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GILBART LECTURES, 1899*

BY J. R. PAGET, ESQ., LL.D., BARRISTER-AT-LAW

THE legality or illegality of a custom does not depend on statute alone.

There is the common law to be reckoned with. And though, as I have shown you, the common law is now to be regarded as a progressive system, assimilating to itself universal customs as soon as they are ripe for the process, so that where you find a universal custom you may treat it as part of the law merchant or common law without waiting for the decision of a court, and though the standard thus set up may be a more liberal one and might authorise a trade or business custom which might have failed to pass the other standard; notwithstanding all this, still even the modern common law exercises a restraining influence over the assertion of new customs of trade or business, at any rate when they are put forward as binding outsiders.

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What, then, are the relations between this common law and the customs of a trade or business? The text books generally tell us the custom of a trade or business must not be contrary to the general law. But they generally say the same thing about the universal customs of merchants, and quote *Crouch v. the Credit Foncier* as an authority for both propositions; so that does not help us much. Or they mix up in a provoking manner the consideration of this point, and the further one of the reasonableness of the custom. They may cover the same ground, but I should like, if I can, to keep them separate.

And we may start from this. The custom of one section of the mercantile community cannot alter the common law, including therein the law merchant, nor can it add thereto. The customs of bankers, as I said before, cannot be put on the same footing as the universal customs of merchants. You may be the Lords or the Commons, whichever you like, but you are not the whole mercantile legislative body.

So we must take this common law as we find it.

Then how far are we bound by it? How far can we counteract or circumvent it by a custom, as against outsiders? Now here I think we must discriminate to some extent. To my mind, the general or common law is that which applies absolutely to all sorts and conditions of men within the realm; it is constituted of general rules affecting the whole community, when it absorbs a custom of merchants that binds everybody, merchant or not; where you have a bill case between a guardsman and a money-lender, the rules of the common law and law merchant apply just as they would between two banks.

This common law and these rules exist independently of the Courts; their enunciation by the Courts only affords them, so to speak, recognition or publication. But when laid down by the Courts, or even without that sanction, this, which I shall call the real general common law, is as efficacious, as imperative, as statute law. As we have seen, even universal custom of merchants cannot repeal it, or claim validity where it contravenes it. And you cannot put the case of custom of a trade higher than universal custom.

So I think we may take it that any custom of a trade or business which ran directly counter to the rules of this general common law could not hold water.

For instance, these rules stigmatise certain things not exactly as criminal, but as immoral or undesirable, on grounds of public policy. No custom would validate a contract obnoxious to the common law on those grounds.

These rules further impose disabilities, as on infants, married women, and the like. No custom could give effect to any dealing which ignored, or sought to obviate, such disabilities.

But outside all this there seems to me to be a region where custom of a particular section of the mercantile community may, and does, operate freely.

A good many people seem to think that, whenever you get two or more judges together, every word they say, whatever may be the subject they are dealing with, is to be taken as laying down common law. That I do not believe. The fact is, as I have above suggested, that it is only when the rule laid down is of universal application that it ranks as general law. When the decision goes further, when it applies the rule to a particular class of the community, then so far as it ceases to be of general application, it ceases to be an exposition of the common or general law, it forms no part thereof, and is not entitled to the same respect or obedience.

This seems to me to be the proper conclusion from authorities which I have carefully considered. Or you may possibly explain the position by saying that though you do not dispute the rule as laid down, you avoid the consequences by custom, as you might do by express contract, and you practically contract yourself out of the resulting liabilities. The latter contention seems, however, running very near the rule that custom must not infringe the general law, and I prefer the other argument.

Be this as it may, the fact remains that wherever a particular rule of the general law is so applied by the Courts as to weigh hardly upon a particular section of the mercantile community, that section may within reasonable limits redress the balance by setting up a custom which may bind even outsiders and relieve that section of the mercantile community from the hardship which would otherwise accrue.

The sort of idea seems to be that so long as the law does not invade your particular domain, you must not trespass over its boundary; if it makes an incursion on you, you may protect yourself and repel it.

I can give no other meaning to the judgment of Lord Esher, which I am about to quote, and Lord Esher's authority is, in my opinion, a high one.

And I will only preface that judgment by asking you to observe also the limitations he imposes on such customs when it is sought to bind outsiders by them.

Lord Esher, then Mr. J. Brett, was advising the House of Lords in the case of *Robinson v. Mollett*, in 1875, and his judgment, or opinion, was practically adopted by the House of Lords. His whole judgment, or opinion, is so instructive and good that I should like to read it *in toto*, but it is too long, and I must therefore content myself with extracts and summaries. The learned judge said: "A very large question is opened, "which is, what is the proper measure or limit of the control of "mercantile customs by the law? That the course of mercan- "tile business should be left to be as free as possible seems to "me to be beyond doubt. That it is subject to some control is "especially undoubted. It is when merchants dispute about "their own rules that they invoke the law. The Courts, there- "fore, being appealed to, have been obliged to apply some rule. "When merchants have disputed as to what the governing rule should be, the Courts have applied to the mercantile busi- "ness brought before them what have been called legal prin- "ciples, which have almost always been the fundamental ethical "rules of right and wrong. They have decided in favour of "that course of business which was in accordance with such "principles or rules, and against that course which was incon- "sistent with them."

The rules Lord Esher here speaks of are not, of course, customs or rules of a particular trade or business, but the general rules or doctrines of the common law and law merchant. Of the customs or rules of a particular trade or business he proceeds to speak as follows:—"But when once rules are laid "down, they must at some time become irksome to some indi- "vidual or to some body of men. And there must from time to

"time be some contention raised, or some course of business "invented, which is alleged to be an attempt to break through "them. The Courts are then again appealed to. Customs of "trade, as distinguished from other customs, are generally "courses of business invented or relied upon in order to modify "or evade some application which has been laid down by the "Courts of some rule of law to business, and which application "has seemed irksome to some merchants. And when some "such course of business is proved to exist in fact, and the "binding effect of it is disputed, the question of law seems to "be, whether it is in accordance with fundamental principles of "right and wrong. A mercantile custom is hardly ever invoked, "except when one of the parties to the dispute has not, in fact, "had his attention called to the course of business to be "enforced by it; for if his attention had in fact been called to "such course of business his contract would be specifically "made in accordance with it, and no proof of it as a custom "would be necessary. A stranger to a locality, or trade, or "market, is not held to be bound by the custom of such locality, "trade or market, because he knows the custom, but because "he has elected to enter into transactions in a locality, trade, or "market wherein all who are not strangers do know and act "upon such custom. When considerable numbers of men of "business carry on one side of a particular business they are "apt to set up a custom which acts very much in favour of their "side of the business. So long as they do not infringe some "fundamental principle of right and wrong, they may establish "such a custom; but if, on dispute before a legal forum, it is "found that they are endeavouring to enforce some rule of con-"duct which is so entirely in favour of their side that it is "fundamentally unjust to the other side, the Courts have always "determined that such a custom, if sought to be enforced "against a person in fact ignorant of it, is unreasonable, con-"trary to law, and void."

Now, that has always struck me as a clear and masterly exposition of the nature and use of trade customs and the principles on which, and the limits within which, the Courts will give effect to them or not, as against outsiders.

Lord Esher puts the test much the same way when he

applies it to the case before the House, which was whether a particular custom of the London tallow market could bind a Liverpool merchant dealing on that market through a London tallow-broker. "The question," he says, "in the present case "is whether the alleged custom is not too much in favour of the "brokers who set it up, and whether it does not pass beyond "due freedom and degenerate into injustice. If the custom "which exists in fact is not unjust as against principals ignorant "of it, your Lordships will uphold it, however much it departs "from the rules hitherto recognised by the Courts as applicable "to the contract of employment between principals and brokers; "but if it so far breaks from those rules as to be unjust to such "principles in such contract, your Lordships will pronounce it "to be void as a custom."

I will only supplement this judgment by an extract from one delivered ten years later by Lord Esher, when he had become Master of the Rolls. "The Courts," he says, "have "always taken upon themselves to consider whether a custom "is or is not within the bounds of reason, and, if the custom is "unreasonable, the Courts have said they will not recognise it "as binding on people who do not know it and who have not "consented to act upon it."

This emphasizes what is really deducible from the other case, viz., that apart from all other considerations the ultimate test of a custom alleged to bind outsiders is "Is it reasonable?"

Now, of course, as I have said, it is much easier, it is more obviously fair to fix the outsider with customs of a definite market than with the customs of a body having no one central place of trading. It is easier to fix him with the customs of the Stock Exchange or the tallow market than with those of bankers. But the principle is the same; customs of the shipwrights of London have been maintained as against outsiders, and I am willing that, subject to the specific exceptions I have mentioned, such as illegality by statute or direct antagonism to general law, the criterion applied by Mr. J. Brett should stand as the test of every established custom of bankers by which it is sought to bind customers. Is it fair to the other side, is it reasonable, would the Courts say it was made too much in the interests of the bankers or was unreasonable?

In applying this test to the question under consideration in *Mollett v. Robinson*, the judges and the House of Lords afford us one other guide. It is only part of the same principle, it is only enunciating a particular form of unfairness or injustice sought to be imported by custom, it is only an example of the general rule. It is this, that though a custom of trade may control the mode of performance of a contract, it cannot alter its intrinsic character. As Brett, J., puts it, "Is the custom "relied on so inconsistent with the nature of the contract to "which it is sought to be applied as that it would change its "nature altogether, or as to change its intrinsic character? If "it would, it is unjust as against the outsider, and therefore it is "void; if it would not, it should be allowed to prevail." And the judgment of the House of Lords was that, as the usage was of a peculiar character and at variance with the relations of the parties, no person ignorant of such usage could be held to have agreed to submit to its conditions merely by employing the services of a broker, to whom the usage was known, to perform the ordinary duties belonging to such employment.

So that we get a specific definition of one class of customs which the Courts will never recognise as reasonable, viz., customs which affect not merely the mode of carrying out the contract, but alter its character or the relations of the parties to it.

The personal application of these tests to the various customs of bankers which have from time to time been suggested to meet difficulties, I must leave mainly to you. Some seem to fall under its condemnation, others to escape it.

For instance, I do not see how you could set up any custom restricting your liability for misdelivery of your customer's goods entrusted to you for safe custody. There is, of course, the initial difficulty that such a custom would be difficult to establish from the comparative rarity of the occurrence. But suppose a sufficient number of cases had occurred, and in each the customer had acquiesced in such alleged custom, and on being satisfied that there had been no negligence on the part of the bank, had relinquished his claim, I still think that if a recalcitrant customer brought the matter before the Courts, they would decline to

recognize the custom, on the ground that it altered the intrinsic nature of the contract, was too much in favour of the banker, and so unreasonable and invalid.

Or an instance on the other hand; a custom of bankers to treat cheques entered to credit before cleared as still being held for collection only, and not as making the banker the holder thereof for value, with no remedy against the customer unless he has endorsed. Such a custom would be an evasion, to say the least of it, of the rules of law laid down in *ex parte Richdale* and *Royal Bank of Scotland v. Tottenham*, but I should by no means despair of upholding the validity of such custom, if sufficiently proved, though possibly the origin of such custom would have to be alleged as subsequent to these two cases.

So again the right of bankers to charge interest on overdrafts. There is no right at common law to charge interest on an ordinary debt unless stipulated for, but if such right on the part of bankers were disputed, it would be supported and unquestionably sustained on the ground of custom.

Now, the next thing to which we have to look when we want to get out of the ordinary results of a contractual relation is course of business. Course of business covers rather a different field from custom. Course of business cannot affect a new-comer, he must be an old customer. Course of business can only arise from previous transactions. In its own domain it is, however, a powerful factor. Its efficacy is based on the theory that as things are they will remain, till notice is given that they are to be altered for the future. It is a reasonable basis; if you have gone on for a considerable period dealing with a man on a particular footing as to the method of keeping accounts, of extending credits, allowing overdrafts as against uncleared cheques or bills not yet due, or anything of that sort, common fairness suggests that you should not be at liberty to break off the whole thing at a moment's notice and leave the other party to meet, as best he may, engagements which he has contracted on the faith of the permanence of such course of dealing. You remember that case of *Buckingham v. the London and Midland Bank*, as to transferring the balance of a customer's current account to a loan account, the two having always been kept separate, closing the current account, and refusing to honour cheques, even the

outstanding ones. Now that was a clear case where a course of business forbade such a course, and the Commercial Court so held.

That course of business bound the banker, but the principle cuts just as much the other way and in the banker's favour. Say you have habitually charged a customer with interest on overdraft or advances, with periodical rests, in other words, with compound interest, and he has acquiesced in accounts showing such charge; a course of business is thereby established which raises the presumption that the same system is to be pursued so long as the relationship of banker and customer remains with regard to that account, and during that period, therefore, you would be entitled to claim and recover such compound interest.

Observe that I say "so long as the relationship of banker "and customer continues with regard to that account." It is an essential feature of all courses of business that the particular business relation should continue uniform and unaltered throughout the whole sequence of dealings from which it is sought to imply, and to which it is sought to apply, this doctrine. Obviously this is right; presumptions from past transactions can only apply to subsequent ones where the circumstances and conditions are identical; a presumption as between banker and customer can only apply so long as that relation exists. If, therefore, that relation ceases with regard to an advance or overdraft on which compound interest is charged; if by taking a mortgage security for it you convert yourself from banker into mortgagee and the debtor from customer into mortgagor, the presumption, the course of business, comes to a short end, and though you might still keep the account in your books you would only be entitled to the rate of interest the mortgage secured to you, and could only reckon that interest in the same way as if you had simply been mortgagee from the beginning, and never banker at all.

I cannot see that, within its somewhat limited sphere, the efficacy of course of business is to any material extent hampered by the considerations of reasonableness affecting the validity of custom of which we previously spoke.

True, both are means of implying a contract, but, in the case of course of business, the element of knowledge of the con-

tracting party is assumed from his acquiescence in the prior transactions, whereas in the case of custom this element is admittedly lacking. You are planting on a man a contract which is pretty much of your own making, and so you must show it to be reasonable. But once get in the idea of his conscious acquiescence, and reasonableness has nothing to do with the matter. As Jessel, M.R., once said, "A man has a perfect "legal right to make a fool of himself."

I do not know that it has ever been laid down how long a course of business must continue in order to found the presumption that dealings are to proceed on the same basis and system for the future. I think it would be a question of fact to be decided on the circumstances of each particular case. But I take it there must be something which could reasonably and fairly be described as a *course* of business. I do not think an isolated transaction here and there, perhaps sandwiched in among a lot of other business, could be so described or give rise to any rights. But, given such a course of business, I can see many points on which this idea of course of business may help bankers over difficulties, either by itself or alternatively with the custom of bankers. For it is not, to my mind, in any way confined to mere keeping of accounts, as some people seem to have imagined. I have been careful not to so state it to you. The deduction is, as I say, that business shall be carried on on the same principles as heretofore, so long as the original relations remain undisturbed, and this covers a good deal more than accounts.

Take the instance of the banker crediting the uncleared bearer cheque which is returned dishonoured. If it is the first time such a thing has happened with regard to that particular customer, and he objected to being debited with the cheque, the banker would have to rely on the custom of bankers; but if the same thing had happened before and the customer had acquiesced in the cheque's being returned to him and entered to his debit, then the banker might in addition set up course of business.

And, lastly, as helping the banker over legal stiles, we get implied contract. I have not much faith in this doctrine, as I dare say you know. The Courts are extremely shy of applying it, and never do so save in very exceptional cases and within the strictest limits. I fancy I have told you something about

this before. In order to imply any stipulation in a contract beyond that which the parties have agreed, the following conditions must exist. It must be perfectly clear to every reasonable man that such a stipulation is what both parties must have intended. No term can be implied which is not reasonably necessary to carry out the intention of the parties. The Court has no right to imply in a written contract any stipulation unless, in considering the terms of the contract in a reasonable and business manner, an implication necessarily arises. There must, from the language of the contract itself and the circumstances under which it is entered into, be such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied.

These are some of the slightly differing, but substantially identical, terms in which the principle has been laid down by the Courts. Another case recognises that the implication may extend so as to impose a duty on either party, if such implication and the existence of such duty be absolutely essential for the commercial efficacy of the contract.

And it is obvious that the principle is at least as applicable to unwritten as to written contracts. Indeed, it is more reasonable to import a term or a stipulation, where the other terms are not reduced to writing, than where they are.

But, after all is said and done, the cases in which this doctrine of implied contract can be practically applied are few and far between. Where the results of a contract or relation are regulated by law it is hard to say those results or consequences are so unreasonable that the parties must of necessity have contemplated something else. This would be very like supplying the place of custom by implied contract. Where implied contract really comes in is, I think, where there is some collateral matter without which the contract cannot have a proper business efficacy and as to which the parties would have infallibly agreed specifically, if it had not escaped their notice. Suppose, for instance, you took a room or a window, at an enormous rent, paid in advance, to see the Jubilee procession in 1897, and the Jubilee procession, for some reason or another, had not taken place, I think a Court would have implied a term by which you

could have got your money back. But, as I told you before, I do not believe an implied contract could be invoked to relieve the banker of the natural consequences of misdelivery or conversion of his customer's goods and put it on the same footing as loss thereof. There is no necessary inevitable deduction that the parties would have made such a term had they thought of it; most probably one of them, the customer, would have strongly objected to so doing.

Now, this concludes my review of the methods in which the ordinary consequences of contracts or relations may be added to or modified. It has run to greater length than I anticipated, but such subjects as the law merchant, custom, usage, course of business, and implied agreement, are not to be dealt with lightly or shortly, and I hope we have arrived at a better comprehension of what they can and cannot do.

I dare say you will have noticed that neither custom, course of business, nor implied agreement ever goes so far as to contradict the express agreement of the parties. Any one of them may annex incidents thereto, or may possibly vary the method of performance, but wherever the express contract and the alleged custom, course of business, or implied agreement come into direct conflict, the former will prevail as between the immediate parties.

The influence of local customs, such as counting 120 rabbits or herrings as 100, is not really an exception; it is merely the application of an interpretation contemplated by both parties, just as if they had used a foreign term and a dictionary had been referred to to ascertain their meaning.

