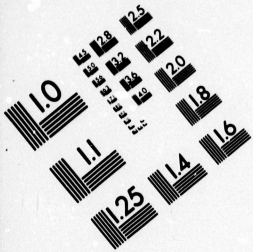

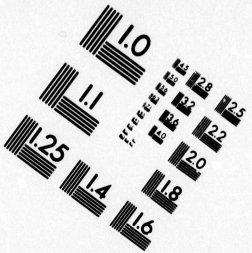

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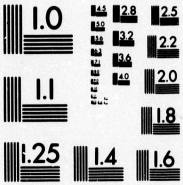

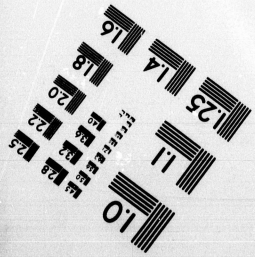

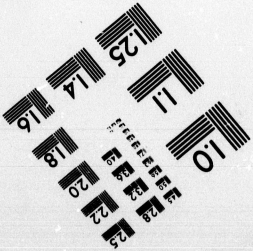

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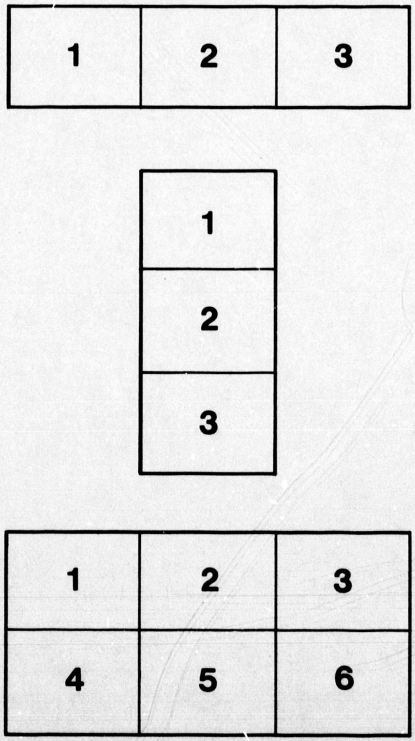

A

TREATISE

ON THE LAW RELATING TO

BILLS, NOTES, CHEQUES AND I O U'S,

BY

S. R. CLARKE, OF OSGOODE HALL,

BARRISTER-AT-LAW,

Author of "The Criminal Law of Canada," "The Law of Insurance."

TORONTO:

R. CARSWELL, LAW BOOKSELLER AND PUBLISHER,

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Entered according to Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and seventy-five, by ROBERT CARSWELL, in the Office of the Minister of Agriculture.

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To the Honourable

John Hillyard Cameron Q.C., M.P.

Treasurer of the Law Society in Ontario,

This work is, by permission,

most respectfully inscribed

as a slight tribute to his varied and brilliant talents

and

as a token of the affectionate regard

in which he is held by the profession among

whom he has so long and

successfully labored.

PREFACE.

I have been induced to publish this work in the hope that it will be a useful supplement to English and American works on the same subject. I have endeavored to trace the law as it exists in each of the Provinces of the Dominion, and have availed myself of all the published reports, the statutes of each Province, and also the Civil Code of the Province of Quebec. A few cases not elsewhere reported have been taken from Stevens' Digest of Reports in New Brunswick.

I have not thought it necessary to cite authorities for every position taken in the book, but I trust that all the points discussed are sustainable by competent authority.

Since Confederation commercial intercourse between the several Provinces of the Dominion has very much increased, and if my efforts render the laws of each Province more intelligible in the others I will be abundantly satisfied. The law as to bills and notes is now so much assimilated that the few slight differences which exist might, with great propriety, be swept away, and I, for one will, with great pleasure hail the day when there is one uniform code of commercial law throughout the Dominion.

S. R. C.

TORONTO, *12th May, 1874.*

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CHAPTER I.

INTRODUCTORY.

OF BILLS AND NOTES.

A bill of exchange is an unconditional written order addressed by A to B, directing him to pay a sum of money, named therein, to C.

In this case, A (who is called the *drawer* of the bill) is said to draw upon B, who is, therefore, called the drawee; and C, the person to whom the money is to be paid, is on that account called the *payee.*

The drawer may be himself the payee, and he may direct B to pay him simply (as by the words "*pay to me,*") or to pay to him or his order (as by the words "pay to me or my order.")

The drawer having written this order, it should be presented to the drawee to receive his assent. If the drawee assents to it, he testifies such assent by writing his name across it, which is called accepting the bill or draft, after which the drawee is called the *acceptor.* If he refuses to accept, he is said to *dishonor* the draft or bill by non-acceptance.

When a person, in order to transfer his interest in a bill, writes his name on the back, he is called an *indorser*, and the person to whom his rights are so transferred is called an indorsee. Bills are often indorsed when the interest in them would pass without such indorsement, but in many cases it is necessary to indorse a bill in order to pass an interest therein; as if the bill be payable to the drawer or his order, the drawer must indorse in order to transfer his interest, and if the bill be payable to C or his order, C must indorse.

The drawer and C would in these cases be called *indorsers*, and the persons taking from them *indorsees*.

When no such indorsement is necessary to transfer the interest in the bill, it is said to be payable to *bearer;* and a person transferring without indorsement is simply called the *transferor*, and the person who takes from him the *transferee*.

The *holder* is, in the words of Mr. Justice Byles, "the person in actual or constructive possession of the bill, and entitled at law to recover its contents from the parties to it."

A promissory note is an absolute promise in writing, signed but not sealed, by A to B, to pay to B, or to B or his order, a specified sum on demand, or at a certain time. (*a*) The person giving the promise is said to be the *maker* of the note, and occupies a position resembling that of the *acceptor* of a bill; and the words *transferor* and *transferee*, *indorser* and *indorsee*, and *holder*, are applicable with reference to notes, the same as to bills of exchange.

An ordinary bank note is a banker's promissory note.

Bills of exchange, being intended for the transfer and transmission to third parties of debts due by one man to another, the drawer is supposed to be the creditor of the drawee, who is presumed to have in his hands effects of the drawer which the latter is desirous of transferring.

An ordinary banker's cheque is a bill of exchange payable to bearer on demand.

It is therefore for the drawer to consult his convenience as to how he shall direct the drawee to pay the money (1), at what time, or (2), at what place, and (3), to whom.

For instance, the bill may be payable (1) at sight, six months after date or after sight; (2), in Toronto, or at any bank; (3), to the drawer or his order.

(a) See Gray v. Worden, 29 Q.B.U.C. 537.

Instead of directing the drawee to pay to the drawer or his order, the drawer may make the bill payable to a third person (naming him), or to such person or his order, or to bearer.

If the bill is not payable to the payee's order, it is not negotiable, and is of no use except to the payee. If it is payable to the payee's order, the payee, in order to transfer his right to it, must indorse it, and the person to whom he gives it will take the money on the bill at maturity, by virtue of the order testified by the indorsement.

If the indorsement be by simply writing the indorser's name, as is usual, the bill is then payable to bearer, and passes by delivery; though at each successive delivery an indorsement is often required for the security of the transferee.

The same rules apply where the bill is payable to the drawer or his order.

If the drawee is directed to pay "to bearer," the bill *needs* no indorsement to confer a title to the money, though indorsements are often given as the bill changes hands.

Promissory notes may be made payable in the same way as bills, and with the same results.

The acceptor is the person who is to be liable to the drawer on a bill, so long as it remains in the drawer's hands, and is *always* the person *primarily* liable; and when the drawer, by indorsement (which is in general necessary), transfers the bill to another, the drawer in his turn becomes liable, with the acceptor, to the holder of the bill, and so does every subsequent indorser—the security thus increasing with each indorsement.

The drawer is also liable upon every unaccepted draft of his which he transfers, for by so doing he makes an implied undertaking that upon presentment to the drawee it shall be accepted.

The maker of a note occupies a position similar to that of an acceptor of a bill, being the person *primarily liable*, and when the note is transferred by indorsement by the payee, the indorser likewise becomes liable to the holder of the note, as does every subsequent indorser.

By drawing a bill payable to a third person the drawer enters into a conditional contract to pay the payee, his order or the bearer, as the case may be, if the acceptor do not. By accepting a bill or making a note, the acceptor or maker enters into an absolute contract to pay the payee, or order, or bearer, as the instrument may require. The effect of indorsing is a conditional contract on the part of the indorser, to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor's or maker's default.

Having explained the foregoing general points in regard to bills and notes, we proceed to notice the several judicial decisions in Canada, by which they have been elucidated. The first part of the definition of a bill of exchange is that it is an *unconditional* order. In accordance with this principle an instrument in the following form:

IN THE QUEEN'S BENCH.

The Municipal Council of the County of Perth—Plaintiffs, vs. *Thomas Smith, Defendant.*

A. M'Gregor, accepted.

this cause, the sum of one hund five pounds, on account of the in this suit; dated the 20th Alexander McGregor, County held not a bill of exchange, able being dependent on the con Plaintiff's claim in the suit, and to a contingency. (a)

"Please pay Egerton G. Ryerson, Esq., Attorney for the Plaintiff, in red and twenty- Plaintiff's claim August, 1856. To Treasurer," was the amount paytinuance of the therefore subject

(a) Corporation of the County of Perth, v. McGregor, 21 Q.B.U.C. 459.

So the order can only be in writing, and an instrument under seal is not a promissory note. Thus an instrument in the following form:

£50 0 0.

For value received, we jointly and severally promise to pay to W. P. Osborne, or bearer, the sum of Fifty Pounds currency, in manner following, &c.
As witness our hands and seals, this 29th April, 1856.

Signed, Sealed and Delivered
In presence of
RICHARD SMITH.

M. M. Patman. *L.S.*
E. H. Gates. *L.S.*

was held clearly not a promisory note, but a specialty, and of course the same rule will apply to bills of exchange. (*a*)

So when an instrument purporting to be a promissory note is made by an incorporated company, under their common seal, the payee and indorser of such instrument is not liable to his indorsee, as the indorser of a note would be for being sealed, it is not a note nor negotiable as such. (*b*)

There cannot be two acceptors to a bill by distinct and separate acceptances, nor can the indorser of a note be considered as a new maker, and where A makes a note payable to B or order, and C writes his name on the back, without B's first endorsement, C cannot be considered as a new maker, and is not liable on the note. (*c*)

But to make a bill of exchange there must be an acceptor or drawee; and to make a promissory note there must be a promise to pay: an instrument in the following form:

£228 7 6. "PORT HOPE, Dec. 8th, 1853.

Three months after date, pay to the order of William

(*a*) Wilson v. Gates, 16 Q.B., U.C. 278.
(*b*) Merritt v. Maxwell, 14 Q.B., U.C. 50.
(*c*) Thew v. Adams, 6 O. S., 60. See also Jones v. Ashcroft, 6 O.S., 154: see post title Transfer.

Thompson, at Port Hope, the sum of two hundred and twenty-eight pounds, seven shillings and sixpence, currency, for value received.

Signed, JOHN THOMPSON.

but not directed to any person, was held not a promissory note, and it seems also, would not be a bill of exchange. (*a*)

A promissory note signed by a cross in the presence of one witness is good (*b*); and the signature or indorsement of negotiable instruments, may be by a mark. (*c*)

A promissory note or bill of exchange, must be for the payment of money absolutely, and it must be a good note in itself, and cannot depend for its validity upon some alleged collateral agreement not visible on the face of it. Thus a promise to pay a certain sum on a day named "in cash or mortgage upon real estate," is not a promissory note, not being an absolute promise to pay in money, and it does not become a note by the maker's election to pay in cash. (*d*)

So the instrument must be for the payment of money in *specie*, and a promise to pay a certain sum in *Canada Bills* would not be a good note, for such bills though currency are not *specie* or money. (*e*)

So a note made in this Province payable in current funds of the United States of America is not a promissory note. (*f*)

The Statute of Canada 29 & 30 Vic., Cap. 10, authorises the issue of Provincial or Dominion notes, and provides that they shall be redeemable in *specie* on presentation at offices to be established for that purpose, and that such notes shall be a legal tender, except at the offices aforesaid.

(*a*) Forward v. Thompson, 12 Q. B., U. C. 103.
(*b*) Collins v. Bradshaw, 10 L. C. R. 366.
(*c*) George v. Surrey, 1 M. & M. 516.
(*d*) Going v. Barwick, 16 Q. B. U. C. 45.
(*e*) Gray v. Worden, 29 Q. B. U. C. 535.
(*f*) Bettis v. Weller, 30 Q. B. U. C. 23.

On the same principle that the note must be for the payment of money, an instrument in the following form was held not to be a promissory note :

"Three months after date, we, or either of us, promise to pay to Elias S. Reed, or John Fraser, his guardian, at the Post office, Embro, £119 17 currency, value received, in rent of farm." (*a*)

The instrument must be for the payment of money and not of any other commodity, and a paper writing, undertaking to pay A B or bearer, a certain sum of money, one half in cash and one half *in grain*, is not a promissory note, and therefore not negotiable. (*b*)

So, where an instrument was made in the following form : "Ten days after date we promise to pay Mr. Newhorn the sum of £83 15 for value received;" and at the time the instrument was made a memorandum was endorsed on it as follows : "It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three years to run," it was held that the endorsement being written at the time the instrument was made, must be considered as forming a part of it, and consequently the sum was to be paid by a lawful mortgage, and not in money, and the instrument, therefore, was not a promissory note. (*c*)

A promissory note must be made for a sum certain, and an instrument purporting to be a promissory note with the words "with exchange on New York," was held not to be a promissory note, the amount being rendered uncertain by the uncertainty of exchange. (*d*)

So an instrument drawn by A upon B requesting him to pay to the order of A five months after date $400 with

(*a*) Reed v. Reed, 11 Q. B. U. C. 26.
(*b*) Gillin v. Cutler, 1 L.C.J. 277. See also Melville v. Bedell, Stevens Dig. N.B. Reps. 65.
(*c*) Newhorn v. Lawrence, 5 Q. B. U. C. 359.
(*d*) Palmer v. Fahnestock, 9 C. P. U. C. 172; s. c. 20 Q. B. U. C. 307. See also Grant v. Young, 23 Q. B. U. C. 387; Saxton v. Stevenson, 23 C. P. U. C. 503.

current rate of exchange on New York is not a Bill of Exchange, for, as the rate of exchange fluctuates, the amount due at maturity is not ascertained. (*a*)

A promissory note must be payable at some specified time, or on a contingency which must happen. (*b*)

If the note is payable eventually, upon a certain contingency, it will be good although the promise is in the alternative. Thus, an instrument in the following form was held a valid promissory note:

"YONGE STREET, 29th April, 1839.

"Seventeen months after date I promise to pay to Mr. James Hogg or order, the sum of £50, without interest, *or* three years and five months after date with two years interest, for value received." (*c*)

An instrument which is conditional in its terms, will not amount to a promissory note, nor will the happening of the contingency upon which payment depends cure the defect. Thus, an instrument in the following form:

"$400. TORONTO, 12th May, 1858.

"Six months after date we promise to pay to James Boulton, Esq., or order, the sum of Four hundred dollars, for value received. Signed,

"N. J.
"W. W. B.
"E. D. W."

