemed just, of the inspector or inspectors.] 62-63 Vict. chap. 42, sec. 2.

29. In all proceedings connected with the company a liquidator shall be described as the "liquidator of the (name of company)," and not by his individual name only. 45 Vict. chap. 23, sec. 33.

30. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act. 45 Vict. chap. 23, sec. 34.

Money was paid into Court on an interpleader order. Before judgment a winding-up order was issued. The plaintiff succeeded on the interpleader issue and was held entitled to the money as against the liquidator, although he had filed a claim: *Gatt v. Saskatchewan Coal Co.*, 4 Man. 304 (1887). When a depositor left with the president of a bank, a blank cheque to draw the money if he found an investment, and the president, when the bank was about to suspend, filled up the cheque and drew \$1,200 in bills, which he placed in an envelope addressed to the depositor and left in the vault of the bank, it was held that the money belonged to the bank: *Re Commercial Bank, Robertson's Claim*, 10 Man. 61 (1894).

31. The liquidator may, with the approval of the court, and upon such previous notice to the creditors, contributors, shareholders or members, as the court orders—

(a) Bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be;

A general authorization to sue for and get in the assets of the company is not sufficient: *Freygang v. Davcluy*, Q. R. 2 S. C. 505 (1892). No *reprise d'instance* is necessary in Quebec to continue a pending case: *Ross v. Perras*, Q. R. 5 S. C. 470 (1894).—The approval of the Court should be given before the action is brought; a subsequent ratification is not sufficient: *Common v. McCaskill*, Q. R. 13 S. C. 282 (1897).—The action to recover money paid to a creditor who was aware of the insolvency of the company at the time, belongs to the liquidator: *Blandy v. Kent*, Q. R. 6 Q. B. 196 (1896).—Where a liquidator intervenes in an action and fails, the opposite party is entitled to a judgment for his costs both against the company and the liquidator personally: *Boyd v. Dominion Cold Storage Co.*, 17 Ont. P. R. 468 (1897).

(b) Carry on the business of the company as far as is necessary to the beneficial winding up of the same;

(c) Sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels;

At an auction sale of the company's property by the liquidator a director may become the purchaser: *Re Mabon Coal & G. Co.*, 27 N. S. R. 305 (1894).—The purchaser of the assets of a company from the liquidator has no exclusive right to the name of the company: *Montreal Lithographing Co. v. Sabiston*, [1899] A. C. 610.

(d) Do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company;

(e) Prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and take and receive dividends in respect of such balance in the matter of the bankruptcy, insolvency or sequestration as a separate debt due from such bankrupt or insolvent and ratably with the other separate creditors;

(f) Draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company; raise upon the security of the assets of the company, from time to time, any requisite sum or sums of money; and the drawing, accepting, making or indorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or indorsed by or on behalf of such company in the course of the carrying on of its business; [and no delivery of the whole or any part of the assets of the company shall be necessary to give a lien to any person taking security upon the assets of the company.] 62-63 Vict. chap. 42, sec. 3.

(g) Do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets. 45 Vict. chap. 23, sec. 35.

32. The liquidator may, with the approval of the court, appoint a solicitor or law agent to assist him in the performance of his duties. 45 Vict. chap. 23, sec. 36.

It is preferable to have a solicitor who is totally unconnected with the company which is being wound up; *Re Joseph Hall Manufacturing Co.*, 10 Pr. R. 485 (1884). The solicitor for creditors whose claims are to be contested will not be appointed: *Re Charles Stark Co.*, 15 Ont. Pr. R. 471 (1893).

33. The liquidator may, with the approval of the court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or other debtor

or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon; and may take any security for the discharge of such debts or liabilities, and give a complete discharge in respect of all or any such calls, debts or liabilities. 45 Vict. chap. 23, sec. 37.

The liquidator is not obliged to consult the creditors before applying to the court to approve of a compromise: *Martin v. Bilodeau*, Q. R. 9 Q. B. 330 (1898).

34. Upon the appointment of the liquidator, all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers. 45 Vict. chap. 23, sec. 38.

The directors no longer occupy a fiduciary relation to the company, and may become purchasers of the property of the company from the liquidator: *Chatham National Bank v. McKee*, 24 S. C. Can. 348 (1895).

35. The liquidator shall deposit at interest in some chartered bank or post office savings bank or other Government savings bank designated by the court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars. 45 Vict. chap. 23, sec. 39.

36. Such deposits shall not be made in the name of the liquidator individually, on pain of dismissal; but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator. 45 Vict. chap. 23, sec. 40.

37. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal,—of which production mention shall be made in the minutes of such meeting; and the absence of such mention shall be *prima facie* evidence that such pass book was not produced at the meeting. 45 Vict. chap. 23, sec. 41.

38. The liquidator shall also produce such pass book whenever ordered so to do by the court, and on his refusal

so to do, he may be treated as being in contempt of court. 45 Vict. chap. 23, sec. 42.

39. The liquidator shall be subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever; and obedience by the liquidator to such order may be enforced by the court under the penalty of imprisonment, as for contempt of court or disobedience thereto; and he may be removed, in the discretion of the court. 45 Vict. chap. 23, sec. 43.

On a petition by a mortgagee for the conveyance to him by the liquidator of the company's equity of redemption, the Court has jurisdiction to make the usual order for foreclosure or sale. It may direct an action or sanction summary proceeding: *Re Essex Land Co.*, 21 O. R. 367 (1891).—Where tenders were asked for by a day named, and it was announced that the sale would be then "peremptorily closed," it was held this did not prevent the acceptance of a better offer after the tenders were in: *Re Alger and Sarnia Oil Co.*, 21 O. R. 440 (1891).

40. The liquidator shall, within three days after the date of the final winding up of the business of the company, deposit in the bank appointed or designated as hereinbefore provided, any other money belonging to the estate then in his hands not required for any other purpose authorized by this Act, with a sworn statement and account of such money, and that the same is all that he has in his hands; and he shall incur a penalty not exceeding ten dollars, and not less than ten per cent. per annum interest upon the sums in his hands for every day on which he neglects or delays such payment; and he shall be deemed to be a debtor to Her Majesty for such money, and may be compelled as such to account for and pay over the same. 45 Vict. chap. 23, sec. 44.

41. The money so deposited shall be left for three years in the bank, subject to be claimed by those entitled thereto,

and shall be then paid over, with the interest, to the Minister of Finance and Receiver-General, and if afterwards claimed, shall be paid to the person entitled thereto. 45 Vict. chap. 23, sec. 45.