Now, the next point I want to deal with follows naturally on this, inasmuch as it also concerns the conflicting claims of two classes of contracts, those which are in writing and those which are oral or by word of mouth.

Now, it is a general and established rule of law that, when once a contract is reduced into writing, that writing must be taken to express the final agreement of the parties on all the matters dealt with therein. All prior negotiations are wiped out, and you cannot set up against the terms of the written contract any verbal contract made prior to or cotemporary with the written one which contradicts it or alters its effect. Now, of

course, this is in itself a fair and a salutary rule; it would never do when a man had put his hand to a written contract to have him setting up something alleged to have been agreed to at the time in order to get out of the contract. And the correlative rules make the main one more distinctly reasonable. For, if the written contract does not purport to contain all the terms, you can generally supply the others by word of mouth; you can, after the written contract is executed, vary it by word of mouth unless the subject matter is such that the law requires it to be in writing, as it does bills and notes; you can, with regard to most written contracts, though not with regard to bills, renounce or waive your rights thereunder or any particular stipulation by word of mouth and so on; but where the law definitely puts down its foot is where any attempt is made to set up a verbal contract made before or at the time of a written one, what is called a prior, or cotemporary oral contract, in order to contradict or vary the terms of a written one. Now, as I say, this is a sound and beneficial rule, but it seems to work rather hardly in some cases. Take the case of a promise to renew a bill at maturity, the case which recently came before the Court of Appeal in the case of *The New London Credit Syndicate v. Neale*, 1898, 2 Q.B., 487, in which this doctrine was discussed and upheld. A man gives a bill or promissory note payable at a fixed date, but before doing so he distinctly stipulates, and the other party distinctly promises, that he will at maturity renew the bill or note, say, for another six months. Now, if that agreement is put into writing, that is all right as between the original parties, at any rate; possibly as against a third party taking with notice or without value.

But suppose such agreement is not in writing, but merely verbal. Then it is clearly settled that the rule applies that the oral agreement cannot be set up and affords no defence whatever to an action on the bill or note at the date of maturity. Now, this does seem a little hard, and various plans have been tried with a view to circumventing the hardship.

It has been contended that the oral agreement does not contradict the written one; but it does, as is really shown by its being set up as a defence to it. The bill or note makes the sum payable on a certain date; the oral agreement seeks to make it

not payable then, but at another date, so it contradicts or varies the written agreement just as much as if the bill was for £100 and an oral agreement that only £50 should be paid were put forward. Then it has been suggested that this was a case in which equity would step in between the immediate parties and prevent the plaintiff enforcing the written agreement in direct violation of his verbal promise. And if equity meant in all cases what it means in ordinary language, namely, fairness, one might have expected that equity would have done something to remind the holder of the bill that his word was, or ought to be, as good as his bond. But equity never really was more than an aggravated form of law, with different and more complicated rules and a higher scale of costs, and so the equity judges said, "No, this "is a rule of evidence that the oral evidence is not admissible "to contradict or vary the written document, and so we cannot "interfere." So that though now any Court is supposed to administer law and equity equally and indiscriminately, this defence would not avail the defendant who found himself sued on the bill, despite the oral agreement to renew.

Now, the circumstances in the case I have alluded to of *The New London Credit Syndicate v. Neale*, which was decided by the Court of Appeal on July 17th last year, were exceptional, inasmuch as there the plaintiffs were indorsees, who admitted that they had knowledge of the circumstances under which the bill was accepted by the defendant, viz., on an oral agreement, made at the time he accepted, that if he could not meet it at maturity the drawer would renew. So that while the indorsees could not, and did not, claim to stand on any better footing than the drawer, the acceptor was able to argue that the promise to renew involved a promise not to part with or negotiate the bill; that it was therefore negotiated in breach of good faith, and that therefore the plaintiffs, not being holders in due course, could not recover, founding his argument on sec. 29, sub-sec. 6 of the Bills of Exchange Act. So that really the indorsees were in a worse, not a better, position than the drawer, because there was this negotiation against them, which it was contended constituted a breach of faith on the part of the drawer. And the defendant's other contention was that the delivery of the bill was conditional only; conditional, I take it that is, either on its not being negoti-

ated or its being renewed at maturity; the report of the argument is not very clear. And these arguments prevailed with the Judge of first instance, who decided for the defendant. But the Court of Appeal took the opposite view, and gave judgment for the plaintiffs, the indorsees. And they were clearly right. The Bills of Exchange Act has not altered the rules of evidence, and this rule that evidence of a prior or contemporaneous oral agreement is not admissible to vary the effect of a written instrument was fatal to both the defendant's contentions. Take the case of the negotiation in alleged bad faith. But how could defendant show such breach of faith? Only by setting up the oral agreement to renew, and that he was precluded from doing. Then as to the conditional delivery. What condition was it on? An oral agreement to renew at maturity. But that is contradicting the terms of the bill; it is making it not payable at the time it specifies for payment, and that makes such evidence inadmissible.

Now, of course, there may be conditional delivery, which, save as against the holder in due course, affords a defence on the bill unless the condition is fulfilled. That is obvious from sec. 21, and was the law before the Bills of Exchange Act.

And, equally of course, the circumstances which make the delivery conditional and not absolute, are constituted or evidenced by something said before or at the time the bill is handed over. And at first sight the distinction that oral evidence is admissible in this case and not in the other, might seem an arbitrary one. Why, for instance, it might be asked, can the acceptor say that he gave the bill for the purpose of its being discounted or retiring other bills, and not that he gave it on condition that the drawer would renew it at maturity.

But the answer is this. So long as the verbal evidence is confined to the delivery, to showing that the bill was not to take effect as a contract at all until some condition is fulfilled, that evidence is admissible. The examples as to bills given for the purpose of being discounted or to take up other bills, have always been held to come under this head. And this view may be justified on several grounds.

The handing over of the bill is only provisional, the rea delivery is postponed until the moment when the bill is utilized for the specified purpose; or the person to whom it is handed

may be looked upon in the light of a bailee or agent, only holding the bill for a specific purpose and having no title himself, though able in fulfilment of the specific purpose to confer one. I think the latter is the more comprehensible view, and it seems to me the one aimed at by sec. 21, sub.-sec. 6 of the Bills of Exchange Act, which says, as between immediate parties, and as regards a remote party other than a holder in due course, the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. For it follows that if the bill is delivered to a person as agent or bailee, such delivery is not for the purpose of transferring, and does not transfer the property in the bill to him, any more than the delivery of a plate-chest to a servant to be taken to a banker's, or the receipt thereof by the banker for safe custody, makes either the servant or the banker the owner of the plate-chest. Lastly, the rule may be supported on the ground that oral evidence of conditional delivery does not contradict or vary the terms of the bill. I cannot say that I much appreciate that argument. If it is a note, it says, I promise to pay; if it is a bill, the acceptance means the same thing, and it is varying, if not contradicting, that written contract, if you set up a verbal agreement to pay on a certain condition or in a certain event, and not otherwise. So I think the other grounds I have enumerated are the far better ones to rely on.

But you can see the essential difference between such cases as these, and the case of a bill really delivered, albeit in reliance on the promise of the transferee to renew on maturity The bill is delivered, the property passes, it is delivered as, or as evidence of, an existing contract; it would suspend the remedy for a pre-existing debt, in respect of which it was given, which is not a bad test; you cannot suggest that there is any relation of principal and agent or of bailor and bailee in relation thereto. It is not really, even looked at apart from technicalities, a conditional delivery. It is delivered absolutely, such absolute delivery being induced by the verbal promise that at a future date the transferee will do something which would be unnecessary were it not that the bill is delivered absolutely and as a valid and existing contract.

I have had a good many of these cases to deal with, and I have always found this the truest test: Was the bill, when it left the acceptor's hands, or the note, when it left the drawer's hands, an existing contract? If so, oral evidence has nothing to do with it, and is inadmissible.

And I may as well state here again what I alluded to briefly before. I said you could, after execution of a written contract, vary the terms thereof by word of mouth, unless the contract were of such a nature that the law required it to be in writing.

Now, a bill by sec. 3 of the Bills of Exchange Act must be in writing, a cheque must be in writing because it is a bill, and a promissory note must be in writing by sec. 83.

Therefore there can be no verbal variation or contradiction of a bill, note, or cheque at any stage of its existence, even after full delivery. Nor can it be waived and the rights thereunder of the holder be abandoned, except by writing, or by the delivery up of the bill to the party primarily liable, which the Bills of Exchange Act, by sec. 62, constitutes an effectual discharge.

THE CURRENCY LAWS OF CANADA

THE subjoined compilation embracing the different Acts of the Dominion Parliament relating to the currency of the country has been prepared for publication in the JOURNAL in response to suggestions made by Associates. Its publication has been deferred until now for want of space.

AN ACT RESPECTING THE CURRENCY

(Chapter 30, R.S.C.)

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

Denominations in currency.

1. The denominations of money in the currency of Canada, shall be dollars, cents and mills, the cent being one-hundredth part of a dollar, and the mill one-tenth part of a cent. 34 V., c. 4, s. 2.

Standard of value of Canada currency.

2. The currency of Canada shall be such, that the British sovereign of the weight and fineness now prescribed by the laws of the United Kingdom, shall be equal to and shall pass current for four dollars eighty-six cents and two-thirds of a cent of the currency of Canada, and the half sovereigns of proportionate weight and like fineness, for one-half the said sum; and all public accounts throughout Canada shall be kept in such currency; and in any statement as to money or money value in any indictment or legal proceeding, the same shall be stated in such currrency; and in all private accounts and agreements rendered or entered into on or subsequent to the first day of July, one thousand eight hundred and seventy-one, all sums mentioned shall be understood to be in such currency, unless some other is clearly expressed, or must, from the circumstances of the case, have been intended by the parties. 34 V., c. 4, s. 3.

Public accounts, etc., to be kept in it.

No bank notes, etc., to be in any other currency.

3. No Dominion note or bank note payable in any other currency than the currency of Canada, shall be issued or reissued by the Government of Canada, or by any bank, and all such notes issued before the first day of July, one thousand eight hundred

and seventy-one, shall be redeemed, or notes payable in the currency of Canada shall be substituted or exchanged for them. 34 V., c. 4, s. 5.

Gold coins may be struck for Canada.

4. Any gold coins which Her Majesty causes to be struck for circulation in Canada, of the standard of fineness prescribed by law for the gold coins of the United Kingdom, and bearing the same proportion in weight to that of the British sovereign, which five dollars bear to four dollars, eighty-six cents and two-thirds of a cent, shall pass current and be a legal tender in Canada for five dollars; and any multiples or divisions of such coin, which Her Majesty causes to be struck for like purposes, shall pass current and be a legal tender in Canada at rates proportionate to their intrinsic value respectively; and any such coins shall pass by such names as Her Majesty assigns to them in her proclamation declaring them a legal tender, and shall be subject to the like allowance for remedy as British coin. 34 V., c. 4, s. 6.

Certain silver and copper coins struck by order of Her Majesty to be a legal tender throughout Canada.

5. The silver, copper or bronze coins which Her Majesty has heretofore caused to be struck for circulation in the provinces of Quebec, Ontario and New Brunswick, under the Acts then in force in the said provinces respectively, shall be current and a legal tender throughout Canada, at the rates in the said currency of Canada assigned to them respectively by the said Acts, and under the like conditions and provisions: and such other silver, copper or bronze coins as Her Majesty causes to be struck for circulation in Canada shall pass current and be a legal tender in Canada, at the rates assigned to them respectively by Her Majesty's Royal Proclamation,—such silver coins being of the fineness now fixed by the laws of the United Kingdom, and of weights bearing respectively the same proportion to the value to be assigned to them, which the weights of the silver coins of the United Kingdom bear to their nominal value; and all such silver coins aforesaid, shall be a legal tender to the amount of ten dollars, and such copper or bronze coins to the amount of twenty-five cents, in any one payment; and the holder of the notes of any person to the amount of more than ten dollars, shall not be bound to receive more than that amount in such silver coins in payment of such notes if presented for payment at one time, although any of such notes is for a less sum. 34 V., c. 4, s. 7.

Amount which may be tendered in one payment.

No other coins of silver or copper to be so.

6. No other silver, copper or bronze coins than those which Her Majesty causes to be struck for circulation in Canada, or in some province thereof, shall be a legal tender in Canada. 34 V., c. 4, s. 8.

As to foreign gold coins.

7. Her Majesty may, by Proclamation, from time to time fix the rates at which any foreign gold coins of the description, date, weight and fineness, mentioned in such Proclamation, shall pass current, and be a legal tender in Canada: Provided that until it is otherwise ordered by any such Proclamation, the gold eagle of the United States of America, coined after the first day of July, one thousand eight hundred and thirty-four, and before the first day of January, one thousand eight hundred and fifty-two, or after the said last mentioned day, but while the standard of fineness for gold coins then fixed by the laws of the said United States remains unchanged, and weighing ten pennyweights, eighteen grains, troy weight, shall pass current and be a legal tender in Canada for ten dollars; and the gold coins of the said United States being multiples and halves of the said eagle, and of like date and proportionate weights, shall pass current and be a legal tender in Canada for proportionate sums. 34 V., c. 4, s. 9.

Proviso: as to U. S. Eagle

Proof of date, etc., of coins.

8. The stamp of the year on any coin made current by this Act, or any Proclamation issued under it, shall establish *prima facie* the fact of its having been coined in that year; and the stamp of the country on any foreign coin shall establish *prima facie* the fact of its being of the coinage of such country. 34 V., c. 4, s. 10.

Defaced coin not a legal tender.

9. No tender of payment in money in any gold, silver or copper coin which has been defaced by stamping thereon any name or word, whether such coin is or is not thereby diminished or lightened, shall be a legal tender. 32-33 V., c. 18, s. 17, *part.*

Payments in Nova Scotia on and after 1st July, 1871, to be in Canada currency.

10. All sums of money payable on and after the first day of July, one thousand eight hundred and seventy-one, to Her Majesty, or to any person, under any Act or law in force in Nova Scotia, passed before the said day, or under any bill, note, contract, agreement, or other document or instrument, made before the said day in and with reference to that province, or made after the said day out of Nova Scotia and with reference thereto, and which were intended to be, and but for such alteration would have been payable in the currency of Nova Scotia, as fixed by law previous to the fourteenth day of April, one thousand eight hundred and seventy-one, shall hereafter be represented and payable respectively, by equivalent sums in the currency of Canada, that is to say, for every seventy-five cents of Nova Scotia currency, by seventy-three cents of Canada currency,

How to be calculated.

and so in proportion for any greater or less sum: and if in any such sum there is a fraction of a cent in the equivalent in Canada currency the nearest whole cent shall be taken. 34 V., c. 4, s. 4.

As to debts in B.C. & P.E.I. contracted before 1st July, 1881.

11. Any debt or obligation contracted before the first day of July, in the year one thousand eight hundred and eighty-one, in the currency then lawfully used in the province of British Columbia, or in the province of Prince Edward Island, shall, if payable thereafter, be payable by an equivalent sum in the currency hereby established. 44 V., c. 4, s. 1.

Sums mentioned in certain Acts to be currency of Canada.

12. All sums mentioned in dollars and cents in "*The British North America Act*, 1867," and in all Acts of the Parliament of Canada, shall, unless it is otherwise expressed, be understood to be sums in the currency by this Act established. 31 V., c. 45, s. 2.

AN ACT RESPECTING DOMINION NOTES

(Chapter 31, R.S.C.)

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

Interpretation.

1. The expression "specie" in this Act means coin current by law in Canada, at the rates and subject to the provisions of the law in that behalf, or bullion of equal value according to its weight and fineness. 31 V., c. 46, s. 13, *part*.

Issue of Dominion notes.

2. The Governor-in-Council may authorize the issue of Dominion notes to an amount not exceeding that herein specified, and such Dominion notes may be of such denominational values and in such form, and signed by such persons and in such manner, by lithograph, printing or otherwise as he, from time to time, directs; and such notes shall be redeemable in specie or presentation at branch offices established or at banks with which arrangements are made as hereinafter provided at Montreal, Toronto, Halifax, St. John, N.B., Winnipeg, Charlottetown and Victoria, and at that one of the said places at which they are respectively made payable. 31 V., c. 46, s. 8, *part*;—43 V., c. 13, s. 4, *part*.

Amount of Dominion notes.

3. The amount of Dominion notes issued and outstanding at any time may, by Order in Council, founded on a report of the Treasury Board, be increased to [but shall not exceed] twenty million dollars, by amounts not exceeding one million dollars at one time, and not

Proviso: amount in gold and guaranteed securities to be held for redemption.

exceeding four million dollars in any one year: Provided that the Minister of Finance and Receiver-General shall always hold, for securing the redemption of such notes, issued and outstanding, an amount in gold, or in gold and Canada securities guaranteed by the Government of the United Kingdom, equal to not less than twenty-five per cent. of the amount of such notes—at least fifteen per cent. of the total amount of such notes being so held in gold; and provided also, that the said minister shall always hold for the redemption of such notes an amount equal to the remaining seventy-five per cent. of the total amount thereof, in Dominion debentures issued by authority of Parliament. 43 V., c. 13, s. 1, *part*.

And in unguaranteed debentures.

Amendment:—The limitation of twenty million dollars was removed by an Act passed in 1895 (59 V., Ch. 16), and the following provision made for the issue in excess of twenty millions:

Notwithstanding anything to the contrary contained in the said Chapter 31 of the Revised Statutes, Dominion Notes may be issued to any amount in excess of the sum of twenty million dollars, authorized by section 3 of the said Chapter, provided the Minister of Finance and Receiver-General, in addition to any amount required to be held by him in gold under the provisions of the said section 3, holds an amount in gold equal to the amount of Dominion Notes issued and outstanding in excess of the said sum of twenty million dollars.

Issue of Dominion Notes may exceed $20,000,000 provided equal amount in gold is held.

Notes to be a legal tender.

4. Such notes shall be a legal tender in every part of Canada except at the offices at which they are respectively made payable: the proceeds thereof shall form part of the Consolidated Revenue Fund of Canada, and the expenses lawfully incurred under this Act shall be paid out of the said fund. 43 V., c. 13, s. 5, *part*.