"The above note is to be paid in merchantable lumber, to be delivered in Toronto, at cash price, and an additional quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same to be paid in cash," was held not to be a promissory note, and not being a note when made, it did not become

(*a*) Cazet v. Kirk 4 Allen, 543. See also Nash v. Gibbon, 4 Allen, 479.
(*b*) Russell v. Wells. 5 O. S. 725.
(*c*) Hogg v. Marsh, 5 Q. B. U. C. 319.

so afterwards by the fact of the defendants not having delivered the lumber before, or when the note matured. (*a*)

If there is a condition written on a note at the time of signing, making it payable on a contingency, and this condition is to be taken as a part of the instrument, it will be void, and if such a condition is fraudulently obliterated or erased by the holder so as to render the note negotiable, no person taking it with knowledge of the fraud could recover on it. (*b*)

A bill of exchange cannot be drawn, payable out of any particular fund, and if not a bill, as drawn, it cannot be made so by the subsequent acceptance of the drawee. Therefore, an instrument in the following form:

"Mr. Ockerman—Mr. Blacklock wants £25—12 o'clock this day, *i.e.* 15th February, 1860. I want you to get it him immediately, out of Scovill's money," was held not a bill of exchange, according to the custom of merchants. (*c*)

A note payable to a person or his order, or to the order of a person, means the same thing, and may be sued upon stating it either way, and when a note is payable to the order of A B, the latter may sue upon it without indorsing it, and it need not be indorsed by A B to himself to give it the effect of a note payable to him. (*d*)

No precise form of words is essential to the validity either of a bill of exchange or of a promissory note. (*e*)

A note cannot be made by a man to himself without more, and notes are usually drawn payable to the order of some person other than the maker. A note payable to the maker's own order is not a promissory note within the Statute of 3 & 4 Anne, Cap. 9, but when such a note

(*a*) Boulton v. Jones, 19 Q. B. U. C. 517. Hill v. Halford, 2 B. & P. 413.
(*b*) Campbell v. McKinnon, 18 Q. B. U. C. 612.
(*c*) Ockerman v. Blacklock, 12 C. P. U. C. 362.
(*d*) Myers v. Wilkins, 6 Q. B. U. C. 421.
(*e*) Chadwick v. Allen, Strs. 706. Peto v. Reynolds, 9 Exch. 410. Reynolds v. Peto, 11 Exch. 418.

is indorsed in blank by the maker, it becomes a note payable to bearer, and may be treated as such. (*a*)

If speciall iyndorsed it becomes a note payable to the indorsee or order. (*b*)

It is necessary that there should be no uncertainty as to the person to whom the note is payable, and a note payable to A *or* B is not a good note within the statute. (*c*)

When a note is payable to bearer it is no objection that a fictitious person, or a person who has no power to hold or transfer notes, is named in the body of the note as payee. Thus a promissory note promising to pay the Church Society of the Diocese of Toronto, or bearer, $200 with interest, towards providing a fund for the support of a Bishop of the Western Diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity, was held good and to be founded on a sufficient consideration, and recoverable in the hands of a *bona fide* holder. (*d*)

An instrument promising to pay "J. P. Esquire, Treasurer of the Building Committee of the congregation of St. John's Church, in the town of Prescott and his successor duly appointed," is a promissory note and may be sued upon after his death by his administrators, for, legally speaking, there can be no successor to a Church Building Committee. (*e*)

No precise words of contract are essential in a promissory note, provided they amount in legal effect to an unconditional promise to pay. Thus, "due James Gray or bearer, four hundred and eighty-two dollars, payable in fourteen days after date," is a good promissory note, the word payable amounting to a promise to pay. (*f*)

(*a*) Ennis v. Hastings, 4 Allen 482. Wallace v. Henderson, 7 Q. B. U. C. 83.
(*b*) Gray v. Lander, 6 C. B. 336.
(*c*) Blanckenbagen v. Blundell 2 B & Ald. 417.
(*d*) Hammond v. Small, 16 Q. B. U. C. 371.
(*e*) Patton v. Melville, 21 Q. B. U. C. 263.
(*f*) Gray v. Worden, 29 Q. B. U. C. 535.

If there be no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties. (*a*)

Such is the common memorandum I O U. (*b*)

An I O U is a mere acknowledgement of a debt, and is not negotiable. It ought regularly to contain a date, the sum acknowledged, the name of the creditor, and the signature of the debtor. The want of a date, or the absence of the creditor's name, will not, however, render it invalid. When the instrument is strictly an I O U it requires no stamp, but if it contains words amounting to a promise to pay the money it must be stamped as a promissory note.

An I O U is evidence of an account stated, and though it do not contain the creditors name, it is *prima facie* evidence for him who produces it. (*c*)

An acknowledgment in the following letters and words, "I O U Twenty-five pounds," is a negotiable promissory note. (*d*)

Although, as we have already seen, no precise form of words is necessary to constitute a promissory note, yet it is necessary that the instrument should contain a promise to pay, and an instrument in this form: "Good to Mr. Palmer for $850 on demand," is not a promissory note, and does not require a stamp. (*e*)

B, being a creditor of A, drew upon him a written order requesting him to pay K "the amount of my account furnished," and delivered it to K. On presentment of the order to A he wrote on it "Correct for say $75," signing the initials of his name. It was held that this instrument was not a bill of exchange, nor could K maintain an action against A on an account stated. (*f*)

(*a*) Waynam v. Bend, 1 Camph. 175.
(*b*) Israel v. Israel, 1 Camph. 499. Tomkins v. Ashby, 6 B. & C. 541.
(*c*) Palmer v. McLennan, 22 C. P. U. C. 570.
(*d*) Beaudry v. Laflamme, 6 L. C. J. 307.
(*e*) Palmer v. McLennan, 22 C. P., U. C. 258. Affirmed on appeal Ib. 565.
(*f*) Kennedy v. Adams, 2 Pugsley 162.

Bills of exchange and promissory notes are freely assignable from one person to another, and when they are payable to bearer, the property therein, so far at least as to the right of action involved passes from one person to another by mere delivery. Many cases go to show that a person in possession of a note who has no beneficial interest therein, but is nevertheless entitled to collect the amount thereof, may bring an action thereon in his own name.

Thus, the holder of a bank note payable to bearer may maintain an action thereon for non-payment, though he has no beneficial interest in the note, and holds it merely as the agent of the owner for the purpose of demanding payment. (*a*)

Where an Attorney is in possession of a note payable to bearer, and sues it in the name of a person who afterwards recognizes the suit, and instructs the attorney to hand over the proceeds to him, such person may be held to be the holder of the note though it is not shewn that he has any actual interest therein. (*b*)

The doctrine seems well established that if a person in possession of a bill commences an action upon it in the name of another, and for his benefit, and the latter afterwards adopts it, he is considered the holder of the note at the commencement of the suit. (*c*)

So an agent or trustee in actual possession of a note belonging to his principal, may sue thereon in his own name. (*d*)

A case decided in the Province of New Brunswick shows that if a note is fraudulently obtained from the holder by means of a misrepresentation he will not thereby lose his rights as holder of the note. In this case plaintiff was managing agent of the bank in which

(*a*) Allison v. Central Bank, 4 Allen 270.
(*b*) Coates v. Kelty, 27 Q. B. U. C. 284.
(*c*) Blake v. Walsh, 29 Q. B U. C. 541. Ancona v. Marks, 7 H. & N. 686.
(*d*) Ross v. Tyson, 19 C. P. U. C. 294.

the defendant had discounted an indorsed note drawn by himself. When the note fell due the plaintiff agreed to renew it on payment of a certain sum and getting another indorsed note for the difference. Defendant brought a renewal note to the plaintiff, who, believing it to be duly indorsed, gave up the original note, but soon afterwards discovering that the renewal note was not indorsed, he called on the defendant to rectify the error, which he refused to do. The Court held that the original note, having been obtained fraudulently, it was still constructively in the plaintiff's possession, and he could sue thereon in his own name as holder. (*a*)

Although the law is as already shewn, yet a person who is not considered as the holder of the bill or note cannot maintain an action thereon. But the bail of any of the parties who are sued upon the bill or note, or any persons who pay the bill or note on account of any of the parties become on payment holders, and they hold as upon a transfer from the person for whom they made the payment, not as on a transfer from the person they have paid, and they stand with respect to other parties to the bill or note in the situation of the party for whom they made the payment, and consequently unless he could have sued upon the bill or note they cannot. (*b*)

By the common law and prior to the passing of the statute 35 Vic. cap. 12, of the Province of Ontario, no contract or debt was assignable so as to entitle the assignee to sue thereon in his own name, but bills of exchange and promissory notes always formed an exception to this rule, and they differ from other simple contracts in these two particulars: First, that no notice of the transfer need be given to the parties liable thereon; secondly, a consideration will be presumed till the contrary

(a) Grover v. Watson, Hil. T. 1866. Steven's Digest, N. B. Reports 66.
(b) Hutchinson v. Monroe, 8 Q. B. U. C. 103.

appear. The above mentioned statute renders choses in action assignable at law, and empowers the assignee thereof to sue thereon in his own name, when the assignor transfers his absolute interest therein, not by way of pledge. (*a*)

The sixth section of the statute provides that in case notice of the assignment is given to the debtor or other person liable in respect of a chose in action arrising out of contract, the assignee shall have, hold and enjoy the same, free from any claims, defences or equities which might arise after such notice as against his assignor. This section, however, does not apply to bills of exchange or promissory notes, nor is there any necessity that it should be so extended.

The common law is, that on the assignment of an ordinary chose in action, the title of the assignee is not complete until he has given notice to the debtor of the assignment; but negotiable securities form an exception to this rule, and the delivery of a note payable to bearer vests the absolute property therein in the transferee, without any notice given by him to the maker; and his right to sue cannot be defeated by any subsequent dealings between the maker and his transferor. For instance, a payment made by the maker to the original holder after the transfer, would be at his own risk, and would not prevent the transferee from afterwards recovering the amount against the maker, even though the note was overdue at the time of the transfer. (*b*)

Promissory notes, however, derive their assignable properties from the Stat. 3 & 4 Anne, c. 9, which makes them assignable and indorsable, like bills of exchange, and enables the holder to bring his action on the note itself.

(a) Hostrawser v. Robinson, 23 C. P. U. C. 359.
(b) Ferguson v. Stewart, 2 U. C. L. J., 116.

A note may be made payable by instalments, and yet be assignable within the Statute of 3 & 4 Anne, c. 9. (*a*)

Days of grace are allowed on each instalment. (*b*) It is conceived that presentment and notice of dishonor are required as each instalment falls due; but that laches as to one instalment in ordinary cases only discharges an indorser as to that one, and that a note payable by instalments cannot be indorsed over for less than the entire sum due upon it.

A written memorandum endorsed on a promissory note at or before the time of signing is considered as a part of such note. If made after the signing of the note it will not be so considered, but merely as a memorandum to identify the note. (*c*)

A promissory note made as an indemnity for assuming liability for a third party, at the request of the maker, is valid as such indemnity, and the party indemnified by the note may sue as soon as troubled and before paying the debt for which he has become liable. (*d*).

A writing merely certifying that a person is indebted unto another in a certain sum of money is not negotiable as a promissory note. (*e*)

A date is not in general essential to the validity of a bill or note, and if there be no date it will be considered as dated at the time it was made. (*f*)

But the date of a promissory note is *prima facie* proof that such note was made on the day of its date, and a party suing on a note cannot prove that it was actually made on a day posterior to its date. (*g*)

(*a*) Orridge v. Sherborn 11 M. & W., 374.
(*b*) Ib.
(*c*) McKinnon v. Campbell, 6 U. C. L. J. 58. Newhorn v. Lawrence, 5 Q. B. U. C. 359.
(*d*) Perry v. Milne, 5 L. C. J. 121.
(*e*) Dasylva v. Dufour, 16 L. C. R. 294.
(*f*) De la Courtier v. Bellamy, 2 Show, 422. Hague v. French, 3 B. & P. 173. Giles v. Bourn, 6 M. & S. 73.
(*g*) Evans v. Cross, 16 L. C. R. 469.

The date of a note is not evidence of the date of the contract out of which the consideration upon the note arises, nor does it afford any evidence of the time when the consideration of the note arose.

If, therefore, it is material to determine the legality of the consideration to ascertain when it arose, the date of the note affords no evidence on the subject. (*a*)

At common law neither money nor securities for money could be taken in execution at the suit of a subject. But now, by the Common Law Procedure Act of the Province of Ontario, section 261, money, bank notes, cheques, bills, notes, and other securities for money may be taken in execution.

A note by two or more makers may be either joint only or joint and several. A note signed by more than one person, and beginning, "we promise," etc., is a joint note only. A joint and several note usually expresses that the makers jointly and severally promise to pay, etc., but a note signed by two persons beginning "I promise to pay," is joint and several. (*b*)

One partner has no implied power to bind his co-partner otherwise than jointly with himself, consequently a joint and several promissory note, signed by one partner for himself and co-partners, does not bind them severally. (*c*)

But it will bind them jointly even when it begins in the singular, "I promise," etc.; and the partner signing the note will be separately liable upon it. (*d*)

A joint and several note, though on one piece of paper, comprises, in reality and in legal effect, several notes; viz., the joint note of the makers, and the several notes of each of them. (*e*)

(*a*) McCann v. Riley, 3 Allen 154.
(*b*) Creighton v. Allen 26 Q. B. U. C. 627. March v. Ward, Peakes Rep. 130. Clerk v. Blackstock, Holt N. P. C. 474.
(*c*) Perring v. Hone, 4 Bing. 32.
(*d*) Maclae v. Sutherland, 3 E. & B. 1. See Lindley on partnership 280. Elliot v. Davis, 2 B & P. 338.
(*e*) Fletcher v. Dyte 2 T. R. 6. Ashurst J. Owen v. Wilkinson 5 C. B. N. S, 526. See also observations of Parke B. in King v. Hoare, 13 M. & W. 505. Beecham v. Smith, E. B. & E. 442.

The joint note may be valid though the several notes are void. (*a*)

Yet for some purposes it is still one contract, and an alteration which affects the liability of one maker vitiates the entire instrument. (*b*)

Thus, if a note originally joint is altered to a joint and several note, without the knowledge and consent of one of the makers, no action can be maintained against such maker on the note. (*c*)

Where the defendant with others signed the following instrument, his subscription being $100, "We, the undersigned, do hereby severally promise and agree to pay to F. W. Thomas, Esq., agent of the Bank of Montreal, in Goderich, the sums set opposite our respective names for the purpose of building an Episcopal church and rectory in the town of Goderich," it was held that this was the several promissory note of each subscriber. (*d*)

The Statute of Canada 26 Vic. cap. 45, recognizes the right of one joint debtor who has paid the whole debt to recover a rateable proportion thereof from his co-debtor. On making such payment he is entitled to have assigned to him, or a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and on proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, to recover from his co-debtor indem-

(*a*) Maclae v. Sutherland 3 E. & B. 1.
(*b*) Gardner v. Walsh 5 E & B. 91.
(*c*) Samson v. Yager, 4 O. S. 3.
(*d*) Thomas v. Grace, 15 C. P. C. C. 462.

nification for the advances made and loss sustained by the person who has paid such debt or performed such duty; and the Statute further provides that such payment or performance so made by such co-debtor shall not be pleadable in bar of any such action or proceeding by him.

Joint debtors, equally liable as between themselves, not being general partners, are severally entitled at law to contribution, (*a*) and may avail themselves of the provisions of this Statute, and as the makers of a note are joint debtors within the Statute, therefore one of several joint, or joint and several makers of a note who pays the whole may maintain an action against another for contribution, according to the terms of the Statute. (*b*)

(*a*) Sadler v. Nixon, 5 B. & Ad. 936. Burnell v. Minot, 4 Moore 340. Hutton v Eyre, 6 Taunt 289. Holmes v. Williamson, 6 M. & S. 158. Edgar v. Knapp, 5 M. & G. 735.