The liquidators of an insolvent bank passed their final accounts and paid a balance into court. The money was paid out under orders issued by error to a party not entitled. The Receiver-General as trustee for the residue intervened, and asked to have the money refunded. Held, that he was entitled to this, although the three years were not up: *Re Central Bank, Hogaboom v. Receiver-General*, 28 S. C. Can. 192 (1897).—Such money is the property of the Receiver-General, subject to the liability of paying it over to the persons entitled: *Re Central Bank*, 30 O. R. 320 (1899).

CONTRIBUTORIES.

42. As soon as may be after the commencement of the winding up of a company the court shall settle a list of contributories. 45 Vict. chap. 23, sec. 46.

A solvent company issued stock to its shareholders at a discount. It was afterwards freshly incorporated with these shares treated as fully paid up. It became insolvent and was being wound up. It was held that these shareholders were not liable as contributories: *Re Owen Sound Dry Dock Co.*, 21 O. R. 349 (1891).—Where new stock was issued illegally and was *ultra vires* the company, the holders of these shares, should not be placed on the list as contributories: *Re Ontario Express and Transportation Co.*, 21 Ont. A. R. 646 (1894).—Where a promoter buys property for the company, for which paid-up shares are given, and he secretly receives part of them, he may be placed on the list of contributories: *Re Hess Manufacturing Co.*, 23 S. C. Can. 644 (1894).—Holders of shares irregularly issued, who had not repudiated them before the winding-up commences, may be placed upon the list of contributories: *Re Thunder Hill Mining Co.*, 4 B. C. R. 61 (1895).—A shareholder whose shares were forfeited may be placed on the list of contributories. He cannot set up irregularities in the formation of the company: *Common v. McArthur*, 29 S. C. Can. 239 (1898).

43. In the list of contributories, persons who are contributories in their own right shall be distinguished from persons who are contributories as representatives of or liable for the debts of others; and it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, but such heirs or devisees may be added as and when the court thinks fit. 45 Vict. chap. 23, sec. 47.

44. Every shareholder or member of the company, or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise; and the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act. 45 Vict. chap. 23, sec. 48.

45. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act; and the amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid. 45 Vict. chap. 23, sec. 49.

Where a shareholder transferred his stock to avoid liability for calls it was held to be valid although he knew the society was insolvent: *Re Provincial Building Society*, 30 N. B. 628 (1891).

46. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; and in the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate. 45 Vict. chap. 23, sec. 50, part.

47. The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories as trustee, receiver, banker, agent or officer of the company, to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *prima facie* entitled. 45 Vict. chap. 23, sec. 51.

48. The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act. 45 Vict. chap. 23, sec. 52.

49. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories amongst themselves; and the court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same: Provided, however, that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. 45 Vict. chap. 23, sec. 50, part, and sec. 53.

50. The court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post office savings bank or other Government savings bank, to the account of the court, instead of to the liquidator; and such order may be enforced in the same manner as if it had directed payment to the liquidator. 45 Vict. chap. 23, sec. 54.

51. The court shall adjust the rights of the contributories among themselves, and distribute, among the persons entitled thereto, any surplus that remains. 45 Vict. chap. 23, sec. 55.

52. The court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee

of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for moneys, goods and chattels to be seized, and him and them to be safely kept until such time as the court orders. 45 Vict. chap. 23, sec. 56.

53. If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded. 45 Vict. chap. 23, sec. 57.

54. After a winding-up order has been made, the court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the court thinks just; and any books and papers in the possession of the company may be inspected in conformity with the order of the court, but not further or otherwise. 45 Vict. chap. 23, sec. 58.

55. No contributory, creditor, shareholder, or member shall vote at any meeting unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally. 45 Vict. chap. 23, sec. 59.

CREDITORS' CLAIMS.

56. When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company,—a just estimate being made, as far as is possible, of the value of all such debts or claims as are subject to any contingency or sound only in damages, or which, for some other reason, do not bear a certain value:

2. Clerks and other persons in or having been in the employment of the company in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or

wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order. 34 Vict. chap. 23, sec. 60, part; 49 Vict. chap. 46, sec. 1.

There is nothing in this section which alters or interferes with the *lex loci contractus* in case of a claim. The company entered into a lease in Quebec and by the law of that province (Civil Code, Art. 1092) on the insolvency of the company the lease became void at the option of the lessor, and the rent at the end of the term became at once exigible, the lessor was allowed to rank for the full amount of rent, taxes, etc.: *Re Harte and Ontario Express Co.*, 22 O. R. 510 (1892).—An auditor of a company does not come within sub-section 2: *Re Ontario Forge Co.*, 27 O. R. 230 (1896). A president or vice-president entitled to a salary under a resolution of the shareholders comes under the section: *Fane v. Langley*, 20 C. L. T. 9 (1899).

57. The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. 45 Vict. chap. 23, sec. 60, part.

A debtor of an insolvent bank cannot pay his debt in notes of the bank acquired after the commencement of the winding up: *Maritime Bank v. Robinson*, 26 N. B. 297 (1887).—A shareholder, who is also a creditor, cannot set off the debt that is due to him by the bank against the double liability on his shares: *Maritime Bank v. Troop*, 16 S. C. Can. 456 (1889).

58. The property of the company shall be applied in satisfaction of its liabilities and the charges incurred in winding up its affairs; and unless it is otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining shall be distributed amongst the members or shareholders, according to their rights and interests in the company. 45 Vict. chap. 23, sec. 61.

The rule as to interest on claims is as follows: If the assets are not sufficient to pay claims in full, no interest after the date of the winding-up order is added. If there be a surplus, deposits bearing interest will bear interest at the same rate as before the winding up. Holders of drafts, bills of exchange of the bank, etc., will

be allowed interest if they have made a demand and given notice of dishonor, but not otherwise: *Re Commercial Bank*, 10 Man. 187 (1894).

59. The court may fix a certain day or certain days on or within which creditors of the company and others who have claims thereon may send in their claims. 45 Vict. chap. 23, sec. 62.

Leave may be granted to withdraw a claim and file another: *Re Lake Winnipeg Transportation Co.*, 8 Man. 463 (1892).

60. When the liquidator has given such notices of the said day as are ordered by the court, the liquidator may, at the expiration of the time named in the said notices or the last of the said notices, for sending in such claims, distribute the assets of the company, or any part thereof, amongst the persons entitled thereto, having regard to the claims of which the liquidator then has notice; and the liquidator shall not be liable to any person of whose claim the liquidator had not notice at the time of distributing the said assets, or a part thereof, as the case may be, for the assets or any part thereof so distributed. 45 Vict. chap. 23, sec. 63.