Debentures may be delivered to Minister of Finance, and disposed of by him for the purposes of this Act.

5. Debentures of Canada may be issued and delivered to the Minister of Finance and Receiver-General for the general purposes of this Act, and to enable him to comply with its requirements—such debentures being held as aforesaid for securing the redemption of Dominion notes, and the said minister having full power to dispose of them and of the guaranteed debentures aforesaid, either temporarily or absolutely, in order to raise funds for such redemption, and for the purpose of procuring the amounts of gold required to be held by him

Proviso. under this Act; but nothing herein contained shall be construed to authorize the issue of debentures not otherwise authorized by Parliament, or any increase of the debt of Canada beyond the amount so authorized. 43 V., c. 13, s. 2.

Amount to be issued against gold only.

6. If any amount of Dominion notes is issued and outstanding at any time in excess of the amount then authorized as aforesaid, the Minister of Finance and Receiver-General shall hold gold to the full amount of such excess, for the redemption of such notes: and any amount of such notes which the public convenience requires may be issued and remain outstanding, provided the excess of such amount over that so authorized is represented by an equal amount of gold held by the Minister of Finance and Receiver-General as aforesaid; and the issue of Dominion notes so represented in full by gold, shall not be deemed an increase of the public debt; but except in the case of notes so issued against an equal amount of gold, the total amount of Dominion notes outstanding shall never exceed the amount authorized under section three of this Act. 33 V., c. 10, s. 6.

See, however, amendment to Section 3.

Minister of Finance to publish monthly statements.

7. The Minister of Finance and Receiver-General shall publish monthly in the *Canada Gazette* a statement of the amount of Dominion notes outstanding on the last day of the preceding month, and of the gold, guaranteed debentures and unguaranteed debentures then held by him for securing the redemption thereof, distinguishing the amounts of each so held at each of the cities at which Dominion notes are redeemable; and such statements shall be made up from returns made to the said minister by the branch offices, bank or banks at which such notes are redeemable. 43 V., c. 13, s. 3.

Offices or agencies for redemption of notes.

8. The Governor-in-Council may, in his discretion, establish branch offices of the Department of Finance at Montreal, Toronto, Halifax, St. John, N.B., Winnipeg, Charlottetown and Victoria, respectively, or any of them, for the redemption of Dominion notes, or may make arrangements with any chartered bank or banks for the redemption thereof, and may allow a fixed sum per annum for such service at all or any of the said places; and gold or debentures held at any such branch office or by any such bank for the redemption of Dominion notes, shall be deemed to be held by the Minister of Finance and Receiver-General: Provided that any Assistant Receiver-General appointed at any of the said cities under the "*Act respecting Gov-*

ernment Savings Banks," shall be an agent for the issue and redemption of such notes. 33 V., c. 10, s. 7;—39 V., c. 4;—43 V., c. 13, s. 4, *part*.

Redemption of Provincial notes.

9. Provincial notes issued under the Act of the late Province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her Majesty's reign, chapter ten, shall be held to be notes of the Dominion of Canada, and shall be redeemable in specie on presentation at Montreal, Toronto, Halifax or St. John, N.B, and at that one of the said places at which they are respectively made payable, and shall be (as provided by the lastly mentioned Act) a legal tender except at the offices at which they are respectively made payable. 31 V., c. 46, s. 8, *part*.

BANK RESERVES—THE BANK NOTE ISSUE

(53 Vict., Chapter 31 *in part*)

Part of reserve to be in Dominion notes

Penalty for non-compliance.

50. 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:

Supply of Dominion notes.

2. 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.

Amount and denomination of bank notes.

51. 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:

Note issue of Banque du Peuple and Bank of British North America.

2. 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:

Penalties for excess of circulation.

3. 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:

Notes under $5 to be called in.

4. 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.

Pledging of notes prohibited.

52. 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:

Penalty for pledging.

2. Every person, who, being the president, vice-president, director, principal partner *en commandite*, general 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:

Penalty for improper issue or taking of notes.

3. 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.

Notes to be first charge on assets.

53. 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:

Liability for penalties in case of insolvency.

2. 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.

Existing banks to make deposit with Minister of Finance equal to five per cent. of note circulation.

54. 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:

Formation of circulation redemption fund.

4. 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 re-issued 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:

Fund to bear interest.

5. 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 circulaton of such bank during the then next preceding twelve months:

Note circulation, how determined.

6. 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:

Notes of banks suspending payment to bear interest until redeemed.

7. 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 re-issued and intended for circulation, and then in circulation, shall bear interest at the rate of six 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

If not redeemed to be paid out of fund.

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;

Proviso.

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:

Payments from fund to be without regard to amount contributed.

8. 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 has at that time contributed to the fund; 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 excess *pro rata* to the amount

Proviso.

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:

Repayment of amount if bank is wound up.

9. 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:

Treasury Board may regulate management of fund.

10. 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:

Enforcement of payment.

11. 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.

Notes of bank to be payable at par throughout Canada.

55. The bank shall make such arrangements as are necessary to insure the circulation at par in any and every part of Canada of all notes issued or re-issued 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.

Redemption of notes.

56. 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:

Payable at chief place of business.

2. The chief place of business of the bank shall always be one of the places at which its notes are made payable.

Payments in Dominion notes.

57. The bank, when making any payment, shall, on 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

Torn or defaced notes.

no payment, whether in Dominion notes or bank notes, shall be made in bills that are torn or partially defaced by excessive handling.

Notes may be signed by machinery.

59. 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.

One signature must be written.

Penalty for unauthorized issue of notes for circulation

60. 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:

What shall be deemed such notes.

2. 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.

Defacement of note.

61. 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.

Penalty.

Counterfeit and fraudulent notes to be stamped as such.

62. 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.

No advertisement, &c., to be issued in the form of a note.

63. 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.

NOTES

ANNUAL MEETING OF THE CANADIAN BANKERS' ASSOCIATION—The Annual Meeting of the Association this year will be held at Montreal, on the 25th October and following days. The Council will be pleased to see a large attendance of Associates, who are again invited to bring before the meeting—by means of a paper, a letter to the Secretary, or otherwise—any matters upon which discussion might prove interesting or profitable.

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CANADIAN EDITION OF THE *Bankers' Magazine*—The attention of our readers is directed to the announcement by the publishers of the American *Bankers' Magazine*, to be found at the end of this number of the JOURNAL, of a special issue of that periodical in which the subject of banking in Canada will be dealt with at length. In view of the attention which the subject of banking legislation is now receiving at the hands of the legislators and financiers of the United States, and of the interest which has been evinced by the public there in the working of the Canadian system, the issue of this special edition is timely. The *Bankers' Magazine* occupies very much the same position among bankers in the United States as its namesake does in Great Britain.

QUESTIONS ON POINTS OF PRACTICAL INTEREST

THE Editing Committee are prepared to reply through this column to enquiries of Associates or subscribers from time to time on matters of law or banking practice, under the advice of Counsel where the law is not clearly established.

In order to make this service of additional value, the Committee will reply direct by letter where an opinion is desired promptly, in which case stamp should be enclosed.

The questions received since the last issue of the JOURNAL are appended, together with the answers of the Committee:

Cheque, unmarked, received on deposit by the bank on which it is drawn—Right to recover on finding that there are not funds

QUESTION 255.—A bank receives on deposit from another bank a cheque drawn upon it by a customer, and enters the deposit at the credit of the other bank in the latter's pass-book. After entering the credit, but before 3 o'clock of the same day, the paying bank discovers that the cheque is not good, and wishes to charge it back to the depositing bank. Has it the right to rescind the credit which has been given? The transaction takes place at a small office where the teller, who took the deposit, should have known or been able to ascertain at once the state of the customer's account?

Would the position be different in a large office where the teller, who receives the deposit and passes the cheque, might not know for some time whether or not there were funds for it?

ANSWER.—The case of a cheque drawn on the same bank in which it is deposited differs from the case of a cheque drawn on another bank. In the one case the holder of the cheque when presenting it is entitled to know at once whether it is good or not, and his recourse against the drawer and endorser depends upon the cheque being dishonoured on presentation and upon

notice of the dishonour being properly given. If the presentation for deposit can be considered a presentation for payment (and we think it should be so considered), the question arises, has the cheque been honoured by credit for it being given in the depositor's book. If so then the holder has lost his remedy against the drawer and endorser, as he cannot properly notify them that the cheque has been dishonoured and the bank cannot, after changing his position in this way, repudiate the credit. *Prima facie* this would, we think, be the position, and the principles explained in the *River Plate Bank v. Bank of Liverpool* case would apply. We think, however, that if it were clearly shown that by universal custom, or by agreement with the customer, the presentation for deposit entitled the bank, as the drawee of the cheque, to take a reasonable time to consider whether to pay the cheque or not, and in the meantime to credit the amount in the depositor's book, then the bank would not be prevented from subsequently, and within the reasonable time, refusing payment, as the entry in the book would not, in such a case, be treated as honouring the cheque in a way to prevent the holder from giving notice of dishonour if payment were afterwards refused.

Place of payment of an acceptance

QUESTION 256.—A bill dated at Woodstock and drawn on a party in St. John reads:

"Pay to the Merchants Bank here the sum of —."

Is this bill payable in Woodstock or St. John?

ANSWER.—It might be argued that "here" qualifies the order to pay, that is, that the bill is an order to pay the money in Woodstock. We think that the word "here" must be regarded as part of the description of the bank, that is that the bill should be read as if made payable to "the Merchants Bank, Woodstock." The *place* of payment not being designated on the bill it should be presented for payment to the acceptor.

Marked cheque raised subsequent to the marking

QUESTION 257.—Could the bank on which a marked cheque is drawn, which has been "raised" after marking, be held responsible for more than the original amount under any circumstances?

ANSWER.—Before the decision in *Schofield v. Earl of Londesborough*, the only case we can conceive where a colour of claim to hold the accepting bank responsible might have arisen would be one where it had accepted a cheque so drawn that the

increased amount might be written in without any alteration being apparent. But that case, which was reported fully at page 102, Vol. IV of the JOURNAL, is conclusive against this and relieves the acceptor from responsibility for a fraud committed in this way.

Hour at which a note may be protested

QUESTION 258.—Is it legal to protest a note at one o'clock on Saturday? Are we not bound to wait till three as on other days?

ANSWER.—The answer which we gave on this point at page 301, Vol. III, applies equally to Saturday. A protest cannot be made on any day till three o'clock. This does not in any way conflict with the bank's right to close its doors at one o'clock. As explained in the answer above referred to, the notary might present a cheque at ten in the morning, and, if then dishonoured, he would do his full duty if he simply held it till three o'clock and thereafter completed the protest without further presentation.

Cheque sent for collection and lost in the mails

QUESTION 259.—On July 18th we sent a cheque on a branch of La Banque Ville Marie to that bank for collection. On July 26th (which would be the usual time to ask its fate), hearing of the suspension of the bank, we wired them to remit cash or return it at once, to which they replied that it had not been received. On the same day we notified the endorsers (from whom we have a general waiver of protest) that it had not been paid, and suggested that they notify the drawer.

The drawer writes that the cheque has not been charged to him, but that, as he sent it to the endorsers on July 14th, they had ample time to cash it before the suspension, and he disclaims any responsibility. As they are out-of-town customers, we claim that the cheque was forwarded in the ordinary course of business, and the drawer was notified of its non-payment as speedily as circumstances permitted. On whom do you think the loss (if any) should fall?

As the cheque has not turned up in the mails, as yet, what action should be taken?

ANSWER.—We think the drawer is responsible notwithstanding the delay in presentation, assuming that there was no unreasonable delay on the part of the payee or the bank in sending the cheque forward.

If a cheque is not presented within a reasonable time, then under sec. 73a, the drawer is discharged to the extent of any damage he suffers by such delay, but delay in making presentment for payment is, under sec. 46, excused when the delay is caused by circumstances beyond his control. Delay in the post-office would, we think, come within this rule.

Note payable with interest—Failure of bank to collect interest

QUESTION 260.—A teller in a bank takes from a customer some notes for collection and at his request initials the pass-book by way of receipt for the same. The notes are handed over to the collection clerk, who puts them through and in turn he gives them to the accountant to check. One note bears interest at six per cent. The collection clerk does not add the interest to the face of the note, and enters it in the diary for the face amount, the entry being checked by the accountant. On the day of maturity the teller initials for the note in the diary and accepts the face amount, placing the money to the payee's credit. Eight months after the payment of the note the payee claims that the interest should have been credited to him and demands the amount. The note is in the promissor's possession, who cannot be found.

At such a late day can the customer demand interest, and has he not to prove that the note bore interest, our books not showing that it did?

Who would be responsible for the amount as among the clerks, the teller or the accountant, or should each bear a share?

ANSWER.—We think that the bank is undoubtedly responsible to the owner of the note for the amount short collected, if, as a matter of fact, the note was payable with interest. The owner must of course prove this fact before the bank could be called on to pay.

As among the clerks it is somewhat difficult to fix the responsibility for the oversight. We should think, however, that it must chiefly rest on the teller. He was handed the voucher, and when he took payment had the document itself on the counter and should have collected the amount according to its terms. We do not think the collection clerk who entered the bill, or the accountant who passed the entry, can be held responsible, although as a matter of fair dealing it must be said that they helped to lead the teller into the mistake.

Cheque to the order of "Sam. Jones"—May the bank pay to anyone of that name?

QUESTION 261.—If a cheque is drawn in favour of Sam. Jones without any further description of payee, can the bank pay the money to any Sam. Jones, or is it the bank's duty to find out to which Sam. Jones the cheque belongs?

ANSWER.—The bank would we think be responsible if it paid the money to anyone other than the Sam. Jones to whom the cheque belongs.

Eligibility for associate membership in the Canadian Bankers' Association

QUESTION 262.—Does an associate of the Canadian Bankers' Association forfeit his right to be an associate by resigning his position in a chartered bank to enter a private banker's employment.

ANSWER.—No one who is not on the staff of a chartered bank is eligible for associate membership. Anyone may of course be a subscriber to the JOURNAL.

Right of drawee bank to demand the endorsement of the payee of a cheque to "order"

QUESTION 263.—(1) A cheque is drawn "Pay to A. B. or order." The payee presents the cheque for payment to the bank on which it is drawn. Can the bank refuse payment unless payee endorses the cheque? (2) Is a party receiving money in payment of a debt due him obliged to give a receipt for the money?

ANSWER.—Both these enquiries are covered in the reply to question 134, p. 446, Vol. V.

Joint and several note presented at the bank where it is payable, and where one of the promissors has an account in funds

QUESTION 264.—A joint and several promissory note made by three parties is presented at maturity at the bank where it is payable and where one of the parties has an account with sufficient funds at credit to cover the note. Should the bank pay the note and charge it to his current account?

ANSWER.—We think the bank ought not to pay the note on its customer's account without his instructions.

Letters of Credit—Drafts thereunder paid at the current rate of exchange for 60-day bills

QUESTION 265.—Referring to the practice of cashing drafts drawn under Letters of Credit, "at the current rate for 60 day

bills," where Bank A cashes a draft under a Credit issued on Bank B, must Bank A accept whatever rate Bank B may claim to be the *current* rate at the point on which the Credit is drawn.

ANSWER.—The proper way to regard the matter is no doubt this, that drafts under Letters of Credit payable at "the current rate of exchange," are to be cashed at the best rate at which the bank would buy a 60-day bank bill on England. This matter was discussed in the JOURNAL; see questions 93 and 99 in Vol. V. The holder is clearly not bound to take an inadequate rate from the drawee, but unless the latter will make itself liable by some undertaking in the nature of an acceptance, the holder would have to look to the drawer or issuer of the Credit for reimbursement.

Authority of an executor to give a renewal of a note made by the testator

QUESTION 266.—The executor of an estate endorses, "Estate of C. B. by A. D. executor," on renewals of a note current during the lifetime of the testator. Has he as executor a right to bind the estate in this way?

ANSWER.—If this were to be regarded as a new contract of endorsement, the executor's authority would depend on the terms of the will, and it would probably be found that he had no authority to bind the estate in this way. Regarded, however, as an extension of the obligation created by the testator, we think that it would be held good, and the original liability of the estate would be continued.

Writ of garnishment served on the maker of a note by a creditor of the original payee—Can the maker safely pay the holder?

QUESTION 267.—A is promissor on a note in favour of B, which is overdue and is held by a bank, having been duly endorsed by B. A creditor of B's serves a writ of garnishment on A for the amount due on the note. Can A safely pay the bank which holds the note, he being ignorant whether the bank holds it for value or merely for collection on account of B.

ANSWER.—The promissor is bound to pay the holder of the note. If B has any interest in the moneys after they are collected, his creditors might take proceedings to attach it in the hands of the bank. A, however, is protected if he pays the note to the holder.

Fire insurance policies as collateral security

QUESTION 268.—Can insurance on the store and goods of a trader, assigned as collateral security for money advanced for the purpose of carrying on his business and meeting his liabilities, be legally recovered?

QUESTIONS ON POINTS OF PRACTICAL INTEREST

FORM FOR QUESTIONS

The Editing Committee

Journal of the Canadian Bankers' Association, Toronto.

Please give your opinion on the following point $\frac{\text{by mail*}}{\text{in the next issue of the Journal}}$

Question : .....

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If the question does not call for an answer by mail, the enquirer's name need not be given if he so prefers.

*If answer is desired by mail, stamp should be enclosed.

ANSWER.—The policy would be voided if it were assigned to a creditor who had no insurable interest in the property, even if the Company assented thereto, or if it were assigned to a creditor who had an insurable interest without the Company's consent. But the insured may assign any sum of money which may become payable under the policy to his creditor. This is not an assignment of the contract of insurance. Under ordinary circumstances the creditor could recover from the insurance company the amount of any loss so assigned.

Warehouse receipt forms

QUESTION 269.—Is the following form of warehouse receipt good from a bank's point of view? It differs materially from the usual bank form:

"Received in store from A. B., 83 large cheese marked 'H' to be "delivered to the order of A.B. to be endorsed hereon.
"Blanktown, 18th August, 1899. C. D. & Co."