(*b*) Batchelor v. Lawrence, 9 C. B. N. S. 543.

CHAPTER II.

OF THE POWER OF PARTIES TO CONTRACT AND THEREIN OF AGENCY AND PARTNERSHIP.

An infant, that is a person under full age, cannot bind himself or herself by a bill or note, unless it be merely for the price of necessaries, and not carrying interest. But a person after he comes of age is liable upon a note made by him when an infant, if after coming of age he promises to pay it. (*a*)

Married women cannot bind themselves, unless they have separate property under "The Married Women's Property Act, 1872," or have separate property vested in trustees for them; in which latter case the proceedings must be in a Court of Equity. (*b*)

It has been held in Quebec that the promissory note of a married woman, separated as to property from her husband, given for provisions and necessaries used in the family, in favour of her husband, and by him indorsed, is valid without proof of express authority to her to sign the same. (*c*)

So where a note was signed by a married woman, separated as to property from her husband, the Court held it valid, though signed without the husband's concurrence, it appearing that the wife had assumed the quality of a public merchant. (*d*)

The ground of the decision in these cases was that the notes were given for necessaries supplied to the

(*a*) Fisher v. Jewett. Berton's N. B. Reps. 35.
(*b*) See as to this point Merrick v. Sherwood, 22 C. P. U. C. 467.
(*c*) Chobet v. Duplessis, 12 L. C. R., 303; 6 L. C. J. 81.
(*d*) Beaubien v. Husser, 12 L. C. R. 47.

wife for the use of the family, and probably, in such a case, the husband's authority would be presumed.

Under ordinary circumstances, even though a wife is separated from her husband, she cannot, without special authority from him, make a promissory note even in respect of purchases made by her. (*a*)

But though infants and married women in general cannot bind themselves, yet they may be agents for others, so as to bind those others; and a married woman may be an agent as well for strangers as for her husband; and if a husband expressly or impliedly constitute his wife his agent for the purpose of making notes he will be liable for all acts done by her in the scope of her authority.

Thus if a man makes a note payable to his wife or order he thereby gives her authority to endorse it as his agent, and her indorsee will have a right to recover against the husband, the maker of the note. (*b*)

A note made payable to A, "or to his wife, and to no other person," is the same as if made payable to A alone, and his executors may sue upon it. (*c*)

Insane persons are under disability to contract only *while* they are insane, unless they have been declared lunatics under a commission of lunacy, in which case the commission must be superseded before any valid contract can be made with them even during a lucid interval.

Idiots are persons who never have sufficient wits to be of a contracting mind, so that a though they may go through an exterior form of contracting, as by making a mark, yet no actual contract can be made with them.

Persons who are drunk, or whose mental faculties are by some accident materially impaired, whether for

(*a*) Badeau v. Brault, 1 L. C. J. 171.
(*b*) M'Iver v. Donaldson, 18 Q. B. U. C. 619.
(*c*) Moodie v. Rowatt, 14 Q. B. U. C. 273.

a long or a short time, are, during such states, incapable of contracting.

But to ascertain whether a person is capable of personally binding himself is generally far easier than to discover, in cases where he affects to act as agent, whether he is capable of binding those whom he pretends to represent. This, which at first sight would appear simple, will be found to require careful attention.

It is scarcely necessary to say that where one man appoints another his agent (which may be by word of mouth as well as by writing, and no particular form is necessary,) the agent becomes able to bind his principal as to all matters within the scope of his authority. We are not speaking now of contracts under seal, *i. e.* by deed, to execute which the agent must be appointed by deed, for this work does not treat of any contracts which come under that class.

But it is not merely by virtue of an *actual* authority that one man becomes able to bind another; for A may hold such a position with regard to B, as that without such authority to act as agent, nay, in the face of an express contract *not* to act as agent, A will be presumed by the law to have authority so to act, and will be capable of binding B in contracts made by all persons who are not aware of the actual arrangement between A and B.

In other words, a man who is not actually an agent, may be an agent to the world, though in so acting he be exceeding his authority, or even be guilty of a breach of contract as between himself and his supposed principal.

Authority, therefore, is divided into *real* and *presumptive;* real being where a man has actually or impliedly authorized another to do certain acts; and presumptive being where a man by his conduct holds out another

as being authorized to bind him: for whether that other be really authorized or not, the public have under certain circumstances a right to conclude that such authority exists.

In fact, real authority arises from the act of the principal, and presumptive authority from the appearances held out to the world. And both these kinds of authority may be either *limited*, *i. e.* as to time, particular acts, or mode of business, or *general*, *i. e.* extending to all acts connected with the principal's affairs at all times. If the supposed agent acts without, or exceeds his real authority, and has no presumptive authority, he alone is liable.

In case of doubt whether a man has real authority or not, the best course, where practicable, is to ask his principal. Where the alleged authority is in writing, and is shewn to you, you must judge for yourself of its sufficiency, and whether the act which the agent proposes to do is within its scope.

There are many cases where you may be quite sure that a man is agent for another for *some* purposes, as in the case of clerks, foremen, attorneys, &c.; but you are not entitled to presume from the situations of these persons that they are capable of binding their employer in bill transactions; you must therefore be satisfied before dealing with them that they have a distinct authority, or a presumptive one, from a ratification of their former dealings.

An agent may have a special or limited authority referring to a single bill or note, or he may have a general authority to become a party to all bills or notes: clerks, and foremen at home, and other agents at a distance, are often general agents. A general authority to transact business does not enable the agent to bind his principal by accepting or indorsing bills. And special or limited authorities to accept or indorse are construed strictly.

We will now pass on to the cases of presumptive authority; that is, cases where, not knowing whether a man is authorized or not, you may presume that he is so.

Authority may be presumed from custom and acquiescence; as where A had been in the habit of indorsing and accepting for B in his name, and B had recognized A's acts (as by paying the bills or otherwise), B cannot defend an action on one of A's acceptances, on the ground that it is a forgery. And it is a question for a jury whether a man has held out another to the world as his agent by thus ratifying and adopting his acts.

Where an agent proposes to indorse bills which are already in his hands, it is quite as important to inquire into his authority, as if he were about to draw or accept a bill; for, unless he be authorized, the only person bound by such indorsement will be the agent himself.

This refers to bills payable to order; if, however, the bills are payable *to bearer*, the agent may be presumed to have authority to transfer. But in whatever way the bills are payable, the transferee, if he knows the agent, has no authority to transfer, cannot recover on the bills.

And when *overdue* bills, even though payable to bearer are improperly transferred by an agent, the transferee cannot recover upon them, though he were ignorant of the absence of authority to transfer. The fact of their being overdue should put the transferee upon his enquiry;—he takes them at his peril.

When a *general* agent is once constituted, his authority is presumed to continue till notice is given of its revocation. When a customer has dealt with a principal through an agent, or has become acquainted with the fact of his agency through business transactions, the customer is entitled to presume that the agency

continues, until he has individually received notice that it has ceased. To persons who have not had such dealings with the firm, notice in the *Gazette* is sufficient.

An agent holding a bill or note may sue and recover upon it the same as the principal; but if the principal cannot recover, no more can the agent.

So a principal, though his name do not appear on the bill or note, may take the benefit of it, if it be held for him by his agent: but is subject to any defence that might be set up against his agent. Thus, where a principal delivered a bill to his agent to be discounted, and the agent treated it as his own, and the transferee who discounted it only paid the agent a part of the money, the principal was held entitled to recover the remainder of the money from the discounter. But in that case, if the defendant, the discounter, had had a set off against the agent, it could have been successfully pleaded against the principal.

A general power of attorney to an agent to sign bills, notes, &c., and to superintend, manage and direct all the affairs of the principal, gives him a power to indorse notes, and an indorsement to pay to the trustees of an insolvent firm without naming them is sufficiently certain, on showing who they are, and that they act in that capacity. (*a*)

It is a general principle that the acceptance admits the ability of the drawer to make the bill, and it admits also his signature, and where the bill is drawn by a person signing as agent of a company upon a defendant who accepts the bill, the acceptance admits the signature of the agent and his authority from the company to draw the bill. It also precludes the setting up of any legal technical objections in regard to the composition or description of the company or their ability to draw the bill. (*b*)

(a) Auldgo v. M'Dougall, 3 O. S. 199.
(b) Bank Montreal v. De Lare, 5 Q. B. U. C. 362.

But such acceptance would be no admission of the agent's authority to indorse the bill, though his indorsement were on the bill at the time of acceptance. (*a*)

The authority of an agent specially authorized to draw a bill of exchange for a particular purpose ceases on the acceptance, and if the drawer is discharged by want of notice of dishonour, the agent cannot, without further express authority, revive the liability by agreeing to waive the legal discharge. (*b*)

A party who, on the face of a note, signs as agent for the makers, cannot, by indorsing his name thereon, render himself liable to the payee as maker of the note. Thus, where a note was signed "George D. Robinson & Co., per Stephen Hill, jr.," and the name of "Stephen Hill, jr.," was indorsed on the note, the Court held that Robinson & Co. were the makers of the note, and that Hill was not liable as maker. (*c*)

The acceptance of a bill of exchange by the officer of a society, if not within the scope of his regular duties as such officer, is, unless specially authorized by the society, not binding upon it. (*d*)

An agent cannot appoint another person to act for him, unless specially authorized to do so.

No action lies upon a bill except against those who are in some shape parties to the bill itself. Where, therefore, an agent indorses, the principal cannot be held liable on the bill as an indorser where his name does not appear in any shape upon it. (*e*)

In such a case as this, the agent would be personally liable. An agent who makes a contract as agent, thereby impliedly undertakes that he has authority, and he and his executors are liable in an action *ex contractu*, if he really had no authority. (*f*)

(*a*) Robinson v. Yarrow, 7 Taunt. 455.
(*b*) M'Ghie v. Gilbert, 1 Allen. 235.
(*c*) Smith v. Hill, 1 Allen. 213.
(*d*) Browning v. British Am. F. Society, 3 L. C. J. 306.
(*e*) Ross v. Codd, 7 Q. B. U. C. 64.
(*f*) Lewis v. Nicholson, 18 Q. B. 509; Collen v. Wright, 7 E. & B. 301.

By the 32 & 33 Vic. c. 21 sec. 76, *et seq*, an agent fraudulently disposing of bills and notes is guilty of a misdemeanor.

An agent will be personally liable to third persons on his drawing, indorsing, or accepting, unless he either signs his principal's name only or expressly state in writing his ministerial character, and that he signs only in that character. (*a*)

If the agent write his own name as well as his principal's he is liable, unless the agent's ministerial character clearly appear by the addition of such words as "per procuration," "sans recours," or "but only as agent for C. D."

There are many illustrations of this doctrine. Thus, where the defendant accepted a bill drawn upon him as Treasurer of the Wolfe Island Railway & Canal Co., thus, "accepted W. A. Geddes, Trea. W. I. R.W. & C. Co." adding the company's seal, he was, nevertheless, held personally liable. (*b*)

"TORONTO, July 5th, 1855.

"Six months after date, for value received, we promise to pay to A. K. Boomer, Esquire, or his order, at the City Bank, Montreal, the sum of four hundred and twenty-four pounds sixteen shillings and two pence currency, with interest, from date.

"GEO. H. CHENEY,
"President Grand Trunk Telegraph Co.
"F. A. WHITNEY,
"Secretary G. Grand Trunk Telegraph Co."

The seal of the company was affixed, and it was held that the makers were not personally liable on the above instrument, as being their promissory note. (*c*)

(*a*) Leadbitter v. Farrow, 5 M. & S. 345; Sowerby v. Butcher, 2 C. & M. 368.
(*b*) Foster v. Geddes, 14 Q. B. U. C. 239.
(*c*) City Bank v. Cheney, 15 Q. B. U. C. 400.

An action was brought on the following instrument by the payee:

"MONTREAL, July 9, 1847.

"£225.

"Three months after date pay to the order of Alexander Simpson, Esq., cashier of the Bank of Montreal, two hundred and twenty-five pounds currency, for value received.

"(Signed) THE COALBROOKE DALE COMPANY,
per
"PHILIP HOLLAND.

"To P. C. De Latre, Esq., President Niagara Dock and Harbor Company, Niagara, C.W."

The bill was accepted thus, in writing "Accepted payable at the office of the Bank of Upper Canada, Niagara.

"(Signed) P. C. DE LATRE,
"President N. H. & D. Co."

And it was held that the acceptor had rendered himself personally liable. (*a*)

G, being the secretary of an insurance company, gave the following note for a loss sustained by an insurer therein:

"£1,000 currency.

"Sixty days after date I promise to pay to the order of James Sword, Esq., of Colborne, the sum of one thousand pounds currency, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton.

"(Signed) C. HORATIO GATES,
"Secretary of the Company."

The Court held that the Secretary was personally liable on the note, and a plea that the same was taken

(*a*) Bank Montreal v. De Latre, 5 Q. B. U. C. 362.

for a liability of the company, and with the understanding that they were to pay the same, was held bad, as setting up a contemporaneous verbal agreement to vary the terms of a written contract. (*a*)

Where a bill of exchange was drawn by a person under the following signature and description:—"W. Lynn Smart, Secretary of the N. & D. Rs. Ry. Co.," on the president of the company, described as follows:—"To George Macbeth, Esq., President, London, C.W.," and the bill was accepted as follows:—"Accepted. George Macbeth, President." It was held that both the president and secretary were personally liable on the bill, the statute 18 Vic. c. 182 sec. 13, only authorizing the company to draw, accept, or endorse bills by the president, or vice-president, and not by the secretary, and further requiring that the drawing or acceptance by the president should be countersigned by the secretary. (*b*)

The defendant, as Commissioner of the New Brunswick & Canada Railway Company, drew a bill of exchange on the company to pay for work done on the railway, and signed it "J. J. Robinson, Commissioner." The bill was duly accepted, and the drawer indorsed it to the plaintiff. The drawer knew for what purpose the bill was drawn, and that the defendant was the agent of the company, but it did not appear that the plaintiff was aware of these facts. It was held that the defendant was personally liable to the plaintiff, and that the defendant should, if he did not intend to make himself liable, have signed the bill on behalf of the company or used clear words to show that he intended to exempt himself from personal liability. (*c*)

An executor, like an agent, is personally liable on making, drawing, indorsing, or accepting negotiable

(*a*) Armour v. Gates, 8 C. P. U. C. 548.
(*b*) Bank Montreal v Smart, 10 C. P. U. C. 15.
(*c*) Peele v. Robinson, 4 Allen, 561.

instruments, though he describe himself as executor, unless he expressly confine his stipulation to pay out of the estate. (*a*)

If notes are given by persons describing themselves as executors for a debt accruing after the testator's death, they will be personally liable on the notes, and they would be liable in the same manner if the debt had accrued in the lifetime of the testator and after his death the executors had given the notes. (*b*)

If a creditor constitute his debtor executor, the debt is released and extinguished; hence it follows that if the holder of a bill appoint the acceptor his executor the acceptor is discharged and all the other parties also, for a release to the principal discharges the surety, and if one of several joint debtors be appointed executor it is a release to all, and though they were liable severally as well as jointly. The debt is also released where one of several executors is indebted, and though the executor die without having either proved the will or administered. (*c*)

The taking out letters of administration by a debtor to his creditor is merely a suspension of the legal remedies as between the parties, but being the act of law, and not the act of the intestate, it is no extinguishment of the debt, and the action will revive when the affairs of the intestate and of the administrator are no longer in the hands of the same person. (*d*)

In many deeds and agreements of partnership there is a stipulation that one partner shall not draw, indorse or accept bills without the consent of his co-partners. The consequence of a violation of this stipulation is, as between the partners, to create a right of action at the suit of the injured partner, against the partner violating it,

(*a*) Child v. Monins, 2 B. & B. 460; Serle v. Waterworth, 4 M. & W. 9; Liverpool R. Bk. v. Walker, 4 De G. & J. 24.
(*b*) Kerr v. Parsons, 11 C.P.U.C. 513.
(*c*) Byles on Bills, 9th edition, 54-5.
(*d*) Sir John Needham's case, 8 Coke, 135; Wankford v. Wankford, 1 Salk. 299.

and to protect the former against bills improperly drawn, indorsed or accepted when in the hands of a holder with notice. But such agreement will be no defence as against a party who has given value for the bill without notice. In fact, unless a bill is absolutely void, it is good in the hands of a *bona fide* indorsee for value.