61. The liquidator may, with the approval of the court, make such compromise or other arrangement as the liquidator deems expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the company, or whereby the company may be rendered liable. 45 Vict. chap. 23, sec. 64.

There is no power in the Court to enforce a compromise recommended by a majority of the creditors if the liquidator does not ask for it: *Sun Lithographing Co.*, 24 O. R. 200 (1893). But see now the Dominion Statute 62 & 63 V. c. 43, s. 3.

62. If a creditor holds security upon the estate of the company, he shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon; and the liquidator, under the authority of the court, may either consent to the retention of the property and effects constituting such security or on which it attaches, by the creditor, at such specified value,* or he may require from such creditor an assignment and

delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment; and in case of such retention the difference between the value at which the security is retained and the amount of the claim of such creditor shall be the amount for which he may rank as aforesaid; and if a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. 45 Vict. chap. 23, sec. 65.

A creditor must value his security, and after having done so, he cannot withdraw it and enforce his security: *Re B. C. Pottery Co.*, 4 B. C. R. 525 (1895).

63. If the security consists of a mortgage upon ships or shipping, or upon real property, or of a registered judgment or an execution binding real property and excepted from the operation of section sixty-six of this Act, the property mortgaged or bound shall only be assigned and delivered to the creditor, subject to all previous mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens, and upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such previous mortgages, judgments, executions, hypothecs and liens, and if there are mortgages, judgments, executions, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors, or upon their filing their claims specifying their security thereon as of no value, or upon his paying them the value by them placed thereon, or upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens. 45 Vict. chap. 23, sec. 66.

64. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority

of the court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof. 45 Vict. c. 23, sec. 67.

65. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established, as herein provided. 45 Vict. chap. 23, sec. 68.

A mechanic's lien is a preferential claim: *Re Empire Brewing Co.*, 8 Man. 424 (1891).

66. No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company; nor shall any lien, claim or privilege be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding up of the business of the company has commenced; but this section shall not affect any lien or privilege for costs, which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued. 45 Vict. chap. 23, sec. 69, part.

67. Any [liquidator,] creditor or contributory or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared: 62-63 Vict. chap. 42, sec. 15.

2. If a claim or a dividend is objected to, the objection shall be filed in writing with the liquidator together with evidence of the previous service of a copy thereof on the claimant:

3. The claimant shall have six days to answer the objections, or such further time as the court allows, and the contestant shall have three days to reply, or such further time as the court allows:

4. Upon the completion of the issues upon the objections, the liquidator shall transmit to the court all necessary papers relating to the contestation, and the court shall then, on the application of either party, fix a day for taking evidence upon the contestation, and hearing and determining the same:

5. The court may make such order as seems proper in respect to the payment of the costs of the contestation by either party, or out of the estate of the company:

6. If, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right:

7. The court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the court thinks just. 45 Vict. chap. 23, sec. 70; 52 Vict. chap. 32, sec. 15.

FRAUDULENT PREFERENCES.

68. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever (whether such person is its creditor or not), within three months next preceding the commencement of the winding up or at any time afterwards, — and all contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements and in respect to which a winding-up order under this Act is afterwards made, with a person knowing such inability, or having probable cause for believing such inability to exist, or after such inability is public and notorious (whether such person is its creditor or not) shall be presumed to be made with intent to defraud its creditors. 45 Vict. chap. 23, sec. 71.

69. A contract, or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether such person is its creditor or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding up of the business of such company under this Act, or at any time afterwards, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such persons from actual loss or liability by reason of such contract, as the court orders. 45 Vict. chap. 23, sec. 72.

70. All contracts or conveyances made and acts done by a company, respecting either real or personal property, with intent fraudulently to impede, obstruct or delay its creditors in their remedies against it, or with intent to defraud its creditors or any of them,—and so made, done and intended with the knowledge of the person contracting or acting with the company, whether such person is its creditor or not,—and which have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them, or any of them, shall be null and void. 45 Vict. chap. 23, sec. 73.

71. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor,—or if any property, real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any court of competent jurisdiction; and if the same is made within thirty days next before the commencement of the winding up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency. 45 Vict. chap. 23, sec. 74.

The Master in Ordinary is not a Court of competent jurisdiction for the purposes of this section: *Re Sun Lithographing Co.*, 22 O. R. 57 (1892); *Re Ontario Express Co.*, 25 O. R. 247 (1894).

72. Every payment made within thirty days next before the commencement of the winding up under this Act by a company unable to meet its engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by the liquidator by suit or action in any court of competent jurisdiction: but if any valuable security is given up in consideration of such payment, such security or the value thereof shall be restored to the creditor upon the return of such payment. 45 Vict. chap. 23, s. 75.

A fair transaction by a bank after suspension will be upheld: *Exchange Bank v. Stinson*, 8 O. R. 667 (1885). Where a depositor gave his cheque to a debtor of a suspended bank, which the bank accepted for the debtor's notes maturing, no action lies against the depositor as he has received nothing from the bank: *Exchange Bank v. Council*, 8 O. R. 673 (1885); *Ibid v. Stinson, supra*.

73. When a debt due or owing by the company has been transferred within the time and under the circumstances in the next preceding section mentioned, or at any time afterwards, to a contributory who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory to set up, by way of compensation or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory. 45 Vict. chap. 23, sec. 76.

This section applies to all persons indebted or liable in any way to the company, in the same manner and to the same extent as it applies to contributories. 52 Vict. chap. 32, sec. 16.

APPEALS.

74. Any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may, by leave of a judge of the court, appeal therefrom, if the question to be raised on the appeal involves future rights, or if the order or decision is likely to affect other cases of a similar nature in the winding up proceedings, or if the amount involved in the appeal exceeds five hundred dollars:

2. Such appeal shall lie,—

In Ontario, to the Court of Appeal for Ontario;

In Quebec, to the Court of Queen's Bench;

In any of the other Provinces, and in the North-West Territories, to the full court:

3. In the district of Keewatin any person dissatisfied with an order or decision of the court or a single judge, in any proceeding under this Act may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada:

4. All appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to: but no such appeal shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the court appealed from allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the court that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. 45 Vict. chap. 23, sec. 78, part, and sec. 79; 39 Vict. chap. 25, sec. 16.

An appeal lies from the decision of a Judge directing the winding up under this Act of a company which was being wound up under the Ontario Act: *Re Union Fire Ins. Co.*, 13 Ont. A. R. 268 (1886).