ANSWER.—We think this is a valid form of receipt. The points in which it differs from the form usually employed by banks, as for example in regard to a statement of the place where the goods are stored, or that they are to be held until delivery pursuant to order, are not essential.

Stop payment of a marked cheque

QUESTION 270.—(1) The successful tenderer for a contract being let by the town of B—discovers after being awarded the contract, that he has made a mistake in his calculations. He asks to have his tender cancelled and the accompanying marked cheque returned, which the town refuse to do. Can he stop payment of the cheque?

(2) The town of B—bring to a local bank the above mentioned cheque which is drawn on a bank in another place, and ask to have it cashed without recourse against the town. Would the bank be safe in cashing it?

ANSWER.—(1) A customer cannot stop payment of a marked cheque which has reached the hands of the payee, without the payee's consent. This point is discussed in the replies to questions 46 and 89. If the customer chooses he can bring proceedings against the town for the return of the cheque, and can obtain, if the Court will grant it, an injunction preventing their dealing with it and preventing the bank from paying it, but short of restraint by the Court we do not see on what ground the bank could refuse to pay the cheque.

(2) A bank might be safe in negotiating a marked cheque without recourse to the payee if they knew of nothing affecting the payee's title to the cheque, or his right to negotiate the same. The proposal, however, would be so unusual that it might almost constitute notice that something was wrong, and we think it would be unwise to adopt such a course.

Notes and cheques of a customer charged at maturity to his savings bank account without special authority

QUESTION 271.—Would a bank be upheld in law in charging up acceptances and notes as they mature to a customer's account in the savings department without special authority. The following clause is printed on the customer's pass-book? "No draft or cheque drawn against the within deposit can be paid unless such draft or cheque be accompanied by this pass book."

ANSWER.—If the bank were the holder of a note made by a party who had funds in a savings bank account, it would certainly be justified in charging the note against that account by way of set-off, but if the bank were not the holder of the note, and it is merely presented at the bank because made payable there, we think that the ordinary relation of banker and customer with respect to a current deposit account (which gives to the bank implied authority to pay for the customer notes and acceptances which he has domiciled with it), would not apply to a savings bank account upon which the customer cannot, as a right, draw cheques in the ordinary way and which is not presumed to be used for payment of his notes and acceptances. Special authority from him would be required.

Collections—Responsibility of banks for the selection of collecting agents

QUESTION 272.—A bank receives on deposit from one of its customers a sight draft which is sent for collection to a branch of La Banque Ville Marie. The latter remit by draft on the head office, but before the draft can be presented the institution closed its doors. Can the first bank look to its customer for the amount?

ANSWER.—The cases make it clear that unless the bank sent the bill to the Banque Ville Marie at the request of the depositor, they are responsible for the consequences of sending it there. The point is fully discussed in the reply to Question No. 38 (Vol. III., p. 394.)

Cheque certified "good for two days only"

Editing Committee Journal of the Canadian Bankers' Association, Toronto:

DEAR SIRS,—The reply given in the JOURNAL for July, 1899, to question No. 228, is so entirely at variance with that which has I believe hitherto been the accepted view of the matter, that I may perhaps be pardoned for drawing your attention to it. Writing from memory I think I am correct in stating that this question arose some years ago in a very important way, when the tenders for the construction of the Canadian Pacific Railway were under consideration by the Government at Ottawa. The Minister of Railways, Sir Charles Tupper, I think, refused to accept the deposit made by one of the tenderers on the ground that the cheque had been marked good by the Bank of Montreal, Ottawa, with a time limit attached. As soon as the question arose it was at once referred, we were told at the time, to the authorities of that Bank at head office, and the reply made was that the cheque would be considered *good until paid*, in spite of any limit attached to the acceptance.

This answer was in accord with the view held by bankers generally when the dispute arose, and I remember it was the cause of a good deal of angry discussion in the press at the time.

If the cheque is charged to a customer's account at the same time that it is marked good with this qualification, how is the acceptance to be cancelled? Is the time limit really of any effect legally, because I have been instructed that it has none?

I submit these remarks with the utmost deference and only for the purpose of making the matter still more clear.

Yours truly,

E. D. ARNAUD

ANNAPOLIS, N.S., 21st Aug., '99

[We think that the answer we have given is correct. The fact that the bank in the case cited had declared that the cheque would be considered good until paid does not affect the question. It merely meant that they were willing to go beyond the contract entered into on the cheque, and in that particular instance it was done because the drawer of the cheque particularly wished it to be held good, and the limitation in the acceptance was an error on the part of the officer who marked the cheque.

On the general question we think that when a cheque is marked with a time limit the Bank might regard itself as free from liability thereon, and reverse the debit to the customer's account after the expiry of the time, although in practice it is quite unlikely that either the customer or the Bank would wish

to do this. If, however, the customer were to say to the Bank under such circumstances: "You are no longer liable on the "cheque which you marked a week ago and charged to my "account. I wish you to reverse this entry and to pay other "cheques which I have drawn," we think it very doubtful indeed whether the Bank would not be liable for damages if it should refuse to honour cheques to the extent of the balance which the customer's account would show after reversing the entry for the marked cheque.

The "moral" of the whole matter seems to be that banks should not accept cheques except in the absolute form.—ED. COMM.]

Legal

LEGAL NOTES

Cheque sent by mail—The decision of the Queen's Bench Division, England, in *Baker v. Lipton* does not differ from the previous judgments on the same point which have been discussed in the JOURNAL. The principle governing these cases is that a cheque sent by mail is at the sender's risk unless it is so sent at the creditor's request. The last preceding case bearing on this point was *Pennington v. Crossley*, which was reported at p. 414 of Vol. IV, and p. 121 of Vol. V.

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Dividends paid out of capital—Some English journals in commenting on the judgment of the Court of Appeal *In re The National Bank of Wales*, in which it was sought to make a director responsible for the payment of dividends where proper allowance was not made for bad debts, suggest that the popular idea as to the responsibilities of directors needs now to be considerably modified. It would, no doubt, be extremely difficult in most cases, assuming that profits could not be calculated until bad debts were written off, to say what the profits really were, because the question as to the provision necessary for bad debts is a matter of rather nice judgment, in which men might honestly differ very much. No doubt this is the basis on which decisions on this point have been reached by the Courts. The judgment is a very able one, dealing with a most important matter, and we have, therefore, published it in full, notwithstanding its length.

Loan company debentures and the prior lien.—The judgment giving priority to the debenture holders of the Farmers Loan Company cannot, we think, be read by the ordinary depositors in companies issuing debentures of a similar character, without some feelings of disquiet. We think that undoubtedly no loan company in Ontario has any desire to discriminate between those having deposits and those holding its debentures, but this case shows that a company may by a declaration in its debenture forms create a charge in favor of one set of creditors, of which another set may be totally ignorant. We are not aware that any other company has created such a charge to the disadvantage of its depositors as existed in the case of the Farmers Loan Co., but we believe it has been the practice of some companies to print on the face of their debentures a statement to the general effect that the moneys represented thereby are invested in a particular way, and in cases where the wording of this statement is such that it might possibly be read as giving the debenture holders a prior lien on the companies' assets, the companies owe it to their depositors to have the matter set right without delay.

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Liability of persons who endorse a note before delivery to payee—From the number of questions that reach us, it is clear that much doubt is felt as to the position of parties whose names appear on bills offered for discount where they are not promissors or payees, nor endorsers in the ordinary sense of the word. The most frequent cases are those where notes are made payable to a bank and presented for discount bearing the endorsement of a third party placed thereon for the purpose of aiding their negotiation. The case of *Jenkins v. Coomber*, which we report in this number, deals with a set of circumstances somewhat different from those usually existing here, and the same conclusion would not necessarily be reached, but the judgment undoubtedly gives a very different view of the law from that hitherto held here, under the sanction of several decisions in our courts, and the opinions that have been

expressed on this point in the JOURNAL from time to time will need to be modified. We hope, however, to discuss the question fully in a later issue of the JOURNAL.

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Guarantee—Appropriation of payments.—The claim of the Government against the Hon. A. W. Ogilvie, in respect to the latter's guarantee of a deposit in the Exchange Bank of Canada, has been heard in appeal by the Supreme Court of Canada and judgment given against Mr. Ogilvie, reversing the previous judgment in the Exchequer Court. The case is perhaps more interesting from the historical point of view than because of the legal principles involved, but the latter are sufficiently interesting. The judgment of the Exchequer Court was fully reported and commented on in Vol. V of the JOURNAL, pages 250 and 257. There is of course no difference of opinion as to the principles of law which should govern the imputation of payments, but the Supreme Court refuses to hold with the Exchequer Court that the action of the bank in treating the payments as made on account of the debts for which Mr. Ogilvie was not liable, was an error which he was entitled to have amended. The Court held that the appropriation by the bank could not be repudiated by it; that even if there had been an error and therefore no appropriation at all on the part of the bank, the Government had then the right to appropriate and had done so by returning the older deposit receipts; and further that even if this were not held to be true the bank could not amend or annul the imputation made by them unless they could restore the Government to the position in which it would have been if no imputation at all had been made, which is impossible.

LEGAL DECISIONS AFFECTING BANKERS

House of Lords

Sharp (Official Receiver) v. Jackson and others*

The question of whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference, but also on the state of mind—the intention—of the person who made it.

This was an appeal from a decision, dated May 13th, 1897, of the Court of Appeal (Lord Esher and Lords Justices A. L. Smith and Chitty), reported under the name of *New's Trustees v. Hunting*, which affirmed a previous decision of Mr. Justice Vaughan Williams. The question was one of alleged fraudulent preference by an insolvent person, on the eve of bankruptcy, of certain of his creditors to the detriment of others. The facts were somewhat complicated, but it will be sufficient to state briefly their general effect. The action was for a declaration that a deed of conveyance executed by Prance (a member of the firm of Messrs. New, Prance, and Garrard, solicitors, of Evesham) on March 29th, 1894, was void as against the plaintiff, as the trustee of his estate in bankruptcy, and that certain deposits of certificates of shares in a company made by Prance by way of security were void and conveyed no title as against the plaintiff. In November, 1893, New, the senior partner in the firm, died insolvent, and the business was carried on by Prance and Garrard until March 31st, 1894, two days after the execution of the deed above mentioned, when a receiving order was made against them on their own petition. They were subsequently adjudicated bankrupts, and the plaintiff was trustee both of the estate of New and of that of the firm. The said firm were practically scriveners and bankers as well as solicitors, and were largely employed by clients who borrowed money from them at interest, and also by clients who deposited money with them for investment and also at interest. Courtney Connell Prance, one of the partners in the firm, was a trustee of a number of properties, and in some of these cases he was the sole trustee. The present litigation is thus one of

*Times Law Reports.

the many striking instances of the extreme danger of allowing trust estates to be in the hands of a sole trustee. The deed which was attacked by the appellant was made between the said C. C. Prance and William Hunting, a clerk in the office of the firm. It stated that Prance was the owner of the Longdon-hill estate, of about 89 acres, in Worcestershire, which yielded about £414 a year, and was subject to mortgages amounting to £6,400. It also recited that Prance was the active trustee of the estates specified in the schedule to the conveyance, and the recital continued thus :—" On the happening from time to time of the payment off of the securities on which the trust funds thereof have been invested, he (Courtney Connell Prance) has allowed the same to be paid into the general banking account of the said firm of New, Prance, and Garrard pending their reinvestment on other securities, with the result that as to the sums mentioned in the second column of the first part of the said schedule hereto there are at the present time no securities appropriated for the same, and, as to the trusts mentioned in the second column of the second part of the said schedule, the trust funds have been invested on securities, yet, by reason of the agricultural depression and the depreciation of land since the investment was made, it is estimated that such securities are deficient in value to the amount mentioned in the second column of the second part of the said schedule." By the said draft the said Courtney Connell Prance purported in effect to convey the Longdon-hill estate to the said William Hunting in fee simple as trustee, subject to the mortgages existing thereon, upon trust to raise by way of sale or mortgage the sums mentioned in the draft, and to pay the same to the trustees for the time being of the scheduled trust estates to be held by them upon and for the trusts declared by the instruments of which they were respectively the trustees; and the draft contained a declaration that, if the moneys ultimately required for rectification and completely satisfying the recited breaches of trust should be less than the sum of £4,200, then that the difference between the moneys received by the trustee (William Hunting), and that which should be actually required for the rectification of the trust estates should be held by the trustee (William Hunting) in trust for the said Courtney Prance. Prance also

instructed one of his clerks to put certain parcels of share certificates in the respective boxes containing the securities and papers connected with certain of the trusts, together with a memorandum in each case that the certificates were thereby deposited as further and additional securities for the amount owing to each of the several trust funds. The plaintiff—appellant in the House of Lords—claimed both the property included in the conveyance and these share certificates for the benefit of the general creditors. The deed was executed and the deposits made by Prance without any pressure on the part either of his co-trustees of any of the properties or of the persons beneficially interested. The Courts below upheld the conveyance and deposits of shares, as against the general creditors, on the ground that Prance's object was not to prefer certain of his creditors to others, but to shield himself from the consequences of his breaches of trust, and that there was thus no fraudulent preference within the meaning of the Bankruptcy Act, 1883, section 48.

THE LORD CHANCELLOR, in moving that the appeal should be dismissed, adopted the language of Lord Esher in the Court of Appeal:—"The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to me to show what was really his object. It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly, and those persons had a hold upon him, because if they chose to proceed against him the consequences to him might be very serious. He thought that

if he put them as far as he could into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object,' or whatever it may be called, of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act."

Lord Macnaghten, Lord Morris, and Lord Shand concurred, and the appeal was dismissed.

COURT OF APPEAL, ENGLAND

In re the National Bank of Wales (Limited)

Held, that payment of dividends out of the annual profits, when no allowance was made for numerous and increasing bad debts, did not amount to payment of dividends out of capital.

Judgment was delivered upon this appeal from a decision of Mr. Justice Wright. The liquidator in the winding up of this company under the supervision of the Court issued a summons against Mr. John Cory, a former director of the company, asking for a declaration that he as director was guilty of misfeasance or breach of trust (1) in authorizing, sanctioning, or participating in the payment to shareholders of the company of interest or dividends on their respective shares out of the capital of the company, and was liable and might be ordered to repay to the liquidator the amount so paid during the period in which he acted as director; (2) in making or sanctioning improper advances out of the funds of the company in contravention of the articles, whereby a loss accrued to the company, and that he might be ordered to pay to the liquidator the amount of that loss; (3) in making or sanctioning improper advances to customers, and allowing overdrawn accounts and debts of customers to continue, with knowledge that those customers were, or were reputed to be, insolvent or otherwise unable to pay the amount of their indebtedness, whereby a loss had accrued to the company, and that he might be ordered to pay to the liquidator the amount of that loss. An agreement was, on February 23rd, 1893, entered into between the bank and the Metropolitan Bank of England and

Wales for the purchase by the latter company of the assets and goodwill (other than the uncalled capital) of the National Bank, the Metropolitan Bank undertaking to satisfy the liabilities of the National Bank. In case the assets and goodwill should prove to be of less value than the liabilities, the National Bank or their liquidators were to call up sufficient of the uncalled capital to pay the deficiency. The agreement was made conditional upon the shareholders passing resolutions for the voluntary winding up of the bank. This was afterwards done, and the agreement was approved by the shareholders and was carried out. There was an amount of £7 10s. per share uncalled upon the shares of the National Bank. In the result it turned out that the value of the assets and goodwill was less by about £41,000 than the amount of the liabilities. The creditors of the National Bank had been paid, and this summons was taken out really in order to obtain payment by means of it of the above-mentioned deficiency of £41,000. Mr. Justice Wright held that the claims (2) and (3) made by the summons had not been established, but he held that claim (1) had, and he ordered Mr. Cory to pay to the liquidator a sum of £37,000, with interest at 5 per cent. The interest amounted to over £17,000. Mr. Cory appealed, and the liquidator gave a cross notice of appeal with regard to the claims (2) and (3) which had been dismissed. The cross notice asked that, "For the purpose of ascertaining the amount of the liability of the said John Cory in respect of the matters aforesaid, all necessary accounts and enquiries may be directed to be taken and made; and that in taking and making such accounts and inquiries the whole period during which the said John Cory acted as such director, as aforesaid, may be considered, notwithstanding that six years may have elapsed from the commencement thereof, on the ground that the losses arising from the wrongful acts aforesaid, and that the true state of affairs of the said company were fraudulently concealed by the said John Cory, and that the said John Cory issued balance-sheets that were false to the knowledge of the said John Cory, and, moreover, that parts of such interest and dividends were retained by the said John Cory, and converted to his own use as a shareholder of the company."

The Court allowed the appeal, and dismissed the cross appeal.