If one partner in trade become a party to a bill or note, the act will render all the partners liable to a *bona fide* holder, although the instrument had no relation to the joint trade, and the other partners are wholly ignorant of the transaction, or were even intentionally defrauded by their co-partner. The plaintiff, having a claim against M, agreed to give him time, on receiving a good indorsed note, and M sent him a note made by himself, payable to W M or order, and indorsed by W M and by the firm of "J. & J. Carveth." The plaintiff took the note before it was due, knowing nothing of the circumstances under which it was indorsed by the firm, or of the authority of James Carveth, who indorsed it, to use the partnership name. When it fell due, James Carveth being absent from the country, the plaintiff sued the other partner, John, and was held entitled to recover. (*a*)

The law presumes that each partner in trade is entrusted by his co-partners with a general authority in all partnership affairs, and when a bill is signed by one partner in the name of the firm the assent of the firm is to be presumed from the use of the name of the firm by one of the partners, and the *onus* of proving the contrary rests on those seeking to rebut the presumption. (*b*)

Each partner, therefore, by making, drawing, indorsing or accepting negotiable instruments in the name of the firm, (*c*) and in the course of the partnership transactions, binds the firm, whether he sign the name of the firm

(*a*) Henderson v. Carveth, 16 Q. B. U. C 324.
(*b*) City Glasgow Bank v. Murdoch, 11 C. P. U. C. 138.
(*c*) Harrison v. Jackson, 7 T. R. 207; Pinkney v. Hall, 1 Salk. 126; Swan v. Steele, 7 East 210; Ridley v. Taylor, 13 East 175.

simply, or sign by procuration, or accept in his own name a bill drawn on the firm. (*a*)

The name of the firm must be used without any substantial variation. But this extended power of drawing bills is only enjoyed by partners in *trade*, and partners not in trade cannot bind each other by bills, without express authority. Therefore, one attorney who is partner with another has not from that relation alone, power to bind his co-partner by a bill or note. (*b*)

In the case of partners in trade there is an implied power from that relation. In other cases the authority to draw must be expressly conferred.

A note signed A. & Co. by B., who is not a partner in the firm *prima facie* imports that B. signs the note for the firm, and not as one of the firm. (*c*)

A dormant partner, whose name does not appear, is bound by bills drawn, accepted or indorsed by his co-partners in the name of the firm, and not only when the bills are negotiated for the benefit of the firm, but when they are given by one of the partners for his own private debt, provided the holders were not aware of the circumstance, (*d*) for credit is given to the firm generally, of whomsoever it may consist. So a party whose name appears in a firm as a nominal or ostensible partner is liable on all bills and notes made in the name of the firm, though he really has no interest therein. (*e*)

We will endeavour to illustrate the different rights which a contracting party may have against a dormant and an ostensible partner.

If at the time you deal with the firm of "A and B," you know that C is a dormant partner, and that D is an ostensible partner in the firm, they are of course both liable to you. But if, after you have taken an acceptance

(*a*) Mason v. Rumsey, 1 Camp. 384; see Jenkins v. Morris, 16 M. & W. 879; Stephens v. Reynolds, 5 H & N. 513.
(*b*) Hedley v. Bainbridge, 3 Q. B. 316.
(*c*) Dowling v. Eastwood, 3 Q. B. U. C. 376.
(*d*) Vere v Ashby, 10 B & C. 288; Lloyd v. Ashby, 2 B. & Ad. 23.
(*e*) See Dickenson v. Valpy, 10 B. & C. 141; Gurney v. Evans, 3 H. & N. 122.

of "A and B," you *discover* that C is a dormant partner, and that D has been acting as a partner, you may treat C as liable to you on the acceptance, for he has been receiving, directly or indirectly, a portion of the profits of the firm, which is the fund to which creditors look for payment. But you cannot make D liable, who was, in the case supposed, *merely* an *ostensible* partner, for the only ground on which he could be liable to you was that you contracted with him and on his credit, and that you did not do, for you did not know him as a partner.

To put it shortly: The man who is really a partner is liable, though he was not known to be a partner; and the man who holds himself out as a partner is liable to those who thought him one, whether he was one or not.

Thus there are two clases of persons who are liable on a bill or note signed in the name of the firm:

(1.) Those who participate, or are entitled to participate, in the profits of the concern.

(2.) Those on the strength of whose credit a person *may* have contracted.

As regards the firm, a partner may have no *right* to pledge the credit of his co-partners, but he has the *power* to do so; and it is unnecessary here to consider the consequences of a breach of the agreement which the partners have made with one another.

A retired partner is, as regards those who knew of his retirement, only liable upon bills and notes signed while he remained a partner.

A joining partner is only liable upon bills and notes signed *after* he has joined the firm.

We have hitherto considered the doctrine of agency as regards partners in a still subsisting firm; we will now treat shortly of the power which, after a dissolution, a partner may have of binding his late co-partners.

There is no charm in the word "dissolution;" for as a partnership may be originally created by a common con-

sent of two or more persons, with or without a deed or written agreement; so, if there has been a deed or written agreement between the partners, and such instrument has been cancelled, and even a deed of dissolution executed, yet the partnership may still subsist by a common consent, or, what comes to the same thing, a new partnership may, by such consent, be straightway created. And after a dissolution, one partner may be so intrusted by his late partners with the management of affairs, that, even with those who knew of the dissolution, he may be able to bind the late firm by contracts made in their name. But, independently of any consent on the part of his late partners, each member of the dissolved firm can, as will be seen, under certain circumstances, bind his late co-partners.

After a partnership is dissolved, a dissolving partner has no longer any right to pledge the credit of the firm. To avoid doing so is his duty to his late co-partners. His *power* as regards the public is as follows:

As regards those who know of the dissolution, a partner is no longer able to bind his former partners; but to those who do not know of it, each partner occupies the same position as a nominal or ostensible partner did before the dissolution, *i. e.* each will be liable to those who may contract upon his credit.

For this reason it is usual upon a dissolution to give express notice of the fact to those who have been customers or correspondents of the firm, and to give notice to the world by advertisements in the *Gazette* and other papers, which will be always sufficient as to those who have not been customers, and will be *prima facie* evidence that even customers knew of the dissolution.

If a bill be accepted by an ex-partner in the name of the dissolved firm in favour of a person who has no notice of the dissolution, such person has not only himself a right to sue, but his transferee, though taking the bill *with* notice, will have a like right.

Notice to one partner is considered by the law to be notice to all; so that a bill improperly accepted by an ex-partner in the name of the dissolved firm in favor of another firm, of whom *one* knew of the dissolution, could not be sued upon by the latter firm.

A dormant or secret partner, whose liability arises solely from his right to participate in the profits, cannot after a dissolution be bound by the acts of an ex-partner; for, with the dissolution, the cause of the liability has wholly ceased.

The estate of a deceased partner is never liable upon contracts made by the surviving partners after his death.

In taking from an ex-partner a bill belonging to a late firm, it will be well to have the separate name of each partner, or else to see that the partner putting the name of the firm to the bill has actual authority to do so.

A shopman, a foreman, a clerk, or a wife, has not, as such, authority to pledge a man's credit by putting his name to a bill; but there is often not only an express authority to such persons, but a presumed one arising from ratification or payment of bills already drawn, indorsed, or accepted by such persons, as the case may be.

An authority to indorse does not include an authority to draw, and *vice versa;* and neither amount to an authority to accept.

Notes are on the same footing as bills with regard to authority, actual and presumed.

If one partner die, being liable or entitled on a bill or note, the legal right of action or the liability to be sued survives, but the personal representatives of the deceased are entitled or liable in equity. (*a*)

Bills and notes being personal property, the executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator; (*b*) and if a bill is

(*a*) Lane v. Williams, 2 Vern. 277; Bishop v. Church, 3 Ves. Sen. 100, 371.
(*b*) Hyde v. Skinner, 2 P. Wms. 196.

indorsed to a man who is dead, by a person ignorant of his death, it will enure as an indorsement to the personal representatives of the deceased. (*a*)

On the death of the holder of a bill or note his executors or administrators may indorse. (*b*)

Presentment notice of dishonor and payment should be made by and to the executor or administrator in the same manner as by and to the deceased.

Without a special authority, express or implied, a corporation has no authority to make, indorse, or accept bills or notes.

A corporation established strictly for trading purposes has an implied authority to become parties to bills, but a mining company incorporated under the "Con. Stat., Can. c. 63," has not, as a necessary incident, the right to draw, accept, or indorse bills of exchange. Such right can only be conferred on them by express authority or reasonable implication. The power of "selling or otherwise disposing of their ores, as the company may see fit," in their articles of association, will not confer such power by implication. Bills directed to the secretary of the company, and so describing him, are, in effect, drawn on the company, and authorize him to accept, on their behalf, if he has authority to bind them, and it is unnecessary to put the seal of the company to the acceptance. Such bills may be accepted in the name of the company per the secretary, and on such an acceptance the secretary is not personally liable. Under section 63 of this statute the trustees are personally liable, where there is no mention in the bills of the capital stock of the company. But this liability does not attach where the trustees have no power to contract at all for the company, and where they assume to exercise such power, they are not liable in their own right. (*c*)

(*a*) Murray v. East Ind. Co., 5 B. & Ald. 204.
(*b*) Rawlinson v. Stone, 3 Wils. 1.
(*c*) Gilbert v. McAnnany, 28 Q. B. U. C. 384. Robertson v. Glass, 20 C. P. U. C. 250.

A municipal corporation cannot make negotiable instruments unless expressly empowered to do so by its charter, and where such power is not expressly given it cannot be implied as necessary to accomplish any of the purposes for which such a corporation is created. A promissory note made by a municipal corporation to pay the amount of a judgment against the municipality is void when the Legislature has empowered the municipality to raise any necessary funds in a different manner. (*a*)

A promissory note made payable to the treasurer of, and endorsed by him to a municipal corporation, to secure a balance due the corporation on a past transaction, is not void under the Municipal Acts. (*b*)

A building society incorporated under the "Con. Stats. U. C. c. 53" may, under certain circumstances, make promissory notes, and as they have this power under some circumstances, when a note is made by such society it will be assumed to be valid, unless it is shewn that circumstances exist depriving them of the power. If such circumstances exist they must be shewn by plea. (*c*)

(*a*) Pacaud v. Corporation Halifax, 17 L. C. R. 56.
(*b*) Corporation Belleville v. Fahey, 5 U. C. L. J. N. S. 73.
(*c*) Snarr v. Toronto P. B. & S. Scy., 29 Q. B. U. C. 317.

CHAPTER III.

OF CONSIDERATION.

A consideration is some benefit or promise made, or loss suffered by the plaintiff to or for the defendant.

It is necessary for a plaintiff suing on contracts or promises, whether made by word of mouth or in writing (unless by deed, *i. e.* under seal), to prove a consideration to have been given for them.

Bills and notes are exceptions to this rule, as we have already seen, for where a bill or note is given a consideration will be presumed to have passed, till the contrary is made probable; and to do this rests with the person sued on the bill.

For instance, if A has drawn upon B, and he has accepted the bill, and A then sue him upon it, it is B's business to shew by his witnesses, or by cross-examination of A, and those called by him, that the acceptance was given not for value, but for the accommodation of A, and to enable him to obtain money from other parties.

Although consideration is presumed to have been given for a bill or note, yet, under certain circumstances, to be presently explained, a defence may be made out by shewing either:

1. The absence of consideration.
2. That the bill or note was obtained by *fraud*.
3. That it was given in pursuance of an illegal contract, *i. e.* on an illegal consideration.

The rule regarding the necessity of consideration is this: Where a person gives a bill gratuitously to another, either by way of accepting it for his accommodation, or indorsing to him another bill, if the accommodating party is afterwards sued on the acceptance or indorsement, it will be a sufficient answer to the action that the plaintiff gave no consideration for the bill or note, and the law is the same when a note is given without any consideration passing, and merely by way of gift or gratuity. (*a*)

Accommodation bills and notes being, however, meant for the person accommodated to obtain money upon, the latter can, by indorsing them to another party for value, entitle him to recover both against the party accommodating and the party accommodated.

For instance, suppose a bill accepted gratuitously (which we will call an "accommodation bill"), were indorsed by the drawer in whose favor it was accepted, to a third party *for value*, such party can recover upon the bill as well against the gratuitous acceptor as against the drawer who indorsed it. And, to go one step further, suppose the indorsee for value, instead of being the plaintiff, were to transfer the bill gratuitously, his transferee would be able to stand in his place, and the transferee might successfully sue all the parties to the bill except his gratuitous transferor.

From this it will be seen that any person may sue upon a bill or note, who has either himself given value for it, no matter to whom, or deduces his title from some one who has; and any person may be sued on a bill, either if he has received value for it, no matter from whom, or if the plaintiff has given value, or deduces title from one who has.

Therefore, where a person, who has gratuitously drawn, accepted, or indorsed a bill, or made or indorsed a note, is sued upon it, it is necessary for him to allege in his plea,

(*a*) M'Carroll v. Reardon, 4 Allen, 261; Poulton v. Dolmage, 6 Q. B. U. C. 277.

and to prove, *not only* that it was an accommodation bill, *but* that the plaintiff and those through whom he deduces his title, gave no value for it. (*a*)

This is necessary in every case where the action is not between immediate parties. (*b*)

Thus a person who indorses a note, though there is no consideration between him and the holder, is liable to the holder if he has given value, and it is no defence to an action on a note by the indorsee (a holder) against the indorser that the plaintiff gave no value to the indorser for his indorsement, or that he took the note knowing at the time he took it that it was indorsed for the accommodation of the maker. (*c*)

On the same principle it is no defence for the maker of a note payable to bearer to shew that it was made for the accommodation of some person other than the plaintiff, and that the latter holds the same without value as regards the maker, for there might still be a valuable consideration as between the plaintiff and the person for whose accommodation the note was made. (*d*) So an indorsee without value is entitled to recover on a bill or note if an intermediate party has given value. (*e*)

But a consideration of some sort is necessary to support the promise made in a promissory note, even as between the original parties, and a promissory note given by A to B, for a debt due by C to B, upon no consideration of forbearance to C, nor any stipulation to discharge him, and without the knowledge and consent of C, cannot be enforced. (*f*)

In this case, the debt payable by C to B was not due when the note was given, and the note was payable before the debt became due, so that there was no giving of

(*a*) Bank B. N. A. v. Sherwood, 6 Q. B. U. C. 213.
(*b*) Whithall v. Ruston, 7 L. C. R. 399.
(*c*) Millier v. Ferrier, 7 Q. B. U. C. 540.
(*d*) Muir v. Cameron, 10 Q. B. U. C. 356.
(*e*) Wood v. Ross, 8 C. P. U. C. 299.
(*f*) M'Gillivray v. Keefer, 4 Q. B. U. C. 456.

time to C, which might have formed a consideration. Where the maker of the note has derived an advantage, though not precisely such, or in such a form as he had in contemplation when he gave the note, and his object is, in effect answered, there will be a sufficient consideration for the note, although the consideration does not prove so beneficial as was expected. (*a*) So a partial failure of consideration is no defence to an action on a note, (*b*) but the entire failure of consideration has the same effect as its original and total absence, (*c*) and it seems that a partial failure of a specific ascertained amount would be a defence *pro tanto*. (*d*) Even if the consideration entirely fails, yet if the bill or note is indorsed to a third party for value, without notice, he could, of course, recover on the principles already stated. As between the original parties there must be either an original absence or a total failure of consideration on the note, and a separate and independent wrong, although it virtually renders worthless that which was the consideration for the instrument, will not prevent the person to whom the instrument is given from recovering upon it. For instance, if a bill be given for the price of goods sold and delivered, and the goods are never delivered, there is a defence to an action on the bill, but if having delivered the goods the vendor forcibly take them away again he may recover upon the bill, and the forcible removal will be merely ground for cross action.