75. If the party appellant does not proceed with his appeal, according to the law or the rules of practice, as the case may be, the court appealed to, on the application of the respondent, may dismiss the appeal, with or without costs. 45 Vict. chap. 23, sec. 80.

76. An appeal shall lie to the Supreme Court of Canada, by leave of a judge of the said Supreme Court, from the judgment of the Court of Appeal for Ontario, the Court of Queen's Bench in Quebec, or the full court in any of the other Provinces or in the North-West Territories, as the case may be, if the amount involved in the appeal exceeds two thousand dollars. 45 Vict. chap. 23, sec. 78, part.

PROCEDURE.

77. The powers conferred by this Act upon the court may, subject to the appeal in this Act provided for, be exercised by a single judge thereof; and such powers may be exercised in chambers, either during term or in vacation:

2. [After a winding-up order is made, the court may from time to time, by order of reference, refer and delegate, according to the practice and procedure of such court, to any officer of the court, any of the powers conferred upon the court by this Act, or any Act amending the same, as to such court may seem meet, subject to an appeal according to the practice of the court in like cases.] 52 Vict. chap. 32, sec. 20.

The Master has the same jurisdiction to try claims for unliquidated damages arising from breach of contract as he would have in an administration proceeding: *Clarke v. Union Fire Insurance Co.*, 10 P. R. 339 (1884).—The Master in Chambers cannot refer or delegate matters to the Master in Ordinary: *Re Queen City Refining Co.*, 10 Pr. R. 415 (1884); *Re Joseph Hall Manufacturing Co.*, 10 Pr. R. 485 (1884).—The Court has not power to refer the appointment of a liquidator to the Master: *Re Union Fire Insurance Co.*, 13 Ont. A. R. 268 (1886).—A winding-up order having been made and a liquidator appointed, subsequent proceedings may be referred to the Master: *Ibid.*, 16 Ont. A. R. 161 (1889).—A claim was made for rent. The liquidator contended that the conveyance of the demised premises to the claimant was a fraudulent preference and that the alleged lease was never executed. It was held that the Master had no jurisdiction to adjudicate upon this contention, but that the liquidator should be left to proceed by action under section 11: *Re Sun Lithographing Co.*, 22 O. R. 57 (1892).—The Master is not a competent tribunal to decide questions of fraudulent transfer: *Re Ontario Express Co. and Molsons Bank Claim*, 25 O. R. 247 (1894).—A judge in chambers may make a winding-up order: *Re Toronto Brass Co.*, 18 Ont. P. R. 248 (1898).—A local judge of the Supreme Court has no jurisdiction to make a winding-up order: *Re Kootenay Brewing Co.*, 7 B. C. R. 131 (1898).

78. [Every order of the court or judge for the payment of money or costs, charges or expenses made under this Act shall be deemed a judgment of the court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any superior court obtained in any suit may bind lands or be enforced in the province where the court making the same is situate.

2. The practice from time to time in force in the superior courts or in any superior court in the province where any such order is made, with respect to the discovery of assets of judgment debtors, shall be applicable to and may be availed of in like manner for the discovery of the assets of any person who by such order is ordered to pay any money or costs, charges or expenses.] 58-59 Vict. chap. 18, sec. 1.

79. Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may be attached and garnisheed in the same manner as debts due to a judgment debtor may be attached and garnisheed by a judgment creditor in any province where the attachment and garnishment of debts is allowed by law. 46 Vict. chap. 23, sec. 2.

80. In any action, suit, proceeding or contestation under this Act, the court may order the issue of a writ of subpoena *ad testificandum* or of subpoena *duces tecum*, commanding the attendance, as a witness, of any person who is within Canada. 45 Vict. chap. 23, sec. 81.

81. The court may, after it has made a winding-up order, summon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, estate or effects of the company; and the court may require any such officer or person to produce any book, paper, deed, writing or other document in his custody or power relating to the company:

2. If any person so summoned, after being tendered a reasonable sum for his expenses, refuses, without a lawful excuse, to attend at the time appointed, the court may cause such person to be apprehended and brought up for examination; but in cases in which any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up, to determine all questions relating to such lien. 45 Vict. chap. 23, sec. 82.

82. The court or the person so named may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner

aforsaid, concerning the affairs, dealings, estate or effects of the company, and may reduce to writing the answers of any such person, and require him to subscribe the same; and if such person, without lawful excuse, refuses to answer the questions put to him, he shall be liable to be punished as for contempt of court. 45 Vict. chap. 23, sec. 83.

83. When, in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the court thinks fit. 45 Vict. chap. 23, sec. 84; 47 Vict. chap. 39, sec. 6.

84. The courts of the various provinces, and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders, of the two courts, or by an order of the Supreme Court of Canada. 45 Vict. chap. 23, sec. 86.

85. When any order made by one court is required to be enforced by another court, an office copy of the order so made, certified by the clerk or other proper officer of the court which made the same, and under the seal of such court, shall be produced to the proper officer of the court required to enforce the same, and the production of such copy shall be sufficient evidence of such order having been made; and thereupon such last mentioned court shall take such steps in the matter as are requisite for enforcing such order, in the same manner as if it was the order of the court enforcing the same. 45 Vict. chap. 23, sec. 87.

86. The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the court, shall apply, as far as practicable to all pleadings and proceedings under this Act; and any court before which such proceedings are being carried on shall have full power and authority to apply the appropriate rules as to amendments of the proceedings. 45 Vict. chap. 23, sec. 88, part.

87. No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded under the rules and practice of the court. 45 Vict. chap. 23, sec. 88, part.

88. Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada, before any judge of a court of record, any commissioner for taking affidavits to be used in any court in Canada, any notary public, the chief municipal officer of any town or city, any British consul or vice-consul, or any person authorized by or under any statute of Canada, or of any Province, to take affidavits. 45 Vict. chap. 23, sec. 89.

89. All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal, or stamp or signature, as the case may be, of any such court, judge, notary public, commissioner, justice, chief municipal officer, consul, vice-consul, liquidator or other person attached, appended or subscribed to any such affidavit, affirmation or declaration, or to any other document to be used for the purposes of this Act. 45 Vict. chap. 23, sec. 90.

90. Any powers by this Act conferred on the court are in addition to, and not in restriction of any other powers subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, for the recovery of any call or other sums due from such contributory or debtor, or his estate; and such proceedings may be instituted accordingly. 45 Vict. chap. 23, sec. 92.