The MASTER of the ROLLS read the judgment of the Court, in which, after stating the order appealed from and the grounds alleged by the liquidator in his notice of cross appeal, his Lordship continued as follows :—

The appeal and cross appeal thus require the Court to examine into Mr. John Cory's conduct as a director of this company from the time when he became a director in 1884 until he ceased to be so in December, 1890, or even later, if the liquidator is correct. The order under review was made on a summons issued under section 10 of the Companies (Winding-up) Act, 1890, on June 14, 1895, a date which is material, having regard to the Statute of Limitations on which Mr. Cory relies as a defence to the greater part of the demands made against him. It will be convenient to consider his appeal first. This raises the question whether the funds of the company have been misapplied in payment of dividends, and, if they have, then whether Mr. John Cory is liable for that misapplication. Before examining the controverted facts, and discussing the legal questions which arise, it is desirable to state shortly the history of the company, and how the present controversy has arisen. The National Bank of Wales is a limited banking company formed in 1879. Its objects were to carry on the business of bankers, including the making of advances and the acquisition of other businesses. Its capital was £2,000,000, divided into 100,000 shares of £20 each. The shares issued were never paid up in full, £10 being paid up and the remaining £10 being uncalled, and forming, therefore, a large sum available in case of need. The number of shares increased from time to time. In 1884 the paid-up capital amounted to £125,000, and it so remained until 1890, when it was increased to £225,000. The articles of the association, which require notice, are the following :—(15) Gives the company a lien on all the shares held by any shareholder indebted to the company, and gives the directors a power to sell the shares of any such shareholder; (78) enables any director to resign, and on the acceptance of his resignation by a board his office is vacated; (82) makes audited accounts approved by a general meeting conclusive, except as regards errors discovered within three months; (82, 83) entitle the directors and officers to indemnity, except against their own wilful acts and defaults; (86) entrusts the management of the business of the company to the board of directors. Article (98*b*) empowers the board to appoint and dismiss branch managers and the general manager; (98*e* and *h*) empower the board to lend money or give credit with or without security. But there is (in 98*c*) a proviso "that no advances without security shall be made or credit given" to any director;

(99 and 100) relate to the general manager; (105) requires the directors to cause proper accounts to be kept, so as to show the true state and condition of the company; (108) requires them to lay before every ordinary meeting a proper balance-sheet, accompanied by a report as to the state and condition of the company, and as to the amount, if any, which they recommend to be paid out of the profits by way of dividend; (109 to 118) provide for auditing the accounts. The auditors are to have access to the company's books and accounts. By (116 and 117) they are to have copies of the statements proposed to be laid before the general meetings, and it is declared to be their duty to examine the same with the accounts and vouchers relating to them, and to make a report thereon, and also to examine and report on the assets of the company. The auditors are also to report errors and irregularities to the board; (119) empowers the directors, with the sanction of a general meeting, to declare dividends in proportion to the amounts paid up on the shares, and also authorizes the payment by the directors of interim dividends out of the profits of the bank accrued in any half year ending June 30th; (120) empowers the directors to set aside out of the profits a reserve fund, and no dividend exceeding 6 per cent. per annum shall be paid until the reserve fund amounts to one-fifth of the paid-up capital; (121) says the reserve fund may be applied to meet contingencies, equalize dividends, repairs, or any other purpose of the company which the board may think fit. The company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what is called a weekly state—*i.e.*, an account showing how the assets and liabilities of the branch stood, what advances or overdrafts have been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office, showing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents, and to report to the board anything disclosed by them which required their attention. The weekly states and quarterly returns were in the board room for reference in case of need, but, unless attention was called to them, the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition two skilled inspectors frequently went around and inspected the accounts and reported to the general manager.

The accounts of the branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders, only saw the head office books and the returns from the branch offices, certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings showed that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board, either by the chairman or by the general manager. Mr. John Cory has stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. Mr. Justice Wright has regarded this evidence as an admission by Mr. John Cory of a total abnegation of the use of his faculties, and of an entire neglect of his duties. We cannot go so far as this. His evidence does, however, show that he only attended, when present, to whatever his attention was called to; and that having no suspicion that anything was wrong he made no special enquiries in order to ascertain that all was right. After Mr. John Cory had ceased to be a director the company made large advances on insufficient security and took over an insolvent business which greatly embarrassed it. The company, however, was not unable to pay its debts, for its large uncalled capital was amply sufficient for that purpose, and, so far as its outside liabilities are concerned, it always has been and is quite able to discharge them in full. Being, however, in difficulties, the National Bank determined to amalgamate with another company and to wind up. An agreement was entered into between the National Bank and the Metropolitan Bank for the transfer to the Metropolitan Bank of all the assets of the National Bank (except the uncalled capital) and for the payment by the Metropolitan Bank of all the debts and liabilities of the National Bank, subject, however, to this stipulation,—namely, that if the assets transferred exceeded the liabilities the excess should be returned to the National Bank, whilst if the assets transferred should prove insufficient to discharge those liabilities the deficiency should be made good by the National Bank. There is a deficiency of about £41,000, which the National Bank has to make good. The sum can be raised easily enough by a call on the shareholders; but they naturally object to this if money can be got in from other quarters which will relieve them from the necessity of paying a call. The investigation into the affairs of the National Bank which has

been made in order to carry out this amalgamation with the Metropolitan Bank has revealed a very unsatisfactory state of things. The whole of the paid-up capital has been lost, and some £41,000 has to be raised to clear it from debt. The cause of loss is to a large extent attributable to the fact that a large number of debts due to the bank by its customers have turned out to be bad; and large sums advanced to directors and owing by them are irrecoverable. Moreover, large dividends have been paid for a number of years as if the bank was flourishing, whilst, in truth, if its affairs had been properly conducted, the large dividends declared and paid ought never to have been recommended by the directors. There can be no doubt that the shareholders were grievously deceived by the reports and balance-sheets laid before them; and no one can be surprised at their anger with the directors, and especially with the chairman and general manager, both of whom have been criminally prosecuted and convicted for their fraudulent conduct. Mr. John Cory's answer, however, to the attempt to make him liable for the losses sustained and dividends paid whilst he was a director is that he was himself as much deceived as the shareholders by the chairman and manager, and that he was not guilty of any breach of his duty in not making special investigation when he had no reason to suppose that anything was wrong. Mr. Justice Wright has come to the conclusion that Mr. John Cory was not only negligent, but fraudulent, or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences. The learned judge has arrived at this conclusion from the fact that in their reports the directors unjustifiably stated that they had made provision for bad and doubtful debts, whereas they had not. That the chairman and manager knew this is very likely true, but that Mr. John Cory knew it is quite another matter. The table of bad debts shows that sums were constantly written off for bad debts, and there is nothing to justify the inference that Mr. John Cory knew that these sums were insufficient, or that he did not honestly believe them to be sufficient. It may be that he ought to have been more vigilant than he was and that he should not have trusted his brother and Collins so much as he did. But negligence is one thing, fraud is another, and we are quite unable to adopt Mr. Justice Wright's view that Mr. John Cory acted fraudulently in making reports to the shareholders and laying the balance-sheets before them. At the close of the argument for the liquidator we intimated that, in our opinion, the charge of fraud against Mr. John Cory failed, and further study of the evidence strengthened this conviction. This is not only a very important matter to him as regards character, but to a great extent it relieves him from responsibility for anything done or omitted before June

14th, 1889. Another part of the case on which we are unable to agree with Mr. Justice Wright relates to the date of Mr. John Cory's retirement from the board. There can be no doubt that he sent in a letter of resignation (although it was not produced), and that his resignation was accepted at a meeting of directors held in London on December 18th, 1890, and that he was informed of its acceptance on December 22nd, 1890. There can also be no doubt that his resignation was concealed from the shareholders until after their meeting on January 21st, 1891, and that, in the report then laid before the shareholders, the name of Mr. John Cory appeared as a director. The evidence is conflicting upon the question whether his resignation was or was not mentioned at the meeting. On the other hand, he was not present at it, he swears he did not know that his name still appeared as a director. The learned Judge says he is unable to believe that John Cory did not know that his name so appeared, and in the view of the Court below Mr. John Cory improperly allowed his retirement to be concealed and allowed himself to be held out as a continuing director and as concurring in the report of January, 1891, which the learned Judge holds to be as fraudulent on Mr. John Cory's part as those which preceded it. We cannot adopt the learned Judge's view of this part of the case. We are satisfied that Mr. John Cory's resignation was *bona fide* and a fact, not a sham. He was not in fact a director after his resignation was accepted. He took no part in drawing up the report nor in recommending the dividend declared in January, 1891. Even if he received the report before the meeting and saw his name as a director and did not insist that his name should be struck out or that his resignation should be mentioned to the meeting (and the case against him cannot be put more strongly than this), even then we fail to see how such knowledge and omission can, without more, make him liable for misapplying the funds of the company, when in truth he took no part in their misapplication. With these preliminary observations we pass to consider Mr. John Cory's liability in respect of the dividends declared in July and December, 1889, and July, 1890. The liquidator has taken the view that the dividends declared and paid by the company when Mr. John Cory was a director were all paid out of the capital of the company, and the evidence adduced by the liquidator is directed to prove that such was the case. But when this evidence is examined it seems quite plain that the dividends were not in fact paid out of any part of the money forming the paid-up nominal capital of the company, but were paid, notwithstanding the loss of that capital, and without making it good. What was done was this. The accounts were made up annually. Such losses incurred during the year as the

directors recognized as losses were written off or provided for by carrying sums of money over to a reserve fund, and the balance of the receipts in each year over the outgoings in the same year (after making some allowance for bad debts and deductions for sums carried over to the reserve fund) were treated as the profits of that year, and were divided as dividends. Losses written off in one year were not brought forward the next year so as to diminish the profits of that year, but were simply ignored, a fresh start being made every year and dividends being divided out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts written off, and not provided for by an increase of reserve fund, on the capital, and to diminish the paid-up capital year by year and nevertheless to keep paying dividends out of the excess of the annual receipts over the annual expenses. It is obvious that this method of procedure, if long continued, would ultimately exhaust the paid-up capital of the company, and the first disastrous year in which the current outgoings exceeded the current incomings would produce great embarrassments. Such a mode of dealing with the company's assets, however reprehensible, must nevertheless not be confounded with paying dividends out of the paid-up capital of the company. The paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise. Even an article of association authorizing the payment of interest to shareholders on the amounts paid upon their shares cannot authorize a payment of such interest out of capital. See *Masonic, &c., Co. v. Sharpe.* But paid-up capital which is lost can no more be applied in paying dividends than in paying debts. Its loss renders any subsequent application of it impossible. There was no such dealing with the paid-up capital of the company in this case as to amount to an illegal application of it. Further, it is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy unexpected loss is sustained. It must be met if there are assets to meet it with. The capital, even uncalled capital, must, if necessary, be applied to meet it. Such an application of capital is a perfectly legitimate use of it. There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees and reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay none at all. There are cases in which no honest competent man of business would think of charging

particular debts or expenses to capital. We are certainly not prepared to sanction the motion that all debt incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over the other outgoings can be afterwards properly divided as profit, as if there had been no previous loss. No honest competent man engaged in trade or commerce would carry on business on such a principle. But, excluding cases in which everyone can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and is often a matter on which opinions of honest and competent men differ. See *Gregory v. Patchett.* There is no hard and fast legal rule on the subject. There can, however, be no doubt that if expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits and to make it appear that dividends may be properly declared, dividends declared and paid under such circumstances cannot be treated as legitimately paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloxam v. The Metropolitan Railway Company*, and has been acted upon in many other cases—*e.g.*, *Rance's Case*, *In re The Oxford Benefit Building Society*, *The Leeds Estate Company v. Shepherd*, *In re The London and General Bank.* It would seem that Sir G. Jessel inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up. See *In re The Ebbw Vale, &c., Company.* But no decision has yet gone this length, and it has since been decided that dividends may be paid, even by a limited company, although its nominal capital is not kept up. See *Verner v. General and Commercial Investment Trust*, and the earlier case *Lee v. Neuchatel Asphalte Company.* What was lost there was fixed capital, and it is obvious that circulating capital or any other money employed in earning returns must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether that money be called circulating capital or any other name) there can be no profits, and no ingenious process of book-keeping can alter the fact. It is not denied in this case that the annual receipts did exceed the annual outgoings, and the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. But, as already pointed out, it does not at all follow that the course adopted by the directors, in declaring dividends year after year as they did, was legally justifiable. It cannot be denied that the balance-sheet and profit and loss accounts concealed the

truth (as now known) from the shareholders, and were, as it now turns out, grievously misleading. The shareholders were never told that the paid-up capital was being constantly diminished by bad debts, as now appears to have been the case. The shareholders were told every year that proper provision was made for those debts, and now that the case has been thoroughly investigated it is really reduced to the question whether Mr. John Cory was justified in making the statements he did and in dealing as he did with debts which have now been ascertained to be bad. It is easy to be wise after the event, and there is danger in treating a director as knowing years ago what now appears to be the fact. But it is the duty of the Court to examine the state of things as they appeared to him when the dividends were declared, and to determine whether he was justified in what he did by what he knew and ought to have known. What he ought to have known is as important as what he knew. It was stated in a judgment delivered in this Court a few weeks ago in the *Lagunas Case*, that if directors act within their powers, if they act with such care as is reasonably to be expected from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to that company. We believe this statement of the law to be correct, and we adopt it as our guide. It has been shown that in this case the dividends did not, in fact, come out of the paid-up capital of the company. Fraud is not established against Mr. John Cory, nor is there any proof that he was acting in the interests of his own friends or of himself and not *bona fide* with a view to the interest of the National Bank. The enquiry, therefore, so far as he is concerned, is reduced to the representations he made as to the position of the company and of his alleged want of care and attention to the affairs of the bank, and more particularly to his omission to find out that the manager was misleading the directors. In the *Lagunas Case* it was said, and we repeat, that the amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them. See *Overend, Gurney & Co. v. Gibb.* Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. We do not know how better to describe it. Some useful observations justifying the expression gross negligence will be found in Lord Chelmsford's judgment in *Giblin v. McMullen.* It is not, however, necessary to enlarge on this subject. The care, which in any case can be reasonably expected to be taken, is, speaking generally, the measure of the

care which the law requires to be taken where there is no contract affecting the question. What we have to determine is whether Mr. John Cory was justified in making the statements he made, and whether he could be reasonably expected to find out more than he, in fact, knew. Bad and doubtful debts were constantly considered and provided for; some being written off; some by setting aside reserve capital; £12,000 odd were written off before 1890, and £13,600, or thereabouts, were written off in that year, and £70,000 was set aside for reserve capital. Such matters were considered by the directors. The accusation is that they did not do enough in this way. But here again, even if some debts known to the manager to be bad were treated as good, it is not proved that Mr. John Cory knew this or had reason to suspect that what was done was inadequate. His evidence is clear that he neither knew nor suspected that such was the case, and that he really believed that the provision was ample. The same question arises, Was it his duty to test the accuracy or completeness of what he was told by the general manager and managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on on principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him appears to us to be laying too heavy a burden on honest business men. But this is the whole of Mr. John Cory's shortcomings as proved by the evidence. Even his letter of January 19th, 1888, on which Mr. Justice Wright placed so much stress, ceases to turn the case against him if he honestly believed it to be true, and if he was justified as a reasonably careful man in so believing; and we cannot say that he was not. Cases such as these are always cases of degree. In *Leeds Estate Company v. Shepherd* the directors trusted their manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him. The case of *In re Denham & Co.* is more like the present, and there the director was held not liable. It must be now conceded that if Mr. John Cory had himself studied the weekly statements and quarterly returns, and had compared those for one period with those for another, and more especially if he had seen the letters addressed by the auditors to the directors, he would have been put upon enquiry, and would have found out, if he had not neglected his duty, that the

affairs of the bank were not in the flourishing condition which he believed them to be in. The existence of the letters written by the auditors and accompanying their certificates was very much relied on against Mr. John Cory. Those letters are not produced. They were never found by the liquidator. His knowledge of them is derived from copies furnished by the auditors. These letters warned the directors annually, in and after 1884, and especially in January, 1890, that there were matters which required investigation, and if Mr. John Cory had known or suspected that there were such letters, and he had omitted to make inquiries into the matters to which attention was drawn, he would plainly have neglected his duty as a director and have been guilty of negligence to the degree justifying the epithet gross. But he had no reason to suppose there were any such letters, and apart from them the auditors' reports justified him in supposing that all was right. The letter from the auditors of January 13th, 1890, to the secretary of the bank was answered by the secretary on February 13th, 1890; it had been laid before the board, and this was done on the 10th. But Mr. John Cory was not there. He was apparently present at a subsequent meeting at which the minutes of the meeting on the 10th were confirmed, but the matter did not attract his attention; and, considering the terms of the minutes, this was very natural. We are satisfied that these letters from the auditors were fraudulently concealed from Mr. John Cory, and that he never knew of, or suspected, their existence. His ignorance of them was not attributable to negligence on his part. Mr. John Cory's omission to examine the weekly statements and quarterly returns is also, we think, excusable, although not on the same grounds, for they were known by him to exist, and were in the board room for inspection. We have had the advantage of an exhaustive examination of them, and of a comparison of long series of them, and we know the result and their full significance. But without a comparison of those for one period with those of an earlier period a director would derive little information that was really useful. No suspicion being aroused, Mr. John Cory's reasons for not examining them are natural, and his omission to examine them does not show want of reasonable care and attention on his part to the affairs of the bank. He had no reason to suppose that there were unsatisfactory debts beyond those written off and provided for. The evidence when carefully sifted unquestionably shows that Mr. John Cory might have found out that he was deceived by the general manager, and that the dividends declared were not in a business sense warranted by the profits made. On the other hand, the evidence shows that although he was deceived he neither knew nor suspected it. We are not prepared to say

that he is guilty of any breach of duty in not discovering that those whom he trusted were misleading him; nor that in point of law he was guilty of any breach of duty in recommending the payment of dividends as and when he did. A director does not warrant the truth of his statements; he is not an insurer. But if he makes misstatements to his shareholders he is liable for the consequences unless he can show that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time. This, we think, Mr. John Cory did. It follows that Mr. John Cory is not only not liable to make good the dividends declared, but also that he is not liable to refund those which he himself received as a shareholder, whether before or after June 14th, 1889, for there was no breach of trust in this matter by him. His conduct before that date was not more remiss than it was afterwards. As regards the advances made to directors without security between June 14th, 1889, and December 18th, 1890. the lien given by Article 15 came into existence automatically, and gave the company an equitable charge on the shares with a power of sale, which is very important. It certainly constituted a security—*The General Exchange Bank.* Article 98 enumerates what the board may do, and presupposes consideration and attention by them; and we are of opinion that no credit was to be given and no advance was to be made to a director without deliberation by the board nor without security, and if so made it would be difficult to justify the advance by falling back on the lien conferred by Article 15. But we cannot go to the length of saying that shares in the bank might not be accepted as security on reasonable deliberation if of adequate value. We do not overlook the fact that their value depends on the value of the assets of the company lending its money on them. This renders care and deliberation all the more necessary whenever the borrower was a shareholder or a director. But in either case we are of opinion that shares in the bank might be accepted as security if the board considered them sufficient as regards value. Suppose the board considered a proposed advance, and, being satisfied that the shares would sell for considerably more than the sum advanced, authorized an advance and obtained a deposit of the share certificates of the borrower as security. We do not think they would have failed in their duty, even if the borrower were a director. This being so, we cannot hold the board liable in point of law for omitting to obtain the certificates; for their lien and power of sale under Article 15 would not be defeated by the absence of the certificates, and we do not understand that any loss has been sustained by the bank by reason of the absence of certificates. In substance, therefore, we agree with the view of Mr. Justice