It seems that a *bona fide* holder for value of a bill or note will not be affected by the failure of consideration between the original parties thereto.

The defendant made a note in favor of S for the amount of a bill of exchange. S failed and the bill was

(*a*) Dutton v. Lake, 4 O. S. 15.
(*b*) Dixon v. Paul, 4 O. S. 327. See also Thompson v. Farr, 6 Q. B. U. C. 387; Hill v Ryan, 8 Q. B. U. C. 443.
(*c*) Solly v. Hinde, 2 C. & M. 516; Wells v. Hopkins, 5 M. & W. 7.
(*d*) Darnell v. Williams, 2 Stark 166; Clarke v. Lazarus, 2 M. & G. 167; Moggeridge v. Jones, 14 East 486; Spiller v. Westlake, 2 B. & Ad. 155.

dishonoured. Before the note became due, and before the failure of S, it was deposited by him, with a number of other notes, with the plaintiffs, as collateral security for the payment of certain bills of exchange, on which he was liable, to the plaintiffs, the agreement being that if the bills were not paid the proceeds of the notes were to be applied in payment of the amount; but if the bills were paid the plaintiffs were to collect the notes and place the amount to the credit of S. The amount of notes deposited by S with the bank, as collateral security, never exceeded his indebtedness, and at the time the note in question was indorsed to the plaintiffs, and when S failed, there was a considerable deficiency. The Court held that the plaintiffs were *bona fide* holders for value, and were not affected by the failure of consideration between the defendant and S.(*a*)

As the payee of an accommodation note cannot himself sue the maker upon it, so neither can his indorsee, unless he pays value for it, and if he only pays or lends a small sum on the note he can only enforce it for the sum lent. (*b*)

Where, in an action on a promissory note, payable to the order of A, it was proved that B indorsed it and then brought it to A, who indorsed merely for accommodation, never having received any value for it, the Court held that want of consideration could not, on these facts, be inferred, as between the maker and B, and that the plaintiff was not obliged to prove the consideration. (*c*)

A person has no right to recover on a note, though made in his favour, if the maker place it in his hands merely for the purpose of its being taken care of, and on condition that the holder shall not negotiate or part with it to any other person, and there is no other consideration for the note. (*d*)

(*a*) Commercial Bank v. Page, East. T. 1871, Stevens' Digest N. B. Reports, 7.
(*b*) Strathy v. Nicholls, 1 Q. B. U. C. 32.
(*c*) Mair v. M'Lean, 1 Q. B. U. C. 455.
(*d*) Wismer v. Wismer, 22 Q. B. U. C. 446.

We have next to consider how far a fraud practised on the defendant is an answer to an action on the bill or note.

If the defendant has been defrauded of the bill or note, or it was given for an illegal consideration, he must state this in his plea, and also that the plaintiff gave no consideration for the bill; but there is an important difference between this case and the one already mentioned, namely, that when the defendant has proved the fraud or illegality, the plaintiff is then put upon proof of having, in ignorance of fraud or illegality, given value for the instrument; (*a*) for there is a presumption that value was given for an accommodation bill, which was intended to raise money, but no such presumption with regard to bills tainted with fraud or illegality; and, besides, it would be manifestly unjust to place the defendant in an action on such bills under the necessity of proving that no consideration passed between the alleged defrauder and the plaintiff in the action; whereas nothing can be more fair than to leave the fact of consideration having passed to be proved by the plaintiff, who should know all about it.

Where a plaintiff is suing upon a bill which he himself has obtained from the defendant by fraud or on an illegal contract, the defendant upon proof of these facts, *and*, in case of fraud, of his having repudiated the contract upon discovery of the fraud, will have made out a valid defence. But where the plaintiff has not *himself* been guilty of the fraud, or a party to the illegality, the proof of these facts, on the part of the defendant will only constitute a defence subject to the conditions above stated, namely, if the plaintiff took the bill with notice of the fraud or illegality, *or* gave no consideration.

We will now proceed to consider what constitutes consideration, fraud, and illegality, respectively.

(*a*) See Withall v. Ruston, 7 L. C. R. 399.

The payment of money amounts to a consideration, and, no matter how small the sum is, so that there is an absence of fraud, it will be sufficient to entitle the holder to recover against prior parties.

Any risk run at the request of the person who gives the bill or note, may be a consideration for it. If A has given B his acceptance, this may be a consideration for B's acceptance given to A. Cross acceptances may thus be considerations for each other, although there is no other consideration than the mere exchange of the bills, for such exchange is sufficient to constitute each party a holder for value of the paper he receives. (*a*)

A debt due to another may be a consideration, though the debt is not payable at the time the note is given; thus, if A owe money to B, and C give B a bill or note for the amount, this will be a good consideration, and, of course, it will be equally so if C be jointly liable with A for the debt. (*b*) Also, if the bill C gave to B were for a debt which C owed to A, the consideration would be good.

Where a bill is given for the debt of a third party, it is no defence to an action on the bill that such debt was without consideration.

A judgment debt may be a consideration for a note payable at a future day; for the person taking it thereby impliedly undertakes to suspend proceedings on the judgment till the maturity of the instrument.

Where a bankrupt gives a note to a creditor for a former debt, such debt is not a sufficient consideration to support the note; nor is it so in the case of an insolvent discharged under the Act, such securities given by him being illegal.

But a debt due to a bankrupt estate is a good consideration for notes for that debt, given to the trustees and assignees of the estate. (*c*)

(*a*) Wood v. Shaw, 3 L. C. J. 169.
(*b*) See Dickenson v. Clemow, 7 Q. B. U. C. 421.
(*c*) Gates v. Crooks, Draper 459–465.

A fluctuating balance may be a consideration when it is in favour of the party to whom a bill or note is given, the consideration increasing or decreasing from time to time with the amount of the balance.

In fact a note cannot be said to be an accommodation note if there is a valuable consideration at any time during its currency. If, therefore, a note is discounted and another note maturing after the first is given as collateral security, the moment the principal note falls due and is unpaid a consideration will arise for the collateral note, and the holder thereof may recover thereon. (*a*)

A pre-existing debt from the maker to the holder is a good consideration for the giving of a note, and although the debt is already secured by a mortgage on real estate, it is still a consideration for the note. As long as there is an unextinguished debt existing, it forms a consideration for a new promise, as may be illustrated by the case of a debt, the remedy for which is barred by the Statute of Limitations, and which is still a good consideration for a note. (*b*)

Where the plaintiffs, who were an insurance company, refused payment of a partial loss to the assured in a marine policy, in consequence of the claims of W. P. & Co., to whom the amount of insurance was, in case of loss, made payable, but consented to advance the amount upon the insured giving his promissory note, indorsed by the defendant, for the sum, which was to be paid at maturity unless they procured the assent of W. P. & Co. to their retaining the money, which assent was refused. It was held that the defendant was liable on the note, and could not defend himself on the ground of want of consideration; or that the plaintiffs were not justified in

(*a*) Blake v. Walsh, 29 Q. B. U. C. 541.
(*b*) Bank U. C. v. Bartlett, 12 C. P. U. C. 238; Evans v. Morley, 21 Q. B. U. C. 547; Gooderham v. Hutchison, 5 C. P. U. C. 241

requiring the assent of W. P. & Co. to the payment of the money for which the note was given. (*a*)

A deed by which the party conveys all his right, title and interest in a lot of land, will form a good consideration for a note given by the grantee to the grantor, for the former would have his remedy on the covenants in the deed, and at all events it would bind the grantor by estoppel: (*b*) that is to say, if the grantor afterwards acquired any interest in the property he could not hold it for his own benefit but would be bound to transfer it to the grantee.

Where the defendant insists on fraud as a defence, he must, on the discovery of the fraud, have entirely repudiated the contract and retained no benefit under it. (*c*)

Fraud is where a man is induced to do any act by means of an intentional material misrepresentation, though the party so deceiving him aim at no profit by the transaction; and where a man, in order to influence the conduct of another in business, makes a random assertion (not being a warranty), without knowing whether it be true or false—this is a fraud.

I say "*material*" misrepresentation, for it is not every assertion that a man may make (as for instance, in vending his goods) which, though intentionally false, will constitute fraud, or will amount to a warranty. Also, the false statement or the conduct (for fraud may be by act as well as words, or by both together) must be such as would be naturally calculated to lead a reasonable man astray.

I say "without being a warranty," for a random warranty of a fact which the warrantor did not know to exist, does not amount to fraud; though it does amount to fraud if he knew the warranty to be false.

There are several cases in our own Courts in which notes have been held void for fraud.

(*a*) New Bk. Assce. Co. v. Ansley, 2 Kerr 196.
(*b*) Lundy v. Carr, 7 C. P. U. C. 371.
(*c*) Archer v. Bamford, 3 Stark. 175.

Thus a promissory note, given by an insolvent debtor to a creditor, in contemplation of a deed of composition, and as a preference to such creditor, without the knowledge of the other creditors, is null and void, and will be declared so even as against the compounding debtor himself. (*a*)

So a note given by an insolvent to one of his creditors, for the purpose of procuring his signature to a deed of composition, and whereby the insolvent agrees to give the creditor more by the amount of the note than his other creditors, cannot serve as a ground of action against the insolvent, and is void as a fraud on the other creditors. (*b*)

The Insolvent Act of 1869 prohibits, under a penalty, the giving of any promise of payment as a consideration or inducement to the creditor to consent to the debtor's discharge; and, therefore, a note of a third party, given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void. (*c*)

If a note is obtained by menaces and threats, without any consideration passing between the parties, it will be null and void. (*d*)

Defendant gave a negotiable note to G, who agreed to hold it as security for a liability he had incurred for the defendant. G, in violation of this agreement, indorsed and transferred the note to C, in order to raise money for G's benefit. C got the note discounted at a bank, and was obliged to take it up at maturity, and two years afterwards he transferred it to the plaintiff. G never paid the money for the defendant, which formed the consideration for the note. The Court held that unless C knew the circumstances under which G got the note, or was implicated in G's fraud, he would have had a right, on taking up the note at the bank, to recover the amount

(*a*) Greenshields v. Plamondon, 3 L. C. J. 240.
(*b*) Sinclair v. Henderson, 9 L. C. J. 306.
(*c*) Doyle v. Prevost, 17 L. C. J. 307; Prevost v. Pickel, 17 L. C. J. 314.
(*d*) McFarlane v. Dewey, 15 L. C. J. 85.

from the defendant, and that the plaintiff, claiming under C had the same right. (*a*)

If an action is brought on a note obtained by fraud, and the defendant, instead of resisting payment on this ground, compromises the action by giving a new note for the original consideration, he will thereby waive the fraud, and cannot take advantage of it in an action on the second note. (*b*)

A plaintiff cannot recover upon a bill given for illegal consideration, if he is obliged to rely on the illegal transaction in making out his case.

Considerations which are illegal are so either (1) at common law, *i. e.* by the general unwritten law of the land, or (2) by statute.

Considerations illegal at common law may be again divided into (1) such as are privately immoral, and (2) such as contravene public policy.

Under the former head come the considerations for bills, notes or cheques given for *future* cohabitation, for the rent of apartments knowingly let for the purpose of prostitution, etc.

Under the latter are included the considerations for bills, etc., given upon a contract for the general restraint of trade or business; as if, upon a purchase of the goodwill of a medical practice, or a shoe-maker's shop, it were bargained that the persons parting with the businesses should thenceforth altogether cease from curing wounds or making shoes respectively. Though there would be no objection to a partial restraint, as to do business only within fifty miles of Toronto, or only with certain classes of customers, as wholesale or retail, etc.

So contracts in restraint of marriage (and it should seem though only in partial restraint) are likewise void; and so are contracts to procure a marriage, or to procure

(*a*) Hastings v. O'Mahoney, 4 Allen 305.
(*b*) Tuttle v. Smith, 3 Kerr 643.

the separation of those already married; also contracts to injure the revenue, to compound a felony or a *public* misdemeanor, or to induce a person to infringe the law.

Contracts with a public enemy, as bills or notes in their favour, are also illegal, and all bills and notes are worthless in their hands; so also contracts for obtaining public offices, and all bills, etc., given in pursuance of such contracts are illegal at common law. These are also many of them illegal by statute, which is the other main division of illegality.

In treating of considerations illegal by statute, it may be convenient first to mention that the offence of usury has ceased to exist, and no contract can any longer be objectionable on that ground, and that gaming contracts, whether written or verbal, are not in general illegal, but are *merely void; i. e.* a man may make a wager or a bet if he pleases upon a lawful game, but having made it, he need not pay. Bills, notes and cheques, therefore, given in pursuance of such bets or wagers, can only be recovered upon by an innocent indorsee or holder, who has taken the bill for value, and in ignorance of the transaction out of which it originated.

Though the winner of stakes at a horse-race may, in general, recover them in an action, (*a*) yet it seems that a *promissory note* given for the amount would be void, except in the hands of an innocent holder for value.

If the loser by play or betting, having given a bill or note, has to pay the innocent holder, the former can recover the amount against the man to whom he lost the bet.

But if one man employs another to bet for him, the employer thereby authorizes his agent to pay losses; the agent having done so, can recover the money from his principal. Therefore a bill drawn by the agent upon, and accepted by the principal for the amount,

(*a*) See Kelly v. Gafney, 8 U. C. L. J. 50.

must be paid by him. In this case, it will be observed, the sum sued for is not money won at play, but a sum paid by the agent to a third party at the principal's express or implied request.

A note given for a bet or wager respecting the result of an election, is null and void, at least as regards the payee. (*a*) And an action cannot be maintained on a note which is given, and the proceeds of which, are applied for the purpose of bribing the electors in a legislative election. (*b*)

"The Corrupt Practices Prevention Act, 1860," of the late Province of Canada, is in force, and applies in Ontario and Quebec to elections of members for the House of Commons of the Dominion, and, therefore, a note given for the payment of even lawful expenses connected with any such election is void in law. (*c*)

So, a note given for a gambling debt is null and void, even in the hands of a third party holding it in good faith before maturity. (*d*)

A note given for the price of a lottery ticket is not avoided by the statute against lotteries, and, therefore, a *bona fide* holder, for value without notice, can recover thereon, and any one in whose hands such securities are valid, can transfer them even to persons cognizant of the illegality, and the latter will have a right to recover on them. If, therefore, any intermediate indorsee of such a note is an innocent holder for value, a person with notice of the illegality of the consideration will take a good title from him. (*e*)

"The Temperance Act of 1864," section 43, avoids all securities given for liquors sold in contravention of that Act, save when they are in the hands of *bona fide* holders

(*a*) Dufresne v. Guevremont, 5 L. C. J. 278.
(*b*) Gugy v. Larkin, 7 L. C. R. 11.
(*c*) Willett v. De Grosbois, 17 L. C. J. 293.
(*d*) Birolean v. Derduin, 7 L. C. J. 128.
(*e*) Wallbridge v. Becket, 13 Q. B. U. C. 395; see also Evans v. Morley, 21 Q. B. U. C. 547; S. C. 20 Q. B. U. C. 236.

for value without notice of the illegality. In general, when the consideration for a bill or note is illegal by statute, a person taking the same for a valuable consideration, without notice of the illegality, may recover thereon.