91. All costs, charges and expenses properly incurred in the winding up of a company, including the remuneration

of the liquidator, shall be payable out of the assets of the company, in priority to all other claims. 45 Vict. chap. 23, sec. 93.

92. In Ontario, the judges of the High Court of Justice; in Quebec, the judges of the Court of Queen's Bench; and in the other provinces the judges of the court, or a majority of the judges in each case, of whom the chief justice shall be one, from time to time may make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and may make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel, and by or to officers of courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act. 45 Vict. chap. 23, sec. 97.

93. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, unless otherwise specially provided, shall, as nearly as may be, be the same as those of the court in other cases. 45 Vict. chap. 23, sec. 98.

UNCLAIMED DIVIDENDS.

94. All dividends deposited in a bank and remaining unclaimed at the time of the final winding up of the business of the company, shall be left for three years in the bank where they are deposited, subject to the claim of the person entitled thereto,—and if still unclaimed, shall then be paid over by such bank, with interest accrued thereon, to the Minister of Finance and Receiver-General,—and, if afterwards duly claimed, shall be paid over to the persons entitled thereto. 45 Vict. chap. 23, sec. 91.

See *Hogaboom v. Receiver-General of Canada*, 28 S. C. R. 192 (1897).

OFFENCES.

95. Every person who, with intent to defraud or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty

of a misdemeanor and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any gaol or place of confinement for any term less than two years, with or without hard labor. 45 Vict. chap. 23, sec. 85.

An officer or employee of the company guilty of such an offence is liable to seven years' imprisonment: Criminal Code, 1892, sec. 363.

96. When a winding-up order is made, if it appears in the course of such winding-up that any past or present director or manager, officer or member of the company is guilty of any offence in relation to the company for which he is criminally liable the court may, on the application of any person interested in such winding-up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company. 45 Vict. chap. 23, sec. 95.

PROVISIONS APPLICABLE TO BANKS.

97. The provisions of sections ninety-eight to one hundred and four, both inclusive, apply to banks only, not including savings banks. 45 Vict. chap. 23, sub-title.

98. In the case of a bank, the application for a winding-up order shall be made by a creditor for a sum of not less than one thousand dollars, and the court shall, before making the order, direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators. 47 Vict. chap. 39, sec. 7, part.

99. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank or other person who usually presides at a meeting of shareholders, shall preside; the court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment, the creditors shall appoint a chairman. 47 Vict. chap. 39, sec. 7, part.

100. In taking a vote at such meeting of shareholders, regard shall be had to the number of votes conferred by law or by the regulations of the bank on each shareholder present or represented at such meeting; and in the case of

creditors, regard shall be had to the amount of the debt due to each creditor. 47 Vict. chap. 39, sec. 7, part.

101. The chairman of each meeting shall report the result thereof to the court, and if a winding-up order is made, the court shall appoint [one or more liquidators, not exceeding] three liquidators, to be selected in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively. 47 Vict. chap. 39, sec. 7, part; 52 Vict. chap. 32, sec. 7.

It is desirable that disinterested persons should be appointed. Where the double liability of a bank is likely to be called up, the nominee of the creditors is naturally to be preferred to that of the shareholders: *Re Central Bank*, 15 O. R. 309 (1887). The English cases under the Winding-up Act lay down rules which it is desirable to follow. Other things being equal, the Court will adopt the recommendation of those most interested in the liquidation. Where a company was being wound up by the sheriff of the county under the Ontario Act, and the assets, books, etc., were there, the Court appointed him liquidator on the nomination of the body of creditors over an accountant outside the county proposed by the petitioning creditor: *Re Alpha Oil Co.*, 12 Pr. R. 298 (1887). The judge appointed the nominees of the creditors as liquidators of the insolvent bank, the creditors objecting to the nominees of the shareholders on the ground that they were shareholders, and, as such, their interests were opposed to the purpose of the proceeding. On appeal the Court was equally divided as to whether the order should be sustained or set aside: *Re Bank of Liverpool*, 22 N. S. 97 (1889). There is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators: *Forsyth v. Bank of Nova Scotia*; *Re Bank of Liverpool*, 18 S. C. Can. 707 (1890). The Court is confined to a selection between the persons nominated at these meetings; but is not bound to accept the choice of the majority; it must exercise its own discretion. If the creditors and shareholders differ and the bank be solvent, the nominees of the latter will be preferred, other things being equal. If the bank be insolvent, or its position doubtful, the wishes of the creditors will have particular regard. It is important that the chief liquidator should have experience in banking. It is undesirable to appoint a debtor of the bank, even if it holds securities, if these be at all doubtful: *Re Commercial Bank of Manitoba*, 9 Man. 342 (1893).

102. [If no one has been so nominated, the liquidator or liquidators shall be chosen by the court.] 52 Vict. chap. 32, sec. 18.

103. The liquidators shall ascertain, as nearly as possible, the amount of notes of the bank intended for circulation and actually outstanding, and shall reserve, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if that is not made until after the expiration of the said time, dividends on such part of the said amount in respect of which claims are not filed; and if claims are not filed and dividends applied for in respect of any part of the said amount before the period herein limited, the dividends so reserved shall form the last or part of the last dividend. 45 Vict. chap. 23, sec. 104.

104. Publication in the "Canada Gazette" and in the official gazette of each province of Canada, and in two newspapers issued at or nearest the place where the head office of a bank is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of bank notes in circulation; and if the head office is situate in the Province of Quebec, one of the newspapers in which publication is to be made shall be a newspaper published in English and the other a newspaper published in French. 45 Vict. chap. 23, sec. 105.

PROVISIONS APPLICABLE TO LIFE INSURANCE COMPANIES.

105. The provisions of sections one hundred and six to one hundred and fourteen, both inclusive, apply only to life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the life insurance business of such companies. 45 Vict. chap. 23, sub-title.

106. Except in the cases provided for in the thirty-second and thirty-third sections of "The Insurance Act," a company shall be liable to be dealt with in the manner herein prescribed for the case of insolvency, whenever its license has expired or been withdrawn under the said Act, and has not been renewed within thirty days after such expiry or withdrawal. 40 Vict. chap. 42, sec. 15, part.

107. In case of the insolvency of any company, the deposits of such company held by the Minister of Finance and Receiver-General and the assets held by the trustees under "The Insurance Act," shall be applied *pro rata* towards the discharge of all claims of policy holders in Canada duly

authenticated against such company. 40 Vict. chap. 42, sec. 15, part; 45 Vict. chap. 23, sec. 107.