Wright on this point. Now let us see what was done by Mr. John Cory. Large advances were made to some directors in 1889 and 1890. We leave out of account the advances made in 1891, as Mr. John Cory was not then a director. We also pass over the errors in figures which Mr. Norris has pointed out. It is proved that in 1889 and 1890 Mr. Crawshay, one of the directors, was constantly allowed to overdraw. The branch manager at Bridgend perpetually drew attention to this and wrote for instructions, but apparently got none. Crawshay was a large shareholder in the company, and the market value of his shares exceeded his advances and overdrafts. Other deeds and documents were apparently also held by the board as a security. Other similar cases are given by the liquidator where these advances and overdrafts have resulted in large losses. The directors clearly regarded the lien as a security, and a "stop-share" book was accordingly ordered to be kept in 1884, in which all shareholders' overdrafts were to be entered. There is no proof that if the shares could in point of law be taken as security they were insufficient at the time they were taken. The securities were never reported to the board as insufficient; nor did Mr. John Cory know or suspect they were so. His cross-examination on these matters shows that many very material facts were concealed from him—*e.g.*, the fact that a director was a partner in a borrowing firm; the amounts to which some of the directors obtained advances or were indebted to the bank; the insufficiency of the securities. Moreover several of the advances which have resulted in loss were not sanctioned by him, and were made without his knowledge. The question of course again arises whether Mr. John Cory ought not to have been more vigilant. The observations already made on this head need not be repeated. Nor is it necessary to examine in detail his liability for other improper advances. Here again his answer is the same, and his liability depends on his omission to find out the facts. His liability for such omission has been already considered and negatived. Having arrived at the above conclusions, it is unnecessary to decide whether Mr. J. Cory's counsel were right in their contention that, assuming Mr. J. Cory to be liable to make good the dividends declared whilst he was a director, the liquidator, as representing the shareholders in the bank, could not have recovered such dividends from him. The argument was that all moneys recovered by the liquidator would have to be distributed amongst the shareholders, who had already had the benefit of the dividends improperly declared, so that they would in effect be paid twice over. In the course of the argument it was pointed out that the money sought to be recovered was, if recoverable, an asset of the company, and that the liquidator was the person to get it in,

and that *Turquand v. Marshall* had no application to claims by incorporated companies. We pointed out that the money which had been divided in years gone by had been paid and received as profits, and not as capital, and Mr. J. Cory could not treat the shareholders, whom on the present assumption he would have misled, as having received the dividends as capital. We said that we agreed with Lord Justice Cotton's observations in *Filcroft's Case*, as we understood them—viz., the Court could and would prevent the liquidator from taking any proceedings which were useless and vexatious, but that this proceeding in the case supposed would be neither the one nor the other. On this part of the case we agreed with Mr. Justice Wright. Lastly, we think it only due to the liquidator to add that, although Mr. J. Cory has succeeded in his appeal his conduct justified the closest scrutiny. But the order appealed from ought to be reversed, and, having regard to the serious charges made against him, the liquidator must pay Mr. J. Cory his costs both of the summons and of his appeal.

QUEEN'S BENCH DIVISION, ENGLAND.

Baker v. Lipton, Limited*

A cheque sent by post, except on the request of the creditor, is so sent at the sender's risk.

This was an action brought by Mrs. A. L. Baker, the administratrix of George Bartrick Baker, deceased, against Messrs. Lipton, Limited, to recover £112 10s., being part of a sum of £125 paid by the deceased to the defendants on or about March 10th, 1898, on applying for shares in the defendant company, after giving credit for £12 10s. payable to the defendant company on 25 shares which only were allotted. It appeared that a few days before his death the late G. B. Baker applied to the defendant company for an allotment of shares, and paid £125 as application money. The application was in the following form:—

"Lipton, Limited. No..... Form of application for ordinary shares (to be retained by the bankers). To the directors of Lipton, Limited. Gentlemen, having paid to the company's bankers the sum of £..... being a deposit of 2s. 6d. per share on application for.....ordinary shares of £1 each in the above company, I request you to allot me that number of shares upon the terms of the prospectus, and I hereby agree to accept the same or any less number, and I authorize you to place my name

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upon the register of members in respect of the shares so allotted to me, and I agree to pay the further instalments upon such allotted shares as required by the terms of the prospectus, and I also agree with the company, as trustee for the directors and other persons liable, to waive any claim I may have against them for not more fully complying in the said prospectus with the requirements of section 38 of the Companies Act, 1867.

Ordinary Signature .....
Name (in full) .....
(Mr., Mrs or Miss) .....
Address (in full) .....
Profession or business .....
Date.....

"All cheques to be made payable to bearer, and crossed to one of the company's bankers.

"A separate cheque must accompany each separate application."

The company allotted only 25 shares and appropriated £12 10s. in payment of the money due on application and allotment of the 25 shares. On March 29th, 1898, Baker died. On March 30th, 1898, a cheque for £112 10s. was drawn (the balance of the £125) by the defendant company to the order of G. B. Baker, and crossed generally, and on March 31st was posted, together with the allotment letter of the 25 shares, to G. B. Baker at the office of the *Pall Mall Gazette*, of which he was city editor, and which was the address furnished by Mr. Baker on his application. The cheque bearing an endorsement "Geo. Bartrick Baker," was subsequently paid into Martin's Bank, Limited, Lombard street, by the Barbeton Development Syndicate, Limited, and credited to the syndicate. Baker's endorsement was admittedly forged by some person. The defendants had no knowledge of the death of Baker or that anything was wrong with the cheque until August, 1898.

MR. JUSTICE RIDLEY, in giving judgment, said that there was no defence to the action. He regretted that it was a case in which one of two innocent persons must suffer. There was no implied request to return the money by post. In a case like the present, where there was no request by the plaintiff that a cheque should be sent by post, he thought that the cheque was so sent at the risk of the sender. It did not constitute payment until the cheque was received. He was also of opinion that, even if defendants had authority to send the cheque by post, it was determined by the death of Baker. There must be judgment for the plaintiff, with costs. Judgment accordingly.

QUEEN'S BENCH DIVISION, ENGLAND

Tate v. Wilts and Dorset Bank, Limited*

A bank permitted a party to open an account in which the first deposit consisted of a crossed cheque in his favor, against which he was not to draw until the cheque was paid.

Held, that this did not constitute negligence which would deprive the bank of the protection afforded by the Bills of Exchange Act with respect to crossed cheques collected for a customer.

This was an action for the recovery from the defendants of the sum of £25, being the amount of a cheque dated 25th May, 1898, drawn by the plaintiff on his bankers, the York City and County Banking Company, Limited (Sheffield branch), payable to the order of "George Dixon" and crossed, and which sum of £25 was received by the defendants from the York City and County Banking Company, Limited, and placed by the defendants to the credit of the said George Dixon, under his real name of George Ernest Laidman.

The action was heard at the Sheffield County Court on the 5th December last, before Judge Waddy, Q.C., and adjourned to the 15th January, when formal judgment was given for the plaintiff for the amount claimed and costs. From this judgment the defendants appealed.

There was practically no dispute as to the facts, which were established as follows:—

The plaintiff, on 25th May, 1898, forwarded to George Dixon the cheque for £25 in part payment for scrap-iron under the circumstances set out in the copy correspondence.

Plaintiff admitted that he knew nothing about Dixon, and did not make enquiries nor ask for references, and did not even mark the cheque "not negotiable." Dixon's real name was George Ernest Laidman, and on the 26th May he took the cheque in question to the defendant's bank, where he saw Mr. Drew, one of the cashiers, and requested them to cash it, explaining that his real name was George Ernest Laidman, but that he traded as a scrap and general merchant as "George Dixon," and was the payee of the cheque; he was a stranger to the bank, and Mr. Drew told him he could not cash the cheque for him, and Laidman then asked him to collect it, and said he

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should probably open an account with the £25. Defendants arranged to collect the cheque, and to ask the bank on which it was drawn to wire at once whether it was good. The next day defendants received a telegram that the cheque was paid, and placed the £25 to Laidman's account, and Laidman at once drew a cheque against it, as is shown by the copy account sent herewith. No scrap-iron ever was delivered by Laidman to the plaintiff, and it was afterwards ascertained that Laidman had already been convicted for obtaining money under false pretences, and that he did not actually carry on any trade, and having ascertained this, and being satisfied that the whole thing was a fraud from beginning to end, the plaintiff claimed back the £25 from the defendants.

The plaintiff's advocate based his claim upon the following points:—

1. That the defendants had been guilty of negligence in collecting the cheque for an entire stranger.

2. That the cheque having been obtained from the plaintiff by fraud, the property in it never passed out of the plaintiff, and that the defendants could have no better title than Laidman, who paid it to them.

3. That the defendants had been guilty of conversion of property belonging to the plaintiff—*i.e.*, the cheque.

4. That the defendants were simply agents for Laidman, and could have no better title than he had.

MR. JUSTICE DARLING: I do not think that what occurred in this instance in the creation of this cheque was at all like, or, at all events, was on a par with what occurred in the case of *Cundy v. Lindsay*. It seems to me that in this case Mr. Tate undoubtedly gave a cheque which he drew in favour of George Dixon. The person in whose favour he drew it called himself George Dixon, but his real name was Laidman, and he had very good reasons—reasons sufficient to him—for calling himself by another name, but Mr. Tate was unlike the persons who created the credit in *Cundy v. Lindsay*, in this he did not believe himself to be dealing with any particular George Dixon whom he knew. It is true he did not know that he was dealing with a person named Laidman. If he had known he was dealing with Laidman, very likely he would not have dealt with him, but though he did not know he was dealing with Laidman, he did not suppose he was dealing with any definite person known

to him as being George Dixon, and known as George Dixon. It seems to me that makes a difference. Then he enters into what upon the face of it seems to be a contract. Was it a contract? I think that *de facto* it was. Then we are within the reasoning of the Court in *Cundy v. Lindsay*, where Lord Cairns says this:—"The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud, but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence." Here we are, I think, dealing with a case in which the contract does come into existence. It is true that it was a voidable contract. It is a contract which Mr. Tate might on discovering the real facts have avoided and if the cheque had remained in the hands of Laidman, and Laidman had presented it, and he had found out that Laidman had obtained it by this fraud, he could have refused to pay Laidman. But that would have been upon grounds quite other than the grounds which were held to be sufficient in the case of *Cundy v. Lindsay*. But now it is said Laidman, not being able to recover upon this cheque, the bank who took it, the Wilts and Dorset Bank, were merely the agents of Laidman. I must say for my own part I do not think that that is the result of the evidence. I do not think that they were merely the agents for Laidman. I think that the true effect of what happened was this. Laidman went to them and asked them if they would cash him this cheque. They did not say anything about the cheque, and they said neither "we will" nor "we won't," but they first of all ascertained whether the cheque would be met if presented. They ascertained that it would be met. Then they told Laidman that they would cash it, but cash it in what circumstances? I do not think that they did say that they would cash it merely as his agents, but he was going to open an account with them. He was not a customer at the moment, but he was going to become a customer if that cheque was collected. The bank would allow Laidman to open an account if he brought them, say, twenty-five sovereigns; they would not allow him to open the account if he brought the cheque, as to which it was problematical whether it would be cashed or not, but having ascertained that the cheque was equivalent to cash, they allowed him to open the account, and thereupon they allowed Laidman to draw against the money which they obtained from the cheque. I do not agree that the true effect of the evidence is that they were agents for Laidman. If I am right there, a good deal of the argument we have heard is beside the point. I will assume for the sake of argument they

were. Assume for the sake of argument that they were merely agents of Laidman, then what have they done? Not knowing that Mr. Tate is in a position, by reason of the fraud of Laidman, to repudiate his contract with Laidman, they being the agents (as for the sake of argument I treat them) pay over the money which they have received from Mr. Tate through the medium of a bank to their principal, Laidman. But they do it without any kind of knowledge that the contract is one which Mr. Tate may repudiate. I think that thereupon they are within the rule laid down in *Holland v. Russell*, which is reported in *Best v. Smith*, and in *Best v. Smith*, because it was appealed against and was affirmed upon appeal. That rule, to put it shortly, is "That A, being only an agent, of which B was aware, and having, without notice of B's intention to repudiate the contract, paid over to his principal the amount received from the underwriters, B was not entitled to recover back from A his amount of the insurance." It is not necessary for me to refer particularly to the judgment, there are passages which I might read to substantiate this doctrine, but it does seem to me that this covers what was done in this case by the bank when they paid the money over to Laidman. It is said that they did that in some way negligently. I am unable to see how anything that they did negligently affects this. They did not do it fraudulently. They did not do it in any kind of way in bad faith. The negligence found by the Judge is this:—"That they acted negligently in collecting the amount of a crossed cheque for a stranger without making due enquiry as to his title." To my mind that is only another way of saying they acted negligently in opening an account with a person who was going to commence the transactions between them by first of all paying the cheque, as to which they did not know his title. It does not appear to me that the real negligence is, what was done here, the paying the money over to Laidman. It is not suggested that the negligence was the paying it over to Laidman without knowing whether he had a good title or whether it was a title which Mr. Tate could repudiate. The negligence suggested is the negligence in collecting the amount for a stranger without making enquiry as to what title he had. If any negligence would affect this case, and take it out of the rule laid down by *Holland v. Russell*, I cannot see that any negligence of that kind would take it out of it, I think the appeal must be allowed.

Mr. Justice Channell concurred.

QUEEN'S BENCH DIVISION, ENGLAND

Jenkins & Sons v. Coomber *

It was agreed between the plaintiffs and A, who owed them money, that they should draw a bill on him, and that the defendant, who was A's father, should endorse it to guarantee payment. They accordingly drew a bill on A, to their own order, and, without endorsing it, gave it to A, who returned it to them accepted by himself and endorsed by the defendant. They then endorsed it, and it was not paid at maturity.

In an action against the defendant —

Held, that he was not liable as endorser under section 55 of the Bills of Exchange Act, 1882, nor as having incurred the liabilities of an endorser under section 56, since at the time he put his name on the bill it was not complete and regular on the face of it, as it lacked the plaintiff's endorsement, nor was he liable on a contract of suretyship since the provisions of the Statute of Frauds were not satisfied.

Appeal from the Westminster County Court.

The action was brought on a bill of exchange, which was in the following form :—

LONDON, Aug. 5, 1897

£57 os. od.

Three months after date pay to our order the sum of Fifty-seven pounds for value received.

(Sgd) J. JENKINS & SONS

To Mr. Arthur Coomber.

Accepted payable at the London and County Bank.

(Sgd.) ARTHUR COOMBER

Indorsed: "ALFRED COOMBER"

"J. JENKINS & SONS"

It appeared that in 1897 Arthur Coomber, who was the son of the defendant Alfred Coomber, owed money to the plaintiffs, Jenkins & Sons. Arthur Coomber requiring time for payment, it was arranged between him and the plaintiffs that they should draw on him at three months, and that his father, the defendant, should endorse the bill to guarantee payment. The plaintiffs accordingly drew this bill upon him to their own order, and, without endorsing it, gave it to Arthur Coomber. He took it to the defendant, who wrote his name on the back of it, receiving no consideration for doing so, but, as he said, "in order to carry his son a bit further." Arthur Coomber then returned the bill to the plaintiffs, accepted by himself and endorsed by

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the defendant, and the plaintiffs afterwards endorsed it. The bill was not paid at maturity, and this action was brought by the plaintiffs against Alfred Coomber as endorser.

The County Court judge gave judgment for the defendant, and the plaintiffs appealed.

WILLS, J.—I am of opinion that the County Court judge was right in this case. I do not think that the Bills of Exchange Act, 1882, was intended to effect such an important alteration in the law as to override the decision of the House of Lords in *Steele v. McKinlay*. That decision seems to me to be in force at the present time. It is clear that, in the present case, when the defendant wrote his name upon the bill it was not complete and regular on the face of it. Nor, indeed, did it become so at any time. Section 56 of the Bills of Exchange Act, 1882, provides that a person who signs a bill otherwise than as drawer or acceptor incurs the liabilities of an endorser "to a holder in due course." But by section 29 a "holder in due course" is a holder who has taken a bill complete and regular on the face of it. Section 56 therefore does not apply. This was not on the face of it a regular and complete bill of exchange, since when the defendant endorsed it the bill had not been endorsed by the plaintiffs, to whose order it was payable. But then it is said that the defendant is liable under section 55, sub-section 2, as an endorser because his name is on the back of the bill. The Bills of Exchange Act certainly does not give much assistance as to the meaning to be attached to the word "endorsement." It says (s. 2): "'Endorsement' means an endorsement completed by delivery"; but it nowhere says what constitutes "an endorsement." Lord Watson, in *Steele v. McKinlay*, draws a distinction between a person who in the nature of things could be the endorser of a bill and a stranger who writes what if he had a right to endorse would be an endorsement on the bill, although he has no right to the contents. He says that it is perfectly consistent with the principles of the law merchant that a person who writes an endorsement with intent to become a party to a bill should be held (notwithstanding that he has not, and therefore cannot give, any right to its contents) to be subject to all the liabilities of a proper endorser. In that case, as in this, the difficulty was that, though the person who wrote his name on the back may have meant to become a party to the bill, he never did become so in fact because the bill was never made complete, so far as he was concerned, by the necessary endorsement of the drawer. It seems to me here that the law merchant, unless it was materially altered by the Bills of Exchange Act, 1882, which I do not think, has no application. The cases which have been cited by counsel for the appellants

to establish the liability of the defendant as endorser are all cases where the bill was a complete and perfect instrument. Here, as I have already said, the bill was not a complete negotiable instrument until it had received the endorsement of the drawers. The result of those cases is that, where there is an agreement between the parties which precludes the notion that the holder of the bill is liable to the endorser, the holder is not prevented from suing the endorser on the ground of circuity of action. The general principle since the Act of 1882 seems to me to be exactly as it was laid down in *Steele v. McKinlay*, and the contract of indemnity on which the plaintiff relies is one which is not recognized by the law merchant, but which arises solely from an agreement between the parties. It is, however, here relied upon as giving a primary liability against the defendant upon this bill of exchange. That, as Lord Watson points out in *Steele v. McKinlay*, will not do. If the agreement exists at all, it must exist as a contract of suretyship, and for that purpose it must satisfy the requirements of the Statute of Frauds.