When a statute does not provide that all securities shall be void which shall be made in furtherance of such dealing as the statute prohibits, but merely prohibits the act, or even goes farther and imposes a penalty, such a statute has not the effect of making void in the hands of an innocent holder for value a negotiable instrument which was made in furtherance of such a transaction. Therefore a note given on account of a sale made on a Sunday is not void in the hands of an innocent holder for value. (*a*)

But a promissory note or agreement in writing, dated on a Sunday, and given in payment of a horse purchased on the same day, is null and void under the 45 Geo. 3 c. 10, and 18 Vic. c. 117, as between the original parties. (*b*)

As to notes and securities made on a Sunday, the result of the law seems to be that under the statutes a note made on a Sunday in payment of goods sold on that day is void, as between the original parties, but not as against an indorsee, for value without notice. (*c*)

An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a promissory note. (*d*)

A promissory note given by a client to his attorney in respect of services to be rendered by the attorney, is invalid. (*e*)

(*a*) Crombie v. Overholtzer, 11 Q. B. U. C. 55
(*b*) Cote v. Lemieux, 9 L. C. R. 221; see also Kearney v. Kinch, 7 L. C. J. 31.
(*c*) Houliston v. Parsons, 9 Q. B. U. C. 681.
(*d*) Dwight v. Ellsworth, 9 Q. B. U. C. 539.
(*e*) Robertson v. Caldwell, 31 Q. B. U. C. 402; Hope v. Caldwell, 21 C. P. U. C. 241.

When any part of the consideration for a bill or note is fraudulent, the bill or note is bad.

When an original bill or note is without consideration, or given on an illegal consideration, a renewed bill or note will be open to the same objection, except the amount be reduced by excluding so much of the consideration of the original bill as was illegal.

CHAPTER IV.

OF TRANSFER.

Transferring a bill or note means so passing it to another person as to enable him to recover at maturity against the parties to it.

A bill or note is only transferable when it contains a direction to pay to the payee's order or to bearer. If it contain no such direction, it is of no use to any but the original payee. The payee may be either the drawer or a third person, and therefore a bill, when payable to order, may either contain the words "pay to me or my order," or "pay to C or his order."

If the bill or note be payable to order it is transferable by endorsement, which may be either in full or in blank. If payable to bearer or indorsed in blank, it is transferable by delivery, either with or without a further indorsement. (*a*)

If the bill or note be not payable either to order or to bearer, it is only good in the hands of the payee, and is not negotiable.

And the fact that the note is payable to a fictitious person does not render it negotiable any more than if the payee were a real person. (*b*) Thus, where a note is, by the maker, knowingly made payable to a fictitious payee, and not to his order or bearer, a person receiving

(*a*) See Art. 2286 of the Civil Code, Quebec.
(*b*) Williams v. Noxon, 10 Q. B. U. C. 259.

it from a third party for value cannot maintain an action against the maker by declaring, as on a note payable to bearer.

Bills may be indorsed or transferred by delivery before as well as after acceptance, and before as well as after they become due.

Indorsements are of two sorts: an indorsement in *blank* and an indorsement *in full*, or *special* indorsement. A blank indorsement is made by the payee simply writing his name on the back of the bill or note, and this makes it thenceforth transferable by delivery, though in practice, the transferor is often asked to indorse each time that the instrument changes hands.

An indorsement in blank entitles any persons to sue upon the bill who may agree to join in the action, and where three out of a firm of four persons sued upon a note averring an indorsement to themselves as plaintiffs it was held that the non-joinder of the other partner was not a ground of non-suit. (*a*)

A note passed before notaries *en brevet* payable to A B or his order cannot be transferred by a blank indorsement, but it may by an indorsement in full, or special indorsement. (*b*)

A special indorsement is by writing a direction to pay to a particular person, and may be made by A B thus: "Pay C D or his order. A B." The words "or his order" may be omitted in this case, for their omission will not restrict the negotiability of the instrument. (*c*)

By Art. 2288 of the Civil Code of Lower Canada, an indorsement may be restrictive, qualified or conditional, and the rights of the holder under such indorsements are regulated accordingly.

(a) Anderson v. Macaulay, 6 O. S. 537.
(b) Brunet v. Lalonde, 16 L. C. R. 347.
(c) Moore v. Manning, Com. Rep. 311; Cunliffe v. Whitehead, 3 Bing N. C. 829.

These indorsements, though not bad if written on the face, are most properly written on the back; and if more space is wanted, a piece of blank paper, for which no stamp is required, should be pasted on to the end of the bill. (*a*)

An indorsement, like an acceptance, is never complete without delivery. Giving or sending a bill to the transferee, or sending it to his place of business, will of course, constitute delivery; but there are so many circumstances which constitute *constructive* delivery, that the general rule is all that can be given.

Every indorser of a bill is in the position of a new drawer, and, as a consequence of this, a person who indorses a bill which is not negotiable, and therefore does not give the indorsee a right to sue the drawee or acceptor, is liable on his indorsement to his immediate indorsee, but he is not liable to any remoter parties, and the second indorser of such a bill cannot by his indorsement give his indorsee an action against the first indorser. (*b*)

There is a distinction in this respect between bills and notes; the indorser of a bill may be treated as a new drawer, but the indorser of a non-negotiable note cannot be so treated; and a party indorsing his name on the back of a note not negotiable, or if negotiable, not indorsed by the payee, cannot be sued as an indorser by the payee. (*c*)

Where W made a note payable to the plaintiffs alone, on which the defendants indorsed their names, one after the other, and it was proved to have been given for money lent to W by the plaintiffs, in defendants' presence, and for which they agreed to become security, and that one of them had paid interest on it; and that one of them had promised to pay the note, when spoken

(*a*) Reg v Bigge, 1 Stra. 18, ex-parte Yates, 27 L. J. (Bky.) 9.
(*b*) Jones v. Whitty, 9 L. C. R. 191.
(*c*) West v. Bown, 3 Q. B. U. C. 290.

to, it was held, nevertheless, that the defendants could not be liable in any way, as upon a note. (*a*)

So where a note was given to a Mutual Insurance Company, and was therefore not negotiable under the statutes; it was held that a person indorsing it could not be fixed with the ordinary liabilities of an indorser. (*b*)

We have already seen (*c*) that the Statute 3 & 4 Anne, c. 9, makes promissory notes assignable and indorsable, like bills of exchange. In the revised Statutes of the Provinces of Nova Scotia and New Brunswick similar provisions are contained, and promissory notes are invested with the same properties as belong to bills of exchange, by the custom of merchants. (*d*)

Where a note is made payable to A or bearer, and A indorses it, though the indorsement is not necessary for the purpose of transfer, yet A will be liable on his indorsement. (*e*)

So where a note is payable to A or bearer, and a third party endorses it, he will be liable on such indorsement to the payee, the latter not having indorsed the note. Thus, when, after the note was made, it was delivered to C, who, as bearer, was the holder thereof, and he afterwards indorsed and delivered the note to the payee, he was held liable on his indorsement to the payee. (*f*)

A party indorsing a note payable to A or bearer, may be sued as indorser, jointly with the maker, under the Stat. chap. 42 of the Con. Stat., Ontario. (*g*)

Where a party holds himself out to the world as an indorser, unless he can show manifest error, and that

(*a*) Skilbeck v. Porter, 14 Q. B. U. C. 430.
(*b*) Gore D. M. Ins. Co. v. Simons, 13 Q. B. U. C. 555.
(*c*) Ante Page 14.
(*d*) See Rev. Stat. N B. Chap. 116, S. 2, Rev. Stat. N.S. Chap. 82, S. 2.
(*e*) Booth v. Barclay, 6 Q. B. U. C. 215.
(*f*) Vanleuven v. Vandusen, 7 Q. B. U. C. 176.
(*g*) Ramsdell v. Telfer, 5 Q. B. U. C, 503.

some one else was the real debtor, he is liable; and where a person, intending to indorse as the agent or attorney of another, indorses his own name by mistake, he is liable. Thus, where the indorsement was "L. Wright per G. F. Wright," L. Wright was held liable, though he intended to sign as agent of G. F. Wright, the error not being pleaded. (*a*)

An agent, or any other person who indorses and does not want to become personally liable, should add to his name the words "*sans recours*," or "without recourse to me."

An agreement, written or verbal, not to hold the indorser liable, will prevent his indorsee suing him. (*b*) But a subsequent indorsee, for value, without notice of the agreement, may of course do so, and such agreement will be no defence against him.

Another way in which the holder of a bill or note indorsed to him *in blank*, may transfer it without incurring personal liability, is by writing over the indorser's signature the words "Pay A B or order." This in no way affects the liability of the blank indorser, but simply converts his blank indorsement into a special one in favor of A B; and this is done without the transferor's name appearing on the bill. (*c*)

When a man indorses a bill or note, he warrants that the bill has properly come to his hands, and that all the signatures on it are what they purport it to be, and these things he cannot deny when sued on the bill.

A holder may, in suing a drawer, acceptor, maker, or early indorser, omit to prove the intermediate indorsements, which may be struck out, and the case may be treated as though the bill were indorsed to the plaintiff in the first instance. This may be done at the trial.

(*a*) Seymour v. Wright, 3 L. C. R. 454.
(*b*) Pike v. Street, 1 M. & M. 226.
(*c*) See Vincent v. Horlock, 1 Camp. 442.

An indorsement intentionally struck out by the holder discharges the indorser. (*a*)

In default of acceptance, or, after acceptance, in default of payment an innocent indorsee for value may sue all the parties to the bill, and none of them can set up the defence of fraud, duress, absence of consideration, or, in general, illegality.

The only cases where an innocent indorsee for value has not a good title against all prior parties to the bill (unless there is an agreement to discharge any of them) are those where the security is rendered *absolutely void* by statute.

The effect of the law in these cases is, that the party who gives the bill or note for any of these considerations, whether as acceptor, maker, drawer, or indorser, cannot be successfully sued thereon, but the other parties may be so sued.

If a bill which either requires indorsing, or was intended by the parties to be indorsed, be delivered without indorsement, the transferee has a right of action against the transferor for not indorsing, (*b*) and perhaps now a mandamus will lie to compel indorsement; at all events, a bill in Chancery may, where it is worth while, be filed for this purpose, and the costs would have to be paid by the person refusing to indorse. The personal representatives of the deceased transferor may also be compelled to indorse.

If a man, having indorsed a bill, gets it indorsed again to him, he cannot, as a general rule, sue the intermediate indorsers. (*c*)

If a man to whom a bill or note is indorsed for a particular purpose, improperly indorse it to another, the indorsee, if he knew of the breach of trust, cannot sue the real owner of the bill upon it; but, on the contrary,

(*a*) Fairclough v. Pavia, 9 Exch. 690; see Art. 2289 Civil Code, Quebec.
(*b*) Rose v. Sims, 1 B. & Ad. 521.
(*c*) Bishop v. Hayward, 4 T. R. 470.

the real owner of the bill may bring his action to have it given u.

This kind of trust may be expressed on the bill itself by the form of indorsement, as "The within must be credited to A B;" "Pay A B or order for my use;" "Pay A B for the account of C D," or "For my use;" or "Pay A B only." But we have seen that if the indorsement had been merely "Pay A B," this would have been equivalent to "pay A B or order."

The restrictive indorsements above mentioned amount to notice to all who may see the bill, that A B is merely a trustee of it, and therefore cannot assign to any one the right to receive on his own account the proceeds of it: so that any one to whom A B indorses the bill will be liable to deliver it up, or the money received upon it, to the real owner. Also, if the person who takes the bill from the trustee indorse it again to another indorsee, who receives the money on it, and pays it to the former, the latter indorsee will be responsible for any misappropriation of the money by such intermediate indorsee; for it is the duty of every holder, having notice of the trust, to pay the proceeds either to the trustee or the real owner. (*a*) And as the trust is apparent on the face of the instrument, every person into whose hands it falls is affected with notice of it.

In accordance with these principles, it has been held that when a bill or note is drawn payable to the order of A, for the use of B, it cannot be transferred for the benefit of any other than the person for whose use it is expressed to have been made, and the indorsee of such a bill is bound to see that the money he pays is applied according to the trust stated in the bill, for he takes it as trustee for the person to whom it is payable. (*b*)

(*a*) See Treuttel v. Barandon, 8 Taunt. 100; Sigourney v. Lloyd, 8 B. & C. 622, 5 Bing. 525

(*b*) Munro v. Cox, 30 Q. B. U. C. 363.

Where a party is made the holder of a promissory note for one purpose, he cannot, contrary to good faith, apply it to another. Where, therefore, a note, indorsed generally, was put into the hands of A, to get it discounted for the benefit of B, and instead of doing this, he discounted it for his own benefit; after the note had matured, as found by the jury, it was held that these facts constituted a good defence to the action. (*a*) But it could only be a defence between the original parties, A and B, unless the agreement appears on the face of the instrument or the holder had otherwise notice of the agreement when he took the bill. The trusts which we have heretofore been considering are such as usually appear on the face of the instrument, but an agreement such as the above would not, in ordinary cases, appear on the instrument, and if it did not it is clear that it would be no defence as against a *bona fide* holder for value, without notice.

Where a promissory note is signed or indorsed on condition that another person becomes a party to it, and the condition is not fulfilled, the note is ineffectual as between the parties to the agreement. Thus where a note, not signed by any one, was indorsed by defendant and delivered by him to the plaintiff, upon condition that A and B should sign it as makers, and it was signed by C only, this was held a good defence, and the defendant was allowed to show these facts under a plea denying the indorsement. (*b*)

When a bill or note is orginally made, or has become payable to bearer, and is transferred by mere delivery, without indorsement, the transferor is, *as a general rule*, not liable. (*c*)

If the transferor merely made a *gift* of the bill or

(*a*) Kerr v. Straat 8 Q. B. U. C. 83.
(*b*) Austin v. Farmer, 30 Q. B. U. C. 10.
(*c*) Camidge v. Allenby, 6 B. & C. 373.

note, he is, of course, not liable, for even if he had indorsed, he could not be sued by the transferee.

If a man pays a bill or note on the purchase of goods without indorsing it, he will not then be liable on the bill (unless he has agreed or promised so to be); for the man who sells the goods, having taken the bill or note without indorsement, must be presumed to have consented to look to the other parties. In fact, the bill has been exchanged for the goods. (*a*)

So, if such bill or note were given in exchange for other bills or notes, or for money by way of discount, this is a *sale* of the bill, and the transferor is not liable. By not indorsing it, the transferor refuses to pledge himself to the solvency of the parties.

But if such a bill be paid for a pre-existing debt, as for goods bought ten minutes before, the transferor will, in the absence of any understanding on the subject, be liable; for the creditor is entitled to cash, and it is not to be inferred that he meant to let the debtor off by merely taking notes or bills. (*b*)

And there are other circumstances from which a jury may infer that the implied contract was that the transferor should be responsible, without indorsement, if the bill or notes were dishonored; as, for instance, if cash were given for the instrument by a friend, as a favor, and not by way of sale or discount.

A person transferring by delivery always impliedly warrants that the bill is not forged or fictitious, and if there be a single fictitious signature there will be a breach of warranty, and any cash given for the bill must be returned; or if any other consideration be given, an action may be brought for the breach of warranty. (*c*)

(a) See Fenn v. Harrison, 3 T. R, 759; Ex-parte Shuttleworth, 3 ves. 368.
(b) Ward v. Evans, 2 Ld. Raym. 928.
(c) Jones v. Ryde, 5 Taunt. 487; Young v. Cole, 3 Bing. N. C. 724; Re Barrington, 2 Sch. & Lef. 112.

A person who has received a bill by delivery does not, on so transferring again, make any implied warranty that the signatures are genuine; nevertheless, if he *knows* that they are not so, he will be answerable for the fraud.

Bills or notes payable to bearer circulate as money. The *bona fide* possessor of them is their true owner. Therefore, a cheque, bill, or note, payable to bearer, passes to any person honestly taking it for value, though the person transferring it had no right to transfer.

We say *honestly* taking it, for mere negligence, however gross, will not of itself invalidate his title. Gross negligence, however, in a man at all acquainted with business, may be sufficient evidence of dishonesty and bad faith.

And these rules apply to the pledging of bills and notes, as well as to their absolute transfer; the honest pawnee obtains a property in the bills or notes, and cannot be compelled, as in the case of goods improperly pledged, to return the bills to their rightful owner. (*a*)

An indorsement may be made on a blank piece of paper, on which no note or bill has been made or drawn; and the effect of this is to make the drawer liable upon any bill or note afterwards drawn or made on the same paper to the extent of the stamp. The indorser cannot, when sued, set up as a defence that the note or bill was not made or drawn when he signed his name at the back.

In regard to signing or indorsing notes in blank, it is settled law that when a person puts his name to or on a bill or note, and gives or intrusts the blank so signed to another, that other has a general authority to fill in the blanks as he may choose, and to an unlimited

(*a*) Barber v. Richard, 20 L. J. Exch. 135; Collins v. Martin, 1 Bos. & Pul. 648.

amount, and the party so signing is liable upon the note or bill so filled up, in the hands of a *bona fide* holder for value, no matter upon what private understanding or terms the blank was signed or parted with. If the authority to fill up the blank is conditional or limited, the person signing must, in order to exempt himself from liability, prove the existence of the condition or limitation, and that the person taking the note had knowledge of its violation. It is immaterial that the person signing the note is defrauded; if the holder has given value, the only thing that will affect his claim is a knowledge of the fraud. (*a*)

It is no objection to the validity of a note that at the time it was indorsed to the plaintiffs it had not in fact been signed by the maker; the subsequent filling up of the maker's name, or of the amount, or of the payee's name, will be treated as if made before the indorsement. (*b*)

Where the indorser places his name upon a note while it is in blank, there being no maker's name attached to it, nor any sum of money nor payee expressed in it, and it appears that the name of the maker was afterwards signed without authority, the indorsee suing upon such a note must show himself a *bona fide* holder for value, and the usual presumption in the first instance, that value has been paid to him as an indorser, will not be entertained. (*c*)

By the Civil Code of Lower Canada, Art. 2285, when a bill or note contains the words "value received," value for the amount of it is presumed to have been received upon the instrument and upon the indorsements thereon. The omission of these words does not render the instrument invalid.

(*a*) McInnes v. Milton, 30 Q. B. U. C. 489; see also Sanford v. Ross, 6, O. S. 104.
(*b*) Rossin v. McCarty, 7 Q. B. U. C. 100.
(*c*) Hanscome v. Cotton, 15 Q. B. U. C 42.

When a transferee takes by indorsement an unaccepted bill, with notice that the acceptance has been *refused*, he takes it solely on the credit of the indorser, so that, if the indorser cannot sue the drawer, neither can the indorsee. As, for instance, if the drawer, owing money to A, were to draw upon a third party a bill payable "to A or order," and were afterwards to pay the money to A, and caution the drawee not to accept, and A were then, instead of returning the draft, to present it to the drawee for acceptance, and upon his refusal were to indorse the draft to B with notice of such refusal, and suppose then B were to sue the drawer upon his dishonored draft, the drawer might successfully defend the action on the ground that A, who indorsed the draft, could not have recovered on it, and that the plaintiff took it with notice of non-acceptance. (*a*)

But if the transferee have no such notice, he may sue the other parties to the bill, although his transferor could not. (*b*)

The same principle is applied in the case of a bill being transferred overdue; for such a bill is said to "come disgraced to the indorsee," who takes it at his peril, and "subject to all the equities with which it may be encumbered."

For instance, suppose a bill, drawn on a person for a gaming debt, and accepted, were endorsed by the drawer, when *overdue*, to an innocent indorsee for value, the latter could not recover against the acceptor; for the indorsee took the bill under circumstances of suspicion, and solely on the credit of his indorser.

But, if the same bill were indorsed in the same way before it became due, the indorsee could have

(*a*) See Crossley v. Ham, 13 East, 498.
(*b*) O'Keefe v. Dunn, 6 Taunt. 305.

recovered against the acceptor, as well as against the person from whom he took the bill.

The above is a case where the person who indorsed the bill overdue could not himself recover upon it, but if the indorser be able to sue upon the bill, so can his indorsee. As if, for instance, in the above case the drawer had indorsed the bill to an innocent indorsee for value *before* it was due, and then the indorsee had indorsed to another *after* due, the latter could recover.(*a*)

Where a bill or note is indorsed, after it becomes due, to a person who takes it with full notice that the indorser has no right to transfer it, and that the indorsement is in direct violation of the trust on which the indorser held the bill, the person to whom it is indorsed cannot recover on it. In general, a person taking a bill or note after it becomes due, takes it subject to all the equities with which it is encumbered in the hands of the person from whom he obtains it. A valid agreement to give time to the maker is an equity which attaches to the bill, as against a person taking it after maturity, and where such agreement is made after the note comes due, by the holder for valuable consideration, a person afterwards taking the bill is bound by the agreement (*b*) and cannot bring an action upon the bill until the expiry of the time given. But the indorsee of an overdue bill takes it subject only to such equities as attach to the bill itself in the hands of the holder when it fell due, and such indorser would not be affected by a collateral matter like a set-off which the acceptor might have against the person transferring the bill. (*c*)

By the Civil Code of Lower Canada, Art. 2287, if the bill or note is transferred by endorsement before it

(*a*) Chalmers v. Lanion, 2 Camp. 383.
(*b*) Britton v. Fisher, 26 U. C. B. 338.
(*c*) See also Wood v. Ross, 8 U. C. P. 299.

becomes due, the holder acquires a perfect title, free from all liabilities and objections which any parties may have had against it in the hands of the indorser; if transferred after it becomes due, the bill or note is subject to such liabilities and objections in the same manner as if it were in the hands of the previous holder.

Where a person takes a note by indorsement, after it becomes due, with notice that it was originally an accommodation note, he takes it subject to all its equities, and though he gives value for the note, he will not be entitled to recover upon it if there was an agreement between the maker and indorser of the note that it should not be negotiated after it became due. In other words, an agreement restraining the negotiability of the note, after maturity, is one of the equities which will invalidate the title of an indorsee for value, though he had no notice of such an agreement when his title accrued. (*a*)

But it seems, unless there is such an agreement, the original absence of consideration, such as arises in the case of accommodation acceptances, will not defeat the title of an indorsee for value of an overdue bill or note, although the indorsee had notice of the fact when he took the bill. (*b*)

The equity attaching to a bill or note must form part of the original consideration for which it was given, and arise between the original parties thereto, at the time the bill or note is made. Thus where a bank took a note after it was due, as collateral security to a note discounted by them for the holder of the first note, and the discounted note was paid; it was held the maker of the collateral note could not, in an action brought

(*a*) Grant v. Winstanley, 21 C. P. U. C. 257.
(*b*) Ib. 261; Sturtevant v. Ford, 4 M. & G. 101.

on it by the bank, set up that the bank had been paid the full amount of the discount. (*a*)

Where a note is made without value or consideration, for the accommodation of the payee, to enable him to raise money thereon, and the note is, after maturity, paid by the payee, it will be wholly extinguished, and cannot afterwards be negotiated to the prejudice of the maker, for payment is one of the equities which attach to an accommodation note after it is due. (*b*)

Where an agent of the holder disposes of a promissory note, overdue, without authority, though for good consideration, the person taking from him obtains no title as against his principal; and an agent who exceeds his authority in negotiating a bill, cannot in any case convey a title to it if overdue at the time, and a party who takes a bill from an agent under such circumstances that his title is affected by the wrongful act of the agent, is liable to refund to the principal money which he may receive in discharge of the bill from the previous parties. (*c*)

Where the holder is a mere agent, and takes it when overdue, the maker may avail himself of all defences which he would have against the owner of the note. (*d*)

It is no defence to an action by indorsee against the maker of a note, that a prior indorsee, while the holder, and before the plaintiff took it, recovered a judgment against the defendant and payee, and that the note was indorsed to the plaintiff when it was overdue. (*e*)

If a promissory note is indorsed over as a security for advances only, the holder is subject to the same equities as the payee. (*f*)

(*a*) Canadian B. C. v. Ross, 22 C. P. U. C. 497.
(*b*) Pyper v. McKay, 16 C. P. U. C. 67.
(*c*) West v. McInnes, 23 Q. B. U. C. 357; Lee v. Zagury, 8 Taunt. 114.
(*d*) Brooks v. Clegg, 12 L. C. R. 461.
(*e*) McLennan v. McMonies, 23 Q. B. U. C. 114.
(*f*) Estabrooke v. McKenzie, C. M's. 69 Steven's Digest N. B. Reports 78.

An indorser of a promissory note cannot pay the amount of a judgment obtained thereon against a previous indorser, and enforce it for his own benefit. (*a*)

When once paid at maturity by the *acceptor* or *maker*, bills and notes are extinguished and cannot again be negotiated; but if paid *before* maturity, they will still be good in the hands of a *bona fide* indorsee for value, who has taken them without notice of their having been paid.

A bill or note which is paid at maturity by or on behalf of the party primarily liable thereon, is for all purposes satisfied and discharged as a bill or note. The giving of a renewal note at maturity operates as a payment which extinguishes the original note, and the liability on the original note will not revive on the dishonor of the renewal bill. Where an overdue note has been retired by the substitution of a renewal note, the original note is so far cancelled that it cannot be put in circulation again, even by the payee, who has taken up the renewal note out of his own funds. (*b*)

But until a note or bill has been paid by the person originally liable upon it, it continues to be negotiable *ad infinitum*, so that the right of action which the holder for value must necessarily have against him may be transferred from one to another, notwithstanding some one of the latter parties to the note or bill may have paid it in his own discharge; therefore a second accommodation indorser who has paid a promissory note after its becoming due may sue the maker or any prior party. (*c*)

The only exception to this rule is in the case of an accommodation note which has been paid by the drawer at maturity; such note cannot be re-issued. (*d*) In all other cases the drawer or indorser who has taken up a dishonored bill at maturity can, instead of himself suing

(*a*) Carr v. Coulter, 2 P. R. U. C. 317.
(*b*) Cuvillier v. Fraser, 5 Q. B. U. C. 152.
(*c*) Breeze v. Baldwin, 5 O. S. 444.
(*d*) Lazarus v. Cowie, 3 Q. B. 464.

the acceptor, indorse the bill to another person, who will have that right.

When the acceptor or maker has made a partial payment at maturity, the balance only can be recovered by the holder.

The holder of a note, on which part of the consideration *has been paid,* can only indorse for the *whole* of the balance.

When a bill is transferred for part only of the sum due upon it, if this fact appears on the bill itself, the indorsee must sue in the name of the person who transferred to him; but if the indorsement do not mention the fact, and there be no memorandum of it on the bill, the indorsee can sue and recover in his own name the whole amount of the bill, and will be a trustee of the surplus for his transferor.

After taking a release of the bill, or after bringing an action on the bill, the holder cannot indorse so as to confer a title on any one who knows of the release or the action, as the case may be.

By indorsing a bill, the indorser admits the genuineness of the signatures of all prior parties; and in an action by an indorsee against his immediate indorser the latter cannot set up that the names of the prior parties are forged. (*a*)

The indorsee of a note cannot deny the title of his immediate indorser; and where the first and second indorsers of a note are sued thereon, the latter cannot set up as a defence that the first did not indorse the note as alleged. (*b*)

An indorser of a note undertakes that he has a good right to transfer it to the immediate indorsee. When a note is made to two persons jointly, who are not part-

(*a*) Eastwood v. Westley, 6 O. S. 55; See also McLeod v. Carman, 1 Hannay, 592; Ross v. Dixil, 7 Q. B. U. C. 414.
(*b*) Griffin v. Latimer, 13 Q. B. U. C. 187.

ners, both must indorse, unless one has authority to write the other's name; and one of them cannot in his own name alone, without the authority of the other, convey a title by indorsement. But any person who, after such indorsement, puts his name on the note, will be liable to an action, at the suit of his indorsee, for as against the latter he would be estopped from disputing the validity of the previous assignment to him. But in such a case as the above, the makers might take advantage of the defect in the indorsee's title, if an action were brought against them. (*a*)

One partner of a firm of attorneys and solicitors has no authority to use the name of another in indorsing notes. In an action against B & S, a firm of solicitors, on promissory notes endorsed by B, in the name of the firm, it was proved that on other occasions S had indorsed in the same manner, and as the witness believed, with B's knowledge; but it did not appear what the consideration was for the indorsement sued on, or that S knew of it. This was held sufficient evidence to go to the jury of a mutual authority; and a verdict having been found for the plaintiff, the Court refused to interfere. (*b*)

One of several executors can indorse a note payable to their testator. (*c*)

An executor or administrator may indorse and transfer bills and notes, though the parties indebted upon them at the time of the testator's or intestate's death resided out of the jurisdiction from which the administration emanated. (*d*)

Where a note is made by a resident of Canada, payable to A or order, who dies in the United States, having the note there in his possession, his administrators appointed there may indorse, and transfer the property in the note,

(*a*) Thurgar v. Clarke, 2 Kerr 379.
(*b*) Workman v. McKinstry, 21 Q. B. U. C. 623.
(*c*) Almon v. Cock, 2 Thomson 265.
(*d*) Wright v. Merlam, 6 O. S. 463.

so as to enable the indorsee to sue upon it in his own name in this country, without their taking out letters of administration here; but if the administrators appointed by the foreign court desired themselves to sue on the note in this country, as representatives of the payee, they would have to shew administration granted to them by the proper authority in this Province. (*a*)

The acceptor or maker cannot be called upon to pay any person who does not appear on the face of the bill entitled to the money; and where a bill is made payable to A or order, though the beneficial interest is in B, the right to transfer, and to sue upon the bill, is in A alone. (*b*)

The indorser, like the drawer of a bill of exchange, is liable to the holder the moment the drawee has refused acceptance; and the holder is not forced to wait until the bill has been presented for non-payment. (*c*)

By the Civil Code of Lower Canada, art. 2298, whenever acceptance of a bill of exchange is refused by the drawee, the bill may be forthwith protested for non-acceptance; and after due notice of such protest to the parties liable upon it, the holder may demand immediate payment of it from such parties, in the same manner as if the bill had become due, and had been protested for non-payment.