108. Upon the insolvency of any such company and the making of a winding-up order under this Act, the policy holders in Canada shall be entitled to claim for the full net values of their several policies at the time of the winding-up order (including bonus additions and profits accrued), less any amount previously advanced by the company on the security of the policy, and such claims shall rank with judgments obtained and claims matured on Canadian policies, in the distribution of the assets.

2. [The liquidator may require the superintendent of insurance to value or to procure to be valued under his supervision the policies before mentioned, such valuation to be made on the basis prescribed in the Insurance Act; and the expenses of such valuation, at a rate of three cents for each policy or bonus addition so valued shall be retained by the Minister of Finance and Receiver-General from the securities held by him.] 62-63 Vict. chap. 43, sec. 6.

3. Upon the completion by the liquidator of the statement to be prepared by him of all judgments against the company upon policies in Canada, and of all claims upon policies matured or outstanding as aforesaid, the court shall cause the securities held by the Minister of Finance and Receiver-General for such company, and the assets held by the trustees provided in "The Insurance Act," or any part of them, to be sold or realized in such manner and after such notice and formalities as the court appoints:

4. The proceeds thereof, after paying expenses incurred, shall, except in so far as they have been applied, under this Act, to effect a re-insurance of policies, be distributed *pro rata* amongst the claimants according to such statement; and if the said proceeds are not sufficient to cover in full all claims recorded in the statement, such policy holders shall not be barred from any recourse they have, either in law or equity, against the company issuing the policy or against any shareholder or director thereof, other than for a share in the distribution of the proceeds above mentioned, or in any distribution of the general property and assets of the company, other than the deposit and the assets vested in trustees:

Sub-section 5 was repealed by section 7 of the Winding-up Amendment Act, 1899.

109. Whenever the company or the liquidator or the holder of the policy or contract of insurance exercises any right, which it or he has, to cancel the policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. 45 Vict. chap. 23, sec. 108, part.

110. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing, by the books and records of the officers of the company, to be creditors or claimants under the two sections next preceding, and of the amounts due to each such person thereunder, and every such person shall be collocated and ranked as and shall be entitled to the rights of a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action; but any such collocation may be contested by any person interested, and any person who is not collocated or who is dissatisfied with the amount for which he is collocated, may file his own claim:

2. A copy of such statement, certified by the liquidator, shall forthwith, after the making of such statement, be filed in the office of the superintendent of insurance at Ottawa; and notice of such filing shall forthwith be given by the liquidator by notice in the Canada Gazette and in the official Gazette of each Province of Canada, and in two newspapers issued at or nearest the place where the head office in Canada of the company is situate; and the liquidator shall also, forthwith, send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. 45 Vict. chap. 23, sec. 109.

111. The holder of a policy or contract of life insurance, upon which a claim accrues after the date of the winding-up order and before the expiration of thirty days after the filing, in the office of the superintendent of insurance, of the statement referred to in the next preceding section, shall be entitled to claim as a creditor for the full net amount of such claim—less any amount previously advanced by the company on the security of the

policy or contract; and the said statement and the dividend sheet shall, if necessary, be amended accordingly:

2. No claim which accrues after the expiration of the thirty days above mentioned, shall rank upon the estate unless and until there is sufficient to pay all creditors in full. 45 Vict. chap. 23, sec. 110.

112. If, before the expiration of the thirty days hereinbefore mentioned, the holder of a policy or contract of life insurance, on which a claim has not accrued, signifies, in writing, to the liquidator, his willingness to accept an insurance in some other company for the amount which can be secured by the dividend on his claim to which such holder is or may become entitled, the liquidator may, with the sanction of the court, effect for such holder an insurance to the amount aforesaid in another company or companies, approved of by the superintendent of insurance, and may apply to that purpose the dividend on his claim to which such holder is or may become entitled; but such insurance shall be effected only as part of a general scheme for the assumption, by some other company or companies, of the whole or part of the outstanding risks and liabilities of the insolvent company. 45 Vict. chap. 23, sec. 111.

113. If the company is licensed under "The Insurance Act," the liquidator shall report to the superintendent of insurance once in every six months, or oftener as the superintendent requires, on the condition of the affairs of the company, with such further particulars as the superintendent requires. 45 Vict. chap. 23, sec. 112.

114. Publication in the Canada Gazette and in the official Gazette of each province of Canada, and in two newspapers issued at or nearest the place where the head office in Canada of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of policies or contracts of insurance in respect of which no notice of claim has been received. 45 Vict. chap. 23, sec. 106.

PROVISIONS APPLICABLE TO INSURANCE COMPANIES OTHER THAN LIFE INSURANCE COMPANIES.

115. The following provisions of this Act, apply only to insurance companies other than life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the insurance business of such

companies which is not life insurance business. 45 Vict. chap. 23, sub-title.

116. Any company shall be deemed insolvent upon its failure to pay any undisputed claim arising, or loss insured against, in Canada, upon any policy held in Canada, for the space of sixty days after becoming due, or, if disputed after final judgment and tender of a legal valid discharge,—and (in either case) after notice thereof to the Minister of Finance and Receiver-General:

2. Provided, that in any case when a claim for loss is by the terms of the policy payable on proof of such loss, without any stipulated delay, the notice to the Minister of Finance and Receiver-General under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due. 38 Vict. chap. 20, sec. 16, part.

117. Any deposit held by the Minister of Finance and Receiver-General for policy holders, shall be applied *pro rata* towards the payment of all claims duly authenticated against such company, upon or in respect of policies issued to policy holders in Canada. 38 Vict. chap. 20, sec. 16, part; 45 Vict. chap. 23, sec. 114, part.

118. Holders of policies or contracts of insurance on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as creditors, for a part of the premium paid, proportionate to the period of their policies or contracts respectively unexpired at the date of the winding-up order; and such return or unearned premium shall rank with judgments obtained and claims accrued, in the distribution of the assets:

2. Upon the completion of the statement to be prepared by the liquidator under this Act, the court shall cause the securities held by the Minister of Finance and Receiver-General for such company, or any part of them, to be sold in such manner and after such notice and formalities as the court appoints; and the proceeds thereof, after paying expenses incurred, shall (except in so far as they have been applied under this Act to effect a re-insurance of the policies) be distributed *pro rata* amongst the claimants according to such statement; and if the proceeds are not sufficient to cover in full all claims recorded in the statement, such policy holders shall not be barred

from any recourse they have either at law or in equity against the company issuing the policy, other than that for a share in the distribution of the proceeds of the securities held for such company by the Minister of Finance and Receiver-General:

3. Whenever the company or the liquidator, or the holder of the policy or contract of insurance exercises any right which it or he has to cancel the policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. 38 Vict. chap. 20, sec. 17, part; 45 Vict. chap. 23, sec. 115, part.

119. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing, by the books and records of the officers of the company, to the creditors or claimants under the next preceding section, and of the amounts due to each such person thereunder; and every such person shall be collocated and ranked as and shall be entitled to the rights of a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action; but any such collocation may be contested by any person interested, and any person not collocated or dissatisfied with the amount for which he is collocated, may file his own claim:

2. A copy of such statement, certified by the liquidator shall, forthwith after the making of such statement, be filed in the office of the superintendent of insurance, at Ottawa, and notice of such filing shall be forthwith given by the liquidator by notice in the Canada Gazette, and in the official Gazette of each province of Canada, and in two newspapers issued at or nearest the place where the head office in Canada of the company is situate; and the liquidator shall also forthwith send by mail, pre-paid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known—and in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. 45 Vict. chap. 23, sec. 116.

120. The holder of a policy or contract of insurance, other than life insurance, upon which a claim accrues after the date of the winding-up order, and before the expiration of thirty days after the filing, in the office of the

superintendent of insurance, of the statement referred to in the next preceding section, shall be entitled to claim, as a creditor, for the full net amount of such claim; and the said statement and the dividend sheet shall, if necessary, be amended accordingly:

2. No claim which accrues after the expiration of the thirty days hereinbefore mentioned, shall rank upon the estate, unless and until there is sufficient to pay all creditors in full. 45 Vict. chap. 23, sec. 117.

121. Before the expiration of the thirty days above mentioned, the liquidator may, with the sanction of the court, arrange with any incorporated insurance company, approved of for such purpose by the superintendent of insurance, for the re-insurance by such company of the outstanding risks of the insolvent company, and for the assumption by such company of the whole or any part of the other liabilities of the insolvent company; and in case of such arrangement the liquidator may pay or transfer to such company, such of the assets of the insolvent company as may be agreed on as the consideration for such re-insurance or assumption, and in such case the arrangement for re-insurance shall be in lieu of the claim for unearned premium: Provided always, that any remaining assets of the insolvent company shall be retained by the liquidator as a security to the creditors for the payment of their claims, and shall, if necessary, be so applied, and shall not be returned to the company, except on the order of the court after the satisfaction of such claims. 45 Vict. chap. 23, sec. 118.

122. If the company is licensed under "The Insurance Act," the liquidator shall report to the superintendent of insurance once in every six months, or oftener, as the superintendent requires, on the condition of the affairs of the company, with such further particulars as the superintendent requires. 45 Vict. chap. 23, sec. 119.

123. Publication in the Canada Gazette, and in the official Gazette of each province of Canada, and in two newspapers issued at or nearest the place where the head office of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors are to be notified, shall be sufficient notice to holders of policies or contracts of insurance, in respect of which no notice of claim has been received. 45 Vict. chap. 23, sec. 113.

52 VICTORIA, CHAPTER 32.

An Act to amend "The Winding-up Act," chapter one hundred and twenty-nine of the Revised Statutes.

[Assented to 16th April, 1889.]

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

SHORT TITLE.

1. This Act may be cited as "The Winding-up Amendment Act, 1889."

INTERPRETATION.

2. The expressions mentioned in section two of "The Winding-up Act" whenever they occur in this Act, have the meaning assigned to them respectively by the said section two; and this Act shall be read with and construed as forming part of "The Winding-up Act."

APPLICATION OF ACT.

3. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of any Act of the late Province of Canada, or of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada:

There is no clashing between this section and section 3 of the Winding-up Act, R. S. C. chap. 129. This provides for the voluntary winding up of these companies at the instance of shareholders; the other for the compulsory liquidation of companies on the application of creditors: *Re Ontario Bolt & Forge Co.*, 25 O. R. 407 (1894). —A company incorporated under the Companies Act, 1890 (B. C.) may be put into compulsory liquidation and wound up under this Act: *Re B. C. Iron Works Co.*, 6 B. C. R. 536 (1899).

2. This Act does not apply to railway or telegraph companies or to building societies which have not a capital stock [*de jure* or *de facto*]. 62-63 Vict. chap. 43, sec. 5.

WINDING UP.

4. The court may make a winding-up order:—

(a) Where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;

(b) Where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;

(c) When the company is insolvent within the meaning of "The Winding-up Act";

(d) When the capital stock [*de jure* or *de facto*] of the company is impaired to the extent of twenty-five per cent. thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year;

(e) When the court is of opinion that it is just and equitable that the company should be wound up.

5. The application for such winding-up order may, in the cases mentioned in paragraphs (a), (b) and (c) of the next preceding section, be made by the company or by a shareholder, and in the other cases mentioned in the said section, the application may be made by a shareholder holding shares in the capital stock [*de jure* or *de facto*] of the company to the amount of at least five hundred dollars.

6. Such application shall be by petition to the court in the province where the head office of the company is situated, or where the chief place of business in Canada is situated, if the head office is not in Canada.

7. The powers of the court in respect to such application and the subsequent proceedings thereon shall be the same as nearly as may be as if the application were made by a creditor under the provisions of "The Winding-up Act."

8. If the company opposes the application on the ground that it has not become insolvent, or that its suspension or default was only temporary, and was not caused by any deficiency in its assets, or that the capital stock [*de jure* or *de facto*] is not impaired to the extent aforesaid, or that such impairment does not endanger the capacity of the

company to pay its debts in full, or that there is a probability that the lost capital will be restored within a year or within a reasonable time thereafter, and shows reasonable cause for believing that such opposition is well founded, the court, in its discretion, may, from time to time, adjourn proceedings upon such application, for a time not exceeding six months from the date of the application, and may order an accountant or other person to inquire into the affairs of the company and to report thereon within a period not exceeding thirty days from the date of such order.

9. Sections eleven and twelve of "The Winding-up Act" extend to an order made under the next preceding section of this Act.

10. The following sections of this Act apply in every case in which a winding-up order is made, whether under "The Winding-up Act" or this Act.

11. The court may, by any order made after the winding-up order and the appointment of a liquidator, dispense with notice to creditors, contributories, shareholders, or members of the company as required by the said Act, where in its discretion such notice may properly be dispensed with.

12. The court may provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the said Act or this Act, without the sanction or intervention of the court; and where a provisional liquidator is appointed it may limit and restrict his powers by the order appointing him.