For these reasons I am of opinion that this appeal must be dismissed.

KENNEDY J.—I am of the same opinion, and for the same reasons. I do not think that the doctrines laid down in *Steele v. McKinlay* have been varied by the Bills of Exchange Act, 1882. In the edition of that Act by Mr. Chalmers, he expressly gives *Steele v. McKinlay* as an illustration to section 56, without a suggestion that the law laid down in that case has in any way been altered. This document was, according to the law merchant, irregular, and therefore the defendant is not liable upon it to the plaintiffs. If it is sought to use it as an agreement of suretyship, it is insufficient to satisfy the provisions of the Statute of Frauds.

SUPREME COURT OF CANADA

Her Majesty the Queen (Plaintiff), Appellant; and the Honourable A. W. Ogilvie (Defendant), Respondent*

A bank borrowed from the Dominion Government two sums of $100,000 each, giving deposit receipts therefor respectively, numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of $50,000 on account that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the finance department stated that this had been done,

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enclosed another receipt numbered 358 for $50,000 on special deposit, and concluded, "Please return deposit receipt No. 323—$100,000 now in your possession." Subsequently $50,000 more was paid and a return of receipt No. 358 requested. The bank having failed the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guarantee loan, and that the president had instructed the accountant so to apply the two sums of $50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown.

Held, reversing the judgment of the Exchequer Court, Taschereau and Girouard, JJ., dissenting, that as the evidence showed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C.C., no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made, which was impossible, as the Government would then have had an option which could not now be exercised.

Appeal from a judgment of the Exchequer Court of Canada dismissing an information by the Attorney-General for Canada on behalf of the Crown against the defendant. (JOURNAL, Vol. V, p. 256).

The material facts are sufficiently stated in the above headnote, and more fully in the judgment of the majority of the Court delivered by Mr. Justice King.

KING, J.—This is an appeal from the judgment of the Exchequer Court (per Davidson, J., *pro hac vice*) dismissing the claim of the Crown.

The claim was based on a letter of respondent dated 11th May, 1883, guaranteeing a loan or deposit of $100,000 then being made to the Exchange Bank of Canada at the request of the respondent.

The Exchange Bank had its head office in Montreal. Its president was one Thomas Craig, and Mr. Ogilvie was one of the directors.

In April, 1883, the bank was in financial difficulty and applied to the Finance Department for a loan of $100,000. The loan was made on the 12th of the month by way of special deposit, at 5 per cent. interest withdrawable on thirty days' notice. The deposit receipt given by the bank was numbered 323.

Four days afterwards the bank made application for another $100,000, and on the 18th of April received this loan also, giving their deposit receipt for the amount. This deposit receipt was numbered 329, and is as follows :

No. 329

$100,000 MONTREAL, 17th April, 1883

The Exchange Bank of Canada acknowledges having received from the Hon. the Receiver-General the sum of one hundred thousand dollars, which sum will be repaid to the Hon. the Receiver-General, or order, only on surrender of this certificate, and will bear interest at the rate of five per cent. per annum, provided thirty days' notice be given of its withdrawal.

The bank reserves the privilege of calling in this certificate at any time on written notice to the depositor, after which notice all interest on the deposit will cease.

If when notice be given by the depositor of withdrawal, the bank elects to pay immediately, it shall have the right to do so.

(Sd.) T. CRAIG,
President

Entered,
(Sd.) ERNEST D WINTLE,
p. Accountant

Three days later the bank wrote the department that another $100,000 would be required to place them in an independent position, but the department declined to make such further loan.

Then Mr. Ogilvie came to Ottawa, and upon his undertaking to guarantee such further deposit, it was made on the 12th of May, 1883.

The letter of guarantee is as follows :

OTTAWA, 11th May, 1883

MY DEAR SIR,—I beg that the Government will place a further sum of $100,000 at deposit with the Exchange Bank on the same terms as the former deposits of $200,000 ; and on the Government agreeing to comply with this request I hereby undertake to hold myself personally responsible for the further deposit of $100,000.

Yours very truly,
(Sd.) A. W. OGILVIE

J. M COURTNEY, ESQ.,
Deputy Minister of Finance, Ottawa

The deposit receipt given in respect of this loan was numbered 346, and is as follows :

No. 346

$100,000 MONTREAL, 12th May, 1883

The Exchange Bank of Canada acknowledges having received from the Hon. the Receiver-General the sum of one hundred thousand dollars, which sum will be repaid to the Hon. the Receiver-General or order, only on surrender of this certificate, and will bear interest at the rate of 5 per cent. per annum, provided thirty days' notice be given of its withdrawal.

If when notice be given by the depositor of withdrawal, the bank elects to pay immediately, it shall have the right to do so.

(Sd.) T. CRAIG,
President

Entered,
(Sd.) ERNEST D. WINTLE,
p. Accountant

On the 31st of May, 1883, Mr. Courtney, for the Finance Department, wrote to the bank that "on the 1st day of July next the Dominion Government will require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account."

In consequence of a letter from the bank of the 29th June requesting that the repayment be postponed until after the 20th July, Mr. Courtney wrote on the 30th of June to the bank as follows:

I am sorry to say that I must have the $50,000 turned into ordinary cash on Tuesday. I had intended to have drawn out immediately (*i.e.* after it had been transferred to general account) in order to meet payments on account of subsidies, but this I will do, I will only draw $5,000 a day for ten days. I may as well inform you that we shall want another $50,000 to be turned into cash on the 1st August.

The following further correspondence in reference to this payment then took place:

Mr. Courtney to the President (Managing Director).

OTTAWA, 7th July, 1883

SIR,—Referring to previous correspondence, I have now the honour to request that you will be good enough to forward to me at your earliest convenience a receipt for the $50,000 which was to be turned into cash on the 1st instant, and also a fresh receipt for $50,000 at interest, and will return you one of the receipts for $100,000 which we now hold. Pray attend to this without delay.

James M. Craig, pro Manager, to Mr. Courtney.

MONTREAL, 9th July, 1883

As requested in your letter of 7th instant I now forward the deposit receipt of this bank No. 358 in favour of the Hon. the Receiver-General for $50,000, and enclose our receipt for $50,000 placed to the credit of the Finance Department account. Please return deposit receipt No. 323—$100,000 now in your possession and oblige.

Mr. Courtney to the President of the bank:

OTTAWA, 10th July, 1883

I have the honor to acknowledge the receipt of your letter of the 9th instant enclosing special deposit receipt for $50,000, and I have now the honour to enclose herewith your deposit receipt No. 323 of the 13th April, 1883, for $100,000.

James M. Craig, pro. Manager, to Mr. Courtney, of 11th July, acknowledging receipt of deposit receipt No. 323.

Then with the respect to the withdrawal or repayment of the second $50,000, of which Mr. Courtney had given notice on 30th June for the 1st of August, there is the following correspondence:

Mr. Toller, acting Deputy Minister of Finance, to the President of the bank:

July 31st, 1883

In reply to your letter of yesterday's date, asking that the $50,000 which is to be taken from interest to ordinary cash to-morrow should be allowed to remain until the 1st of September, I regret to say that I am unable to comply with your request, as my instructions from Mr. Courtney were that the money was to be paid on the day named by him....

President of bank to Mr. Toller, asking that Government will draw on the general account only at the rate of $10,000 every third day.

Toller to President of bank, 15th August.

As I wrote to you the end of last month my instructions were to call upon you to place $50.000 (of which due notice has been given) at the credit of the Receiver-General's ordinary cash from the amount now at interest. I do not see how I can consent to its remaining until the 1st of September. I shall, however, be most happy to comply with your request about drawing out the money. Please send us a receipt showing that the amount has been transferred from "interest" to current account with the accrued interest thereon.

James M. Craig, Pro. Manager, to Deputy Minister of Finance, 16th August, 1883.

I beg to acknowledge the receipt of your letter of the 15th instant, and herewith enclose receipt showing the current account with the department credited $50,315.07. Please return deposit receipt No. 358—$50,000, in favour of the Receiver-General and oblige.

The bank suspended payment on the 17th of September, 1883, and on the 5th of December a winding-up order was issued under which the affairs of the bank have been fully wound up.

The Crown filed a claim for the amount of the two deposits as per Receipts Nos. 329 and 346, with interest thereon, and for the further sum of $37,840.24 in respect of other transactions, and received in dividends a sum $160,503.21, or sixty-six and three-eighths per cent.

The principal question relates to the application of the two payments of $50,000 each.

For the Crown it is contended that they were made upon the first indebtedness evidenced by the special deposit receipt No. 323, and by the receipt No. 358, given in substitution for the one-half of such loan remaining unpaid after the payment of the first sum of $50,000.

The respondent contends that such alleged application is null and void for error and want of authority in the person making it, and that in such event by the law of Quebec (which is claimed to be applicable) the payments are to be applied to the discharge of the guaranteed debt, thereby relieving the debtor of his obligations at once to the creditor and to his surety.

Arts. 1160 and 1161 (in part) of the Civil Code are as follows:

(1160.) When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt except upon grounds for which contracts may be avoided.

(1161.) When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying.

It may be noticed in passing that Art. 1160 seems to relate to cases where the creditor has made the imputation, and not to cases where the imputation has been made by the debtor.

The error assigned as sufficient under Art. 1160 to avoid the imputation of payment of the first loan or debt is briefly this :

It is said that in consequence of the bank having agreed with Mr. Ogilvie that the first moneys paid would be paid on account of the guaranteed debt, Thomas Craig, the bank president, gave instructions to the accountant, James M. Craig, so to apply the two sums of $50,000, but that without the knowledge or consent of the bank he omitted to do so, but on the contrary purported to make the payments on account of the first of the loans. It is not suggested that the Government knew anything of these transactions or understandings between the bank and Mr. Ogilvie, or of the instructions to James M. Craig.

The learned judge has upheld these contentions of the respondent, and has directed that the payments be applied to the discharge of the guaranteed indebtedness, and dismissed the information of the Crown.

It may for present purposes be assumed that the view taken in the court below as to the case being governed by the law of Quebec is correct.

It has not been contended that the guarantor's responsibility under the terms of his letter of guarantee would cease whenever the bank's special deposit indebtedness to the Crown should become reduced to $200,000, the amount at which it then stood. If it had been so contended, it might have been replied that the guarantee was that of a particular debt then being about to be contracted, and referred to as "the further deposit of $100,000." The several loans were distinguished by the respective deposit receipts or contracts entered into in respect of each, and which were not entirely similar in terms. The contract numbered 346 was that for the performance of which by the bank Mr. Ogilvie made himself responsible.

Then as to error and want of authority on the part of James Craig in purporting to make the imputation of payment.

The act of an agent binding the principal needs to be not only within the scope of the authority, but for the employer's benefit. As to the last point first. The natural effect of Craig's imputation was to maintain the failing credit of the bank with its creditor, by preserving to the latter the personal security of Mr. Ogilvie, while at the same time the total liability was

reduced. It was therefore clearly an act done by James Craig for the benefit of the bank under the circumstances in which it was placed.

Then as to the scope of Craig's authority. It seems manifest from the testimony of the bank president that, in the condition in which the bank was, things were left to be done by the accountant acting for the manager which perhaps at other times might not have been left to him. Thomas Craig, the president, says:

> At that time things were in a pretty bad shape and we did not know where we were standing, and instead of doing this myself, as I ought to have done according to the agreement of the board (referring to the agreement with Mr. Ogilvie), by some means or other it was done by the accountant.

That is to say, owing to the confusion the president by some means or other left it to the accountant acting for him to transact this part of the bank's business. It further appears from the instructions said to have been given by the president to the accountant that the latter was recognized and treated as the officer charged with the signification of the imputation of payments.

Throughout the correspondence, beginning with the forwarding of the first deposit receipt, James Craig acts at every stage of the transactions as on behalf of the president, and with his knowledge.

In the letter to the bank president of 10th July, 1883, Mr. Courtney referred to James Craig's letter of the day before and enclosed "deposit receipt No. 323 of the 13th April."

There can be no reasonable question then that the president knew of what had been done, for the deposit receipt was referred to not only by its number but its date, and not only did he not repudiate it, but concluded the arrangement by making out fresh deposit receipt No. 358.

Supposing, however, that there was error, the annulment of the imputation by James Craig would still leave the act of the Crown in immediately sending back the deposit receipts as a sufficient act of appropriation on their part, no appropriation at all having been made by the bank on the hypothesis of error.

And even if this were not so, the bank could not get a benefit from their own error, and annul the imputation made by Craig, unless the creditor could be put in the same position as he would have been if there had been no imputation at all by the bank, and for obvious reasons no option can now be exercised by the Crown. There was clear prejudice to the Crown in being deprived of an option that would have belonged to it if Craig's act had, on the instant of making it, been nullified.

There seems, therefore, upon these several considerations, to be no satisfactory ground for treating the case as though there had been no appropriation of payment either by the bank or the Crown.

It is further suggested that the imputation was invalid because not made at the time of payment.

With regard to the first payment of $50,000, Craig's letter of 9th July advises that the amount has been placed to the credit of the Finance Department, *i.e.*, to the credit of the general or current account, and simultaneously asks for return of deposit receipt No. 323. This was at once assented to by the Crown (whose assent may be considered necessary upon a part payment of the debt), and acted upon by the return of the receipt asked for. Craig's letter constitutes an immediate appropriation. If not, there was the appropriation instantly made by the Crown upon being notified of the fact of payment, or it was made by the joint assent to receiving part payment on account of such debt. In either way, therefore, there was valid application to the first debt.

If the actual payment of the money upon cheques drawn against general account be regarded, it must on principle be considered that the previous declarations and consents as to the application of the payments continued to operate so as to govern and explain the act of payment when it should take place, and to determine its character and quality.

So as to the second sum of $50,000, Craig's letter of 16th August advises of the transfer of the amount from the interest account to current account, and at the same time requests the return of deposit receipt No. 358. This also was acted upon and the deposit receipt returned. Until such return of the deposit receipt the transaction was incomplete.

Again, regarding the payments as not made until payment of the cheques drawn against general account, such subsequent payments would in the way already mentioned be considered as being made in pursuance of the subsisting declaration of intention and consent.

As to the dividends received by the Crown in the winding-up, the debts being distinct, the surety is entitled to have a ratable amount applied towards the reduction of the guaranteed debt.

As to interest, the respondent in his letter of 11th of May requested that the further deposit of $100,000 be made on the same terms as the former deposits of $200,000, and these terms included payment of interest by the bank at 5 per cent.; the obligation to be responsible for the deposit therefore reasonably includes interest at the named rate.

The result, therefore, is that the appeal is to be allowed with costs here and below, and judgment to be entered for the Crown for the amount of the deposit with interest at 5 per cent., deducting a ratable amount of the dividends received by the Crown upon the winding-up of the bank.

Sir Henry Strong, C.J., and Sedgewick, J., concurred.

Girouard and Taschereau, JJ., dissented.

High Court of Justice, Ontario

Re Farmers' Loan and Savings Company. Debenture Holders' Case*

The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors.

The company was formed on the 19th October, 1871, under C. S. U. C. c. 53, by sec. 38 of which the right of a society formed under it to borrow money, if authorized by its rules to do so, was recognized.

By rule 7 of the company, passed under the authority of sec. 2 of c. 53 C.S.U.C., the directors were authorized to borrow money for the use and on the assets of the company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution :—

Held, that the company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed.

And this power to pledge the assets was one which might be delegated to the directors under C.S.U.C. c. 53, sec. 5.

The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada: "—

Held, that these instruments created a charge upon the property of the company.

Per Meredith, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors.

In the winding-up of the company under the Dominion statute R.S.C. ch. 129, before the Master in Ordinary, the holders of the company's debentures asserted a claim to priority over the depositors. The Master ruled against this claim, from

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*Ontario Reports. Reported by E. B. Brown

which ruling certain of the debenture holders appealed. The appeal was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 9th and 10th December, 1898, and allowed.

MEREDITH, C.J. :—These appeals are by debenture holders from the ruling of the Master in Ordinary against their claim to be entitled to a charge on the assets of the company in priority to depositors.

The company was formed under the C.S.U.C. c. 53, on the 19th October, 1871, and among its rules, passed under the authority of sec. 2, is the following :—

"7. The directors are authorized to borrow money for the use and on the assets of the company, to receive money on deposit in large and small sums, and to pay such interest therefor and under such regulations as they may from time to time deem advisable, and to loan or invest such money either on mortgage on real estate or in any other way they may think best for the interests of the institution."

It has been determined by the highest authority (*Murray v. Scott*), that such a company, if authorized by its rules to do so, may borrow money for the purposes of the company, and may charge or pledge its assets for the payment of the money borrowed.

The original Building Societies Act, consolidated with the Acts amending it by the Act already referred to, was 9 Vict. c. 90, the provisions of which, as far as they affect the present enquiry, are substantially the same as those of the Imperial Act upon which the questions arose which were under consideration in *Murray v. Scott*, with the following exceptions :—

(1) The Imperial Act did not, as the Upper Canada Act does, create the members of the society a body corporate.

(2) The Upper Canada Act expressly recognizes the right of a society formed under it to borrow money, if authorized by its rules to do so, by providing in sec. 38 as follows :—

"38. Every such society by its rules, regulations and by-laws authorized to borrow money, shall not borrow, receive, take or retain, otherwise than in stock and shares in such society, from any person or persons, any greater sum than three-fourths of the amount of capital actually paid in on unadvanced shares, and invested in real securities by such society; and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society."

Besides this recognition of the power of the society to pass such rules, the subsequent legislation has practically converted what were originally building societies into loan companies, and has conferred largely increased borrowing powers upon them.

It is clear, therefore, I think, that this company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed, and it follows, I think, that such security might be given in the form of a mortgage or pledge of or charge on the whole or any part of the assets of the company, whether existing when the security was given or subsequently acquired, or in the nature of what is known as a "floating security" upon the assets, present and future.

That this is the result of the decision in *Murray v. Scott* is manifest, I think, because the rule which was under consideration in that case professed to give to the lenders of the money a first charge for it upon the property of the company, and that charge was held to be a valid one. If the members might create such a charge, I know of no principle of law which, even if no express power were given to do it, would prevent them from conferring on the trustees or directors the authority to create such a charge, and that they may do so is expressly provided by sec. 5.

It was argued, however, that the effect of sec. 38 is to give a statutory charge on the capital of the company to persons from whom the company borrowed money, either by receiving it on deposit or otherwise, for the money lent, and that this statutory charge has priority over any charge or security created or given by the company, and to that argument the learned Master has given effect.

I am unable to agree with this view as to the effect of sec. 38.

It may be difficult to ascertain with certainty the purpose which the Legislature had in view in enacting the provisions of sec. 38.

It may have been, as was argued by counsel for the appellants, with the intention of preventing a society from returning to its members who desired to withdraw their shares, instead of making them fixed or permanent, the amount paid in by them, to the prejudice of those who had lent money to the society, or it may have been to leave no room for doubt that it was not to the trustees but to the capital of the society, paid in and subscribed, that persons lending money to it must look for the repayment of the money lent. The fact that the members of the society are made a body corporate does not necessarily exclude the latter view, for it is to be remembered that the Act was framed substantially on the lines of the Imperial Act, which require the society to act in the name of its trustees, in whom its property was vested, and that while the members are by the Upper Canada Act created a body corporate, as I have already mentioned, the property of the society is vested in its president and treasurer (sec. 27), and by sec. 31 the president, vice-presi-

dent and directors of the society, in their private capacity, are exonerated from all responsibility in relation to the liabilities of the society.

. . . I come now to the consideration of the second and more difficult branch of the case.

The question to be determined is whether the debentures issued by the company, all of which are in the same form, create a charge on the property of the company, and if they do, what is the nature and extent of the charge created.

The instrument is headed "Land Mortgage Debenture;" it is numbered, and is stated to be issued "under the authority of an Act of the Parliament of Canada, 37 Vict., c. 50, and also under the authority of the Revised Statutes of Ontario, c. 164;" it is in form a promise by the president and directors of the company to pay to the person named as payee the sum for which the debenture is issued, at a time and place named, with interest at a named rate, payable half-yearly on presentation of the proper coupon annexed to it; it is signed by the president and secretary, and the seal of the company is affixed, and it is also, when issued in Great Britain or Scotland, countersigned by the local director there; and immediately below the signature of the president and secretary are the words following: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada."

The language of the instrument is open, as it appears to me, to three possible meanings:—

(1) That the capital and assets of the company are invested in mortgages upon approved real estate in the Dominion of Canada, and that this fact affords a guarantee to the holder of the debenture that the principal and interest payable according to its terms will be paid, and that in this sense the debenture is a land mortgage debenture.

(2) That the payment of the principal and interest is secured upon the capital and assets of the company, which are stated to be invested in mortgages upon approved real estate in the Dominion of Canada, the latter words being used, not as limiting the security to the moneys so invested, but as a representation by the company that the capital and assets upon which the charge is created are invested in that kind of securities.

(3) That the payment of the principal and interest is secured upon so much of the capital and assets of the company as is invested in mortgages upon approved real estate in the Dominion of Canada.

The third of these constructions suggested as possible to be put on the instrument seems to me to be the least likely to have been that which was intended by the contracting parties, and that which the language used least accords with.

It is, I think, more probable that if it was intended to create a charge, the charge was one which would embrace all the assets of the company rather than so much of them as might from time to time be invested in mortgages, and so to leave it in the power of the borrower to reduce the security of the lender as he might see fit by changing the investments from mortgages to debentures of municipal corporations or of public school corporations, or Dominion or provincial stock or securities —R.S.O. 1877, c. 164, sec. 21—or to loans on unadvanced shares —sec. 43. I can hardly imagine that a lender, having this Act referred to on the face of his debenture, would have taken the risk of his security being lessened or probably entirely destroyed by the borrower exercising his right to change the character of the investments so as to produce that result.

I have difficulty, too, if the security is to be so limited, in holding the charge to be a floating security. There are, upon such a construction, no words referring to future investments in mortgages, and I do not see how they can be implied. Where the security is upon the undertaking or upon the capital and assets, the almost necessary inference is that the assets as they may exist when the security is to be enforced are that which is to be the security. If the language does not imply that the security is to be a floating one, I have difficulty in conceiving that the company would give a security which would prevent their dealing with their securities as the necessities of their business might require, or that a lender would run the risk of his security being destroyed, or that lenders would be found when the debentures must have priority according to their respective dates of issue, and a complicated and difficult enquiry would be necessary, in case the securities were changed, or there were successive issues of debentures, to determine the security to which each debenture holder was entitled.

The words "invested . . . upon approved real estate" are also to my mind indicative rather of an intention to describe the kind of securities in which the company made the investment of its capital and assets—mortgages . . . upon approved real estate—than as descriptive of the subject matter of the security.

Being of this opinion, my choice must be between the first and second of the suggested constructions, and I have come to the conclusion that the second is the one which should be adopted.

The instrument, as has been seen, is described as a "land mortgage debenture." Had the word "land" been omitted, this description would point plainly to a well known form of security, a debenture which is both an obligation for the payment of the money which is payable by the terms of it, and a

mortgage on the property of the company by which it is issued, or some part of it, or secured by such a mortgage, and the addition of the word "land" appears to me to be indicative of the nature of the property on which the mortgage is represented to exist.

What then is the meaning fairly to be attributed to the words added at the foot of the instrument, "the payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada?"

The position which the provision occupies in the instrument is, I think, immaterial, as it forms an integral part of the debenture. The words "guaranteed by" are, or at least may be, the equivalent of the words "secured upon," and had that form of expression been used, there would be no room for doubt, I think, that the words would amount, if not to a direct charge on the capital and assets of the company, to a representation that the debentures were secured in that manner, and a contract with the payee of the debenture that he should have that security for the payment of the debenture money and interest.

It is unnecessary to refer to all of the authorities which were cited on the argument to support the proposition that such language as I have indicated will create a floating charge on the company's property. It will suffice to refer to three of them.

In *In re Panama, New Zealand, and Australian Royal Mail Co.*, the debenture was headed "mortgage debenture," and by it the company charged its "undertaking, and all sums of money arising therefrom, and all the estate, right, title, and interest of the company therein," with the repayment of the money borrowed and interest thereon, and it was held by the Court of Appeal, affirming the judgment of Vice-Chancellor Malins, that the debenture holders acquired a charge upon all the property of the company, past and future, and that they were entitled to be paid out of the property of the company in priority to the general creditors.

In *In re Florence Land and Public Works Co.—Ex. p. Moor*, the instrument, which was called an "obligation," was expressed to be made under the power of the company's articles, which gave to the directors power to borrow money by mortgage on any part of the company's property, or by bonds, debentures, or mortgage debentures, which should entitle the holders to be paid out of the moneys, property, and effects of the company *pari passu*, and by the obligation the company bound themselves, their successors and assigns, and all their estate, property, and effects, to repay the sums mentioned therein at a future date. It was held that the obligation constituted a charge on the property of the company, subject to the power of the directors to dispose of

any part of it in the ordinary course of their business; the Master of the Rolls (Sir George Jessel) came to this conclusion, reading the obligation with reference to the articles of association, but Lord Justice James was of opinion that upon the construction of the obligation itself, without reference to the articles, except as to whether the obligation was *intra vires*, there was sufficient to constitute a charge upon the property of the company, and Lord Justice Thesiger agreed in the result without expressing any opinion as to the latter point.

In *In re Colonial Trusts Corporation*, the debenture was in the form of a bond, and by it the company "obligated" for payment of the debenture and interest the real and personal estate of the company. It was held that this created a floating security covering the company's property as it stood at the moment when the business was put an end to, but did not cover the uncalled capital of the company, as that was not "property" of the company.

Had the language in question in this case been used in a prospectus and not found a place in the debenture, there would be more room for the argument that it was intended merely to convey information to those who were invited to deal with the company by lending money to it upon its debentures, as to the nature of the securities in which the company invested its capital and assets, and to the "moral" security that was thus afforded for the payment of the debentures and interest; but found as the provision is on the face of the debenture itself, it cannot, I think, be so treated, and must be taken to have been intended to be, as I have said, at least a representation by the company that the payment of the debenture and interest thereon was secured upon the capital and assets of the company, and a contract that it should be so secured.

Assuming, however, that the language of the debenture is not such as in terms to create a charge on the capital and assets of the company, the case of *In re Strand Music Hall Company (Limited)*, is an authority for my last proposition. In that case the directors of the company borrowed £5,000, under a written agreement with the lender, one of the terms of which was that two hundred mortgage bonds of £50 each, "forming part of £25,000 of mortgage bonds constituting a first charge on the property of the company," should be deposited with the lender as collateral security for the loan, which was secured by two promissory notes of £2,500 each, and it was held that, as the directors had power to charge the property of the company, and the intention to create the charge appeared from the agreement, a valid charge was created, though the mortgage bonds were invalid through incompleteness.

The principle of this decision is, I think, clearly applicable to the present case, if I am right in the view that the debenture contains a contract with the debenture holder that he shall have, as security for the payment of his debenture and interest, the capital and assets of the company.

The same principle was applied in *Town of Dundas v. Desjardins Canal Company*, to the case of a canal company which had executed a bond which did not contain direct words of charge, but stated that the receiver was "entitled to such security therefor (*i.e.*, money lent) as is mentioned in the said recited Act." The Act which authorized the borrowing provided that "all such bonds or mortgages * * shall take precedence and have priority of lien on the said canal and the tolls thereon, and other property of the company over all claims," etc., and it was held that, beyond doubt, the holders of the bonds were entitled to a charge on the canal and tolls and to the appointment of a receiver therefor.

So also in *Ross v. Army and Navy Hotel Co.*, where the debentures were issued with a condition annexed that the holders of the debenture bonds of that issue were entitled *pari passu* to the benefit of a "covering deed" to secure the payment of all moneys payable on the debenture bonds, it was held that, assuming the covering deed to be void for want of registration under the Bills of Sale Act, the intention to give the debenture holders a valid charge on the property comprised in the deed was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels intended to be charged with the money due on the debentures were subject to an equitable charge in favour of the holders of those debentures.

I refer also upon this point to *In re New Durham Salt Co.*, Brice on Ultra Vires.

If the language of the instrument were more ambiguous than I think it is, the case is, in my opinion, one for a liberal application of the principle of taking words "*fortius contra proferentem.*"

The ruling of the Master in Ordinary should, therefore, in my opinion, be reversed, and there be substituted for it a declaration that the debenture holders are entitled to be paid out of the assets of the company in priority to the depositors and other creditors. The costs of the appeal should, I think, be paid out of the moneys in the hands of the liquidator.

UNREVISED TRADE RETURNS, CANADA

(000 omitted)

IMPORTS

Year ended 30th June—	1898		1899	
Free	$51,447		$59,807	
Dutiable	73,695		87,536	
	$125,142		$147,343	
Bullion and Coin	4,389	$129,530	4,677	$152,020

EXPORTS

For the Year ended 30th June—				
Products of the mine	$13,998		$13,343	
" Fisheries	10,792		9,948	
" Forest	26,533		28,025	
Animals and their produce	44,243		46,688	
Agricultural produce	33,234		23,014	
Manufactures	10,455		11,457	
Miscellaneous	147		201	
	$139,402		$132,676	
Bullion and Coin	4,632	$144,034	4,010	$136,686

SUMMARY (in dollars)

For the Year ended June—	1898	1899
Total imports other than bullion and coin	$125,142,000	$147,343,000
Total exports other than bullion and coin	139,402,000	132,676,000
Excess	(*Exp.*) $14,260,000	(*Imp*) $14,667,000
Net imports bullion and coin	243,000	667,000

STATEMENT OF BANKS acting under Dominion Government charter for the months of June, July and August, 1899, and comparison with August, 1898:

LIABILITIES

	30th June, 1899	31st July, 1899	31st August, 1899	31st August, 1898
Capital authorized	$76,808,664	$ 76,308,664	$ 76,808,664	$ 76,258,684
Capital paid up	63,674,085	63,390,653	63,826 333	62,407,759
Reserve Fund	28,956,908	29,114,793	29,341,697	27,555,666
Notes in circulation	$ 39,097,708	$ 40,270,100	41,446,399	$ 37,299,496
Dominion and Provincial Government deposits	7,407,996	5,834,952	6,205,731	5,748,413
Public deposits on demand	91,852,400	93,080,103	95,264 689	84,306,117
Public deposits after notice	166,549,940	168,044,220	168,627,016	149,972,984
Bank loans or deposits from other banks secured	42,000	528,016	483,333	.....
Bank loans or deposits from other banks unsecured	3,529,152	3,923,984	5,004,981	3,418,628
Due other banks in Canada in daily exchanges	144,822	153,629	228,246	133 783
Due other banks in foreign countries	684 932	598,017	616,882	502,360
Due other banks in Great Britain	6,536,052	6,066,940	4,437,249	2,557,089
Other liabilities	485,392	672,004	389,400	223,523
Total liabilities	316,330,478	319 172,045	322,704,010	$284,162,483

ASSETS

Specie	$9,240,810	$ 9,114 677	$ 9,442,296	$ 9,656.747
Dominion notes	16,959,927	17.393,073	18,486,264	17,579,203
Deposits to secure note circulation	2,016,573	2,072,615	2,074,202	1,983.983
Notes and cheques of other banks	11,015,876	10,931 766	9,953,665	9,055,625
Loans to other banks secured	46,185	595,373	522,648	25,000
Deposits made with other banks	3,606,522	3,568,741	4,629,688	4,188,193
Due from other banks in Canada in daily exchanges	280,673	423,215	490,258	204,478
Due from other banks in foreign countries	21,674,085	21,672,107	28,315,269	25,553,817
Due from other banks in Great Britain	10 170,065	12,279.908	11,968.240	11,483,170
Dominion Government debentures or stock	4,898,019	4,945 892	4.946,393	4.899,211
Public, municipal and railway securities	31,107.771	34,135,229	30.244,545	35,117,485
Call loans on bonds and stocks	30,659,460	30,821,503	31,692,777	21,475,172
Current loans and discounts	250,974,389	247,747,500	247,669,051	218,077,369
Loans to Dominion and Provincial Governments	3,150,714	1,941,897	1.981,663	1,777.447
Overdue debts	2,080,089	2,160,321	2,313,145	3,127,450
Real estate	1,810.380	1,766,908	1,710,865	2,071,962
Mortgages on real estate sold	607,875	576,479	629,634	559.135
Bank premises	6,012,083	5,968,422	6,041,048	5,830,126
Other assets	2,624,712	4,481,902	4,692,283	2,019,555
Total assets	408,936,411	412,597,714	417,804,124	$374,685,325
Loans to directors or their firms	7,182,672	7,357,683	7,300,781	$7,255,148
Average amount of specie held during the month	9,308,030	9,358,261	9,416,553	9,727.955
Average Dominion notes held during the month	16.383,245	16,612,667	17,948,198	16,459,260
Greatest amount of notes in circulation during month	39.313,896	41,125,246	42,447,841	38,138,731

MONTHLY TOTALS OF BANK CLEARINGS at the cities of Montreal, Toronto, Halifax, Hamilton, Winnipeg, St. John, Vancouver and Victoria.

(000 omitted)

	MONTREAL		TORONTO		HALIFAX		HAMILTON	
	1897-8	1898-9	1897-8	1898-9	1897-8	1898-9	1897-8	1898-9
	$	$	$	$	$	$	$	$
September	55,080	61,856	32,466	33,932	5,164	4,919	2,971	2,773
October ..	59,340	66,354	35,736	38,349	5,817	5,408	2,970	3,103
November	59,166	67,246	34,211	39,125	5,580	5,154	2,878	3,147
December	56,509	69,143	35,986	43,508	5,386	5,838	3,094	3,334
January ..	60,334	64,850	37,836	42,388	5,009	5,913	3,028	3,274
February .	62,332	62,432	33,414	40,818	4,446	4,583	2,663	2,807
March ...	62,043	69,610	39,012	40,646	5,285	4,838	3,021	3,122
April	50,003	61,249	33,035	39,182	4,472	5,209	2,858	3,304
May	56,475	71,777	34,374	44,349	4,798	5,602	2,932	3,513
June	59,471	63,756	36,960	41,189	4,997	5,461	3,001	3,224
July.....	60,423	63,209	35,727	40,569	5,851	4,742	3,117	3,304
August ..	55,578	63,115	32,390	37,207	5,551	7,823	2,655	3,138
	696,754	784,597	421,147	481,262	62,356	65,490	35,188	38,043

	WINNIPEG		ST. JOHN		VANCOUVER	VICTORIA
	1897-8	1898-9	1897-8	1898-9	1898-9	1898-9
	$	$	$	$	$	$
September	8,035	6,414	2,620	2,508		
October ..	13,291	9,347	2,498	2,498	2,518	*
November	13,550	11,553	2,660	2,660	2,838	2,663
December	9,784	10,708	2,738	2,746	3,058	2,433
January ..	6,347	7,683	2,417	2,470	2,441	2,544
February .	5,517	6,209	2,022	2,212	2,099	2,849
March ...	5,968	6,756	2,148	2,391	2,818	2,689
April	6,240	6,916	2,254	2,494	3,024	2,848
May	8,683	7,472	2,513	2,910	2,784	2,700
June	7,397	8,211	2,592	2,606	3,768	2,509
July.....	6,316	8,169	2,927	2,753	3,355	3,087
August ..	6,180	7,995	2,059	3,103	4,929	3,039
	97,308	97,433	29,448	31,351	33,632	27,361

*Figures for October not furnished.