The words, "I guarantee the payment of the within," written upon the back of a promissory note, over the signature of the payee, may be treated as an endorsement of the note, and not as a guarantee or collateral agreement for its payment. (*d*)

This case would seem to be overruled by that of *Palmer* v. *Baker*, where such a memorandum was treated as a guarantee. (*e*)

(*a*) Hard v. Palmer, 20 Q. B. U. C. 208.
(*b*) Bank U. C. v. Ruttan, 22 Q. B. U. C. 451; see also Corporation County Perth v. McGregor, 21 Q. B. U. C. 459.
(*c*) Ross v. Dixil, 7 Q. B. U. C. 414.
(*d*) Walker v. O'Reilly, 7 U. C. L. J. 300.
(*e*) 23 C. P. U. C. 302.

A promissory note payable to the order of an Insurance Company, and given in payment of a premium of insurance, is negotiable. A memorandum at the foot of the note, indicating its consideration, does not limit its negotiability. The indorsement of such a note by the secretary of the company, in that capacity, is sufficient to pass the title to the note to the plaintiffs, an implied authority in him to do so having been shewn by proof of the ordinary business of the company, that the directors had effected the arrangement with the plaintiffs, of which the transfer of the note formed part, and that the company had received the consideration of such transfer. (*a*)

A *billet promissoire en brevet*, executed in notarial form before two notaries, without signature or mark, (the defendant being unable to write,) payable to a party or his order, is negotiable by indorsement in the ordinary way. (*b*)

When a note is made payable to A B, or order, the latter must indorse the note before he can maintain an action against another person as indorser. (*c*)

And where a note is made payable to B, or order, and indorsed only by C in blank, B cannot sue C as maker of the note. (*d*)

When a man makes a note payable to his own order, and indorses it, the note becomes a note payable to bearer, but not to any particular person; and though any holder of such a note may sue the indorsee thereon, he should not, in his declaration, describe the note as payable to himself or bearer. (*e*)

(*a*) Wood v. Shaw, 3 L. C. J. 169.
(*b*) Morrin v. Deslauriers, 3 L. C J. 55.
(*c*) Moffatt v. Rees, 15 Q. B. U. C. 522.
(*d*) Wilcocks v. Tinning, 7 Q. B U. C. 372; following Thew v. Adams, 6 O. S. 60.
(*e*) Burns v. Harper, 6 Q. B. U. C. 509.

CHAPTER V.

OF PAYMENT, SATISFACTION, EXTINGUISHMENT AND SUSPENSION.

The holder of a bill or note may, if payment be refused by the acceptor or maker on presentment, immediately give notice of dishonor to all or any of the earlier parties to the instrument. (*a*)

But the maker or acceptor has the whole of the day of the presentment in which to pay, and if he pay on that day, though after a refusal, the payment is good, and the notice of dishonor, if given, falls to the ground. (*b*)

No payment will discharge the maker or acceptor, unless it be made to the true holder. For instance, if the drawer have indorsed an accepted bill to his bankers, who give him credit for it, and the acceptor at maturity pay to the drawer, the acceptor is liable to be sued by the bankers and may have to pay over again. (*c*)

If the bill or note be not payable to bearer, that is, if it has required indorsement to make it the property of the holder, the acceptor or maker should be satisfied, on paying the money on presentment, that the indorsement is genuine; for if it be forged or made by an unauthorized person, the payment will be no discharge, and the money may have to be paid over again.

(*a*) Ex parte Moline, 1 Rose 303.
(*b*) Hartley v. Case, 1 C. & P. 555.
(*c*) See Field v. Carr, 5 Bing. 13.

To the rule that no payment, save to the true holder, will operate as a discharge, there is an exception in favor of bills or notes made or become payable to bearer. Not only does a person who has taken such instruments *bona fide* and for value from one who has found or stolen them, acquire a title to them so as to be able to recover on them, but a payment made *bona fide* and *without negligence*, even to the finder or the thief, will discharge the party paying, though the finder or the thief could not recover on the instrument in a court of law. (*a*)

But where a note is payable to bearer, and before it becomes due, the plaintiff, for a valuable consideration, delivers it to certain persons, unknown to the maker, who lose the note, and the same then comes into the hands of the plaintiff by finding, and not by assignment or delivery for consideration, and the persons who lost the note are entitled to it, the plaintiff cannot recover thereon. (*b*)

If a bill be paid by the drawer, the holder may still, at the drawer's request, sue the acceptor on it, and thus reimburse the drawer, or the drawer may himself sue the acceptor. If the holder sue he will be a trustee for the drawer of the amount recovered from the acceptor. This rule arises from the acceptor being the person primarily liable, and, therefore, does not apply to accommodation bills, in which, as we have seen, the drawer is usually the person primarily liable. Payment by the drawer, therefore, of such bills is a complete discharge of the bill. (*c*)

By article 2,313 of the Civil Code of Lower Canada, payment by the drawer of an unaccepted bill finally discharges it. If it be accepted he is entitled to recover from the acceptor, unless the acceptance is for his accommodation. And by article 2,312 the obligation of the acceptor to pay the bill is primary and unconditional, and legal

(*a*) Byles on Bills, 9th edition, 213.
(*b*) Wanzer v. Storkenburgh, 13 Q. B. U. C. 184.
(*c*) Lazarus v. Cowie, 3 Q. B. 459.

payment by him discharges the bill with respect to all the parties, unless he is an acceptor for honor, in which case he is substituted in the place of the party for whose honor he accepts, and has his recourse against such party also. In Ontario and the other Provinces of the Dominion the undertaking of the acceptor for honor is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay if the drawee do not, and notice of dishonor must be given to the acceptor for honor on non-payment by the drawee at maturity. (*a*)

A bill may be paid at maturity by the drawer or indorser, in which case the person paying has his remedy intact upon the bill. This is called *retiring* a bill or note, a word sometimes improperly applied to a payment by the acceptor.

On this point article 2,314 of the Civil Code of Lower Canada provides that payment by an indorser entitles him to recover from the acceptor and drawer, and all the indorsers prior to himself, saving the rights of the acceptor for his accommodation. This is also the law in the other Provinces.

The retirement of a note by a prior indorser, before it comes due, does not discharge a subsequent indorser, as against a holder for value, if there was no real payment, but a mere exchange of securities with express reservation of the liability of the parties to the note. (*b*)

It may sometimes be a question whether an indorser paying a bill does so as the agent of the acceptor, or for the purpose of retiring the bill.

A payment by a stranger, as for instance, a friend of the acceptor or maker, need not necessarily be a payment by the acceptor, so as to put an end to the bill.

Though a bill is discharged when paid at maturity by the acceptor or maker, yet it may be paid any number of

(*a*) Hoare v. Cazenove, 16 East 391.
(*b*) Bull v. Cuvillier, 5 L. C. J. 127.

times before it is due, and may be circulated anew between each payment. For example, the acceptor or maker of a bill or note, made or become payable to bearer, and not yet due, may pay the present holder, and straightway, for a consideration, give the instrument to another. Or if a bill payable to bearer be paid by the acceptor before it is due, and, instead of being destroyed, get lost, and the person finding it give it to a *bona fide* holder for value, such last-mentioned holder may recover on it at maturity.

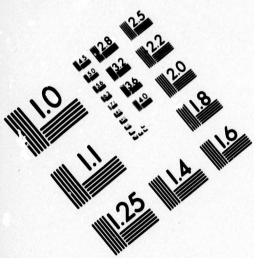
A bill or note payable on demand can never be prematurely paid, and, therefore, a payment on demand of such a bill will be a defence even against an indorsee for value without notice of the payment, for such bills are *prevented by statute* from circulating again.

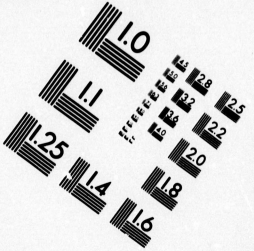
When the note is payable on demand it cannot be ascertained, from inspection of the note, when it became due, and such a note is not considered as overdue unless there be some evidence of payment having been refused; but it would seem that if payment has been demanded and refused, or if the note has actually been paid before it comes into the hands of the holder, the latter will have no better title than the person from whom he obtains it. If, therefore, a note payable on demand has been paid, or if payment has been demanded before it reaches the holder, the latter cannot recover, even if he is an indorsee for value, without notice of the payment. (*a*)

A note payable on demand was indorsed to the plaintiff as security for a liability he had incurred for the payee; the maker afterwards paid the amount of the note to the payee, and the Court held that the note not having been absolutely transferred to the plaintiff, he stood in the same position as the payee, and could not recover. (*b*)

Payment may be made in money or by means of any

(*a*) Dougan v. Small, 2 Kerr 89.
(*b*) Estabrooks v. M'Kenzie, Hil. T. 1827; Steven's Digest, N. B. Reports 65.





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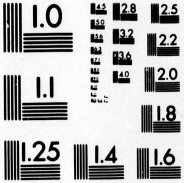
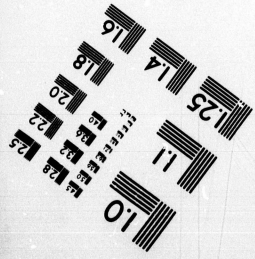
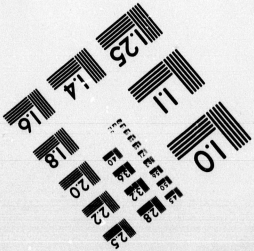
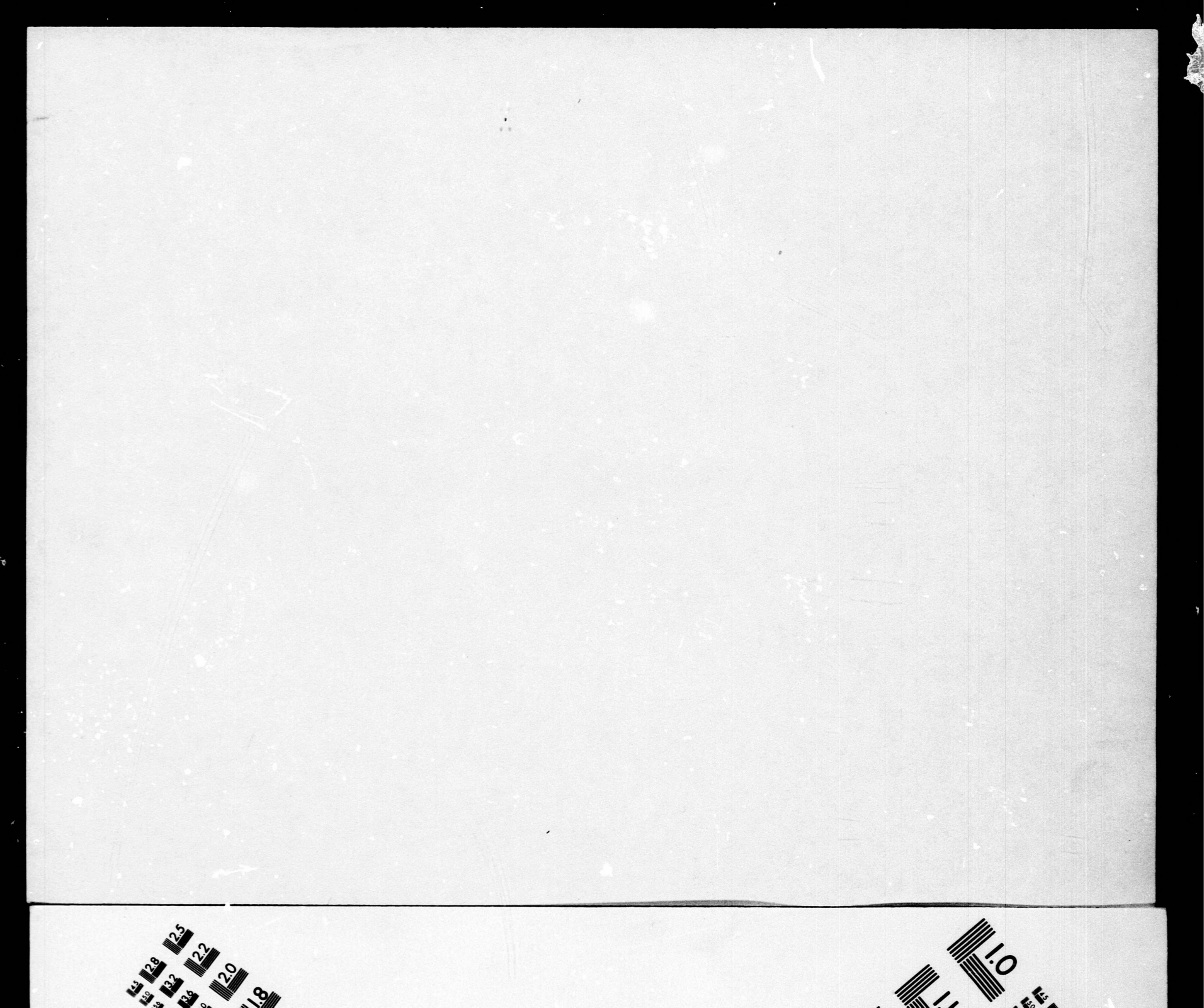








other consideration. Payment of a smaller sum can never be a satisfaction of a larger sum. (*a*)

By article 2,318, payment of a bill or note must include the full amount of it, with interest from the last day of grace, and all expenses of noting, protest and notices legally incurred upon it, with the damage prescribed by law. If it be made by a cheque, as is often the case, and the bill be given up to the acceptor, and the cheque be dishonored, the drawer and indorsers will be discharged; for they, when *they* pay, have a right to have the bill given up to *them*, and, if the acceptor has the bill, this is impossible. (*b*)

It has been held, nevertheless, that an agent, unless ordered to the contrary, is justified in giving up the bill on receipt of a cheque. (*c*)

The same result would probably be considered to arise if the payment were made in bank notes, and the banker were to fail. (*d*)

When a man is sued upon a bill or note, and he produces a cheque for the amount of the bill or note drawn by him, and which has passed through his banker's hands, and bears the plaintiff's name at the back, this raises a presumption of payment, unless there have been so many dealings between the parties that it is impossible to say to which the cheque in question relates. (*e*)

It may be observed that upon payment of a note the holder must deliver it up to the person paying. This delivery is of great importance when a bill is paid before maturity, for, as we have already seen, a note may be negotiated after payment, unless it is paid at maturity by or on behalf of the party primarily liable thereon. The delivery is also of importance where the payment is not made to the true holder.

(*a*) See Fitch v. Sutton, 5 East 230.
(*b*) Powell v. Roche, 6 Esp. 76.
(*c*) Russell v. Hankey, 6 T. R. 12.
(*d*) Vernon v. Bouverie, 2 Show. 296.
(*e*) Egg v. Barnett, 3 Esp. 196; Aubert v. Walsh, 4 Taunt. 293.

An action lies by the makers of a note against the executors of the payee to get possession of the note paid by one of them in part to the payee during his life and partly to his executors. (*a*)

The Con. Stat. of the Province of Quebec c. 64 s. 6, enacts that three days of grace and no more after the day when a bill or note becomes due and payable, or after the day when the bill is presented to the drawee thereof, if drawn at sight, shall be allowed for the payment thereof, and shall be reckoned to expire in the afternoon of the third day of said days of grace. Three days of grace are also allowed in Ontario, Nova Scotia and New Brunswick, and they are reckoned exclusive of the day on which the bill or note falls due, and inclusive of the last day of grace. In this respect the law is the same in all the Provinces, and if a note is dated January 10th, 1874, and is payable three months after date, the last day of grace would be the 13th of April, 1874. Days of grace are allowed for the payment of all bills and notes except those payable on demand. (*b*)

As a cheque is in fact an inland bill payable on demand, days of grace are not allowed on cheques. On this point article 2350 of the Civil Code of Lower Canada, provides that cheques are payable on presentment without days of grace. (*c*)

The Statute of Canada, 35 Vic., c. 8