13. In directing meetings of creditors, contributories, shareholders or members of the company to be held as provided in the said Act, the court may either appoint a person to act as chairman of such meeting, or direct that a chairman be appointed by the persons entitled to be present at such meeting; and in case the appointed chairman fails to attend the said meeting, the persons present at the meeting may elect a chairman qualified, who shall perform the duties prescribed by the said Act.

14. The liquidator may give notice in writing to creditors who have sent in their claims to him, or of whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the court on a day to be named in such notice,

and prove their claims to the satisfaction of the court; and the court may allow or disallow the said claims; and in case any creditor does not attend in pursuance of such notice his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof. 55-56 Vict. chap. 28, sec. 1.

15. Section sixty-seven of the said Act is hereby amended by inserting after the word "Any" in the first line of the said section the word "liquidator."

16. Section seventy-three of the said Act shall apply to all persons indebted or liable in any way to the company, in the same manner and to the same extent as it now applies to contributories.

17. Section one hundred and one of the said Act is hereby amended by inserting before the words "three liquidators" in the third line of the said section, the words "one or more liquidators, not exceeding."

18. Section one hundred and two of the said Act is hereby repealed and the following is substituted therefor:

"102. If no one has been so nominated, the liquidator or liquidators shall be chosen by the court."

19. The court shall have the same power and jurisdiction to cause or allow the service of process or proceedings under the said Act and this Act, to be made on persons out of the jurisdiction of the said court in the same manner, and with the like effect, as in ordinary actions or suits within the ordinary jurisdiction of the court, but this provision shall not apply to service made before the passing of this Act.

20. Sub-section two of section seventy-seven of the said Act is hereby repealed, and the following substituted therefor:—

"2. After a winding-up order is made, the court may, from time to time, by order of reference, refer and delegate, according to the practice and procedure of such court, to any officer of the court, any of the powers conferred upon the court by this Act, or any Act amending the same, as to such court may seem meet, subject to an appeal, according to the practice of the court in like cases."

21. The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court.

55-56 VICTORIA, CHAPTER 28.

An Act further to amend "The Winding-up Act."

[Assented to 9th July, 1892.]

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

1. Section fourteen of the Winding-up Amendment Act, 1889, is hereby amended by inserting in the second line thereof after the word "him" the words "or of whose claim he has notice."

2. Whenever a company is being wound up and the realization and distribution of its assets has proceeded so far that in the opinion of the court it becomes expedient that the liquidator should be discharged, and the balance remaining in his hands of the moneys and assets of the company can be better realized and distributed by the court, the court may make an order discharging the liquidator and for payment, delivery and transfer into court, or to such officer or person as the court may direct, of such moneys and assets, and the same shall be realized and distributed, by or under the direction of the court, among the persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the liquidator; the court may likewise make an order directing how the books, accounts and documents of the company and of the liquidator may be disposed of, and may order that they be deposited in court or otherwise dealt with as may be thought fit.

See *Hogaboom v. Receiver-General*, 28 S. C. CAN. 192 (1897).

3. This Act may be cited as the Winding-up Amendment Act, 1892.

58-59 VICTORIA, CHAPTER 18.

An Act further to amend "The Winding-up Act."

[Assented to 22nd July, 1895.]

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

6. Section seventy-eight of the Winding-up Act, being chapter one hundred and twenty-nine of the Revised Statutes, is hereby repealed and the following substituted therefor:—

"78. Every order of the court or judge for the payment of money or costs, charges or expenses made under this Act shall be deemed a judgment of the court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any superior court obtained in any suit may bind lands or be enforced in the province where the court making the same is situate.

"2. The practice from time to time in force in the superior courts or in any superior court in the province where any such order is made, with respect to the discovery of assets of judgment debtors shall be applicable to and may be availed of in like manner for the discovery of the assets of any person who by such order is ordered to pay any money or costs, charges or expenses."

62-63 VICTORIA, CHAPTER 43.

An Act further to amend the Winding-up Act.

[Assented to 11th August, 1899.]

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

1. This Act may be cited as the Winding-up Amendment Act, 1899.

2. The expressions "company," "contributory" and "court," wherever they occur in this Act have the meanings assigned to respectively in section 2 of the Winding-up Act, and this Act shall be read with and construed as forming part of the Winding-up Act, and the Winding-up Amendment Act, 1889.

3. Where any compromise or arrangement is proposed between a company, which is, at the time of the passing of this Act or afterwards, in the course of being wound up either voluntarily, or by or under the supervision of the Court, under the provisions of the Winding-up Act or of any amendment thereto, and the creditors of the company, or by and between any such creditors or any class or classes of such creditors and the company, the Court, in addition to any others of its powers, may, on the application in a summary way of any creditor or of the liquidator, order that a meeting of such creditors or class or classes of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number representing three-fourths in value of such creditors or class or classes of creditors present, either in person or by proxy, at such meeting, agree to any arrangement or compromise, such arrangement or compromise, if sanctioned by an order of the Court, shall be binding on all such creditors, or on such class or classes of creditors as the case may be, and also on the liquidator and contributories of the company.

4. Section 8 of the Winding-up Act is hereby amended by inserting immediately after the word "dollars" in the second line thereof the following words: "or a shareholder except in the case of banks and insurance corporations, holding shares in the capital stock of the company, or to the amount of at least five hundred dollars;" and all companies now being wound up under a winding-up order made upon the application of a shareholder holding shares as aforesaid, are hereby declared to be in the same position as if the order had also been applied for under the said section 8 as hereby amended, and had been made in pursuance of the provisions of the Winding-up Act, as well as of the provisions of the Winding-up Amendment Act, 1889.

Section 8 has been amended by the insertion of these words, *ante* p. 298.

5. The words "capital stock" where they occur in section 3 of the Winding-up Act and in section 8 thereof as hereby amended, and in sections 3, 4, 5 and 8 of the Winding-up Amendment Act, 1889, shall mean and be taken to have heretofore meant a capital stock either *de jure* or *de facto*.

6. Sub-section 2 of section 108 of the said Winding-up Act is hereby repealed and the following sub-section substituted therefor:—

2. The liquidator may require the Superintendent of Insurance to value, or procure to be valued under his supervision, the policies before mentioned, such valuation to be made on the basis prescribed in the Insurance Act; and the expenses of such valuation, at a rate of three cents for each policy or bonus addition so valued shall be retained by the Minister of Finance and Receiver-General from the securities held by him.

Section 108 has been amended by the insertion of this sub-section, *ante* p. 329.

7. Sub-section 5 of the said section 108 is hereby repealed.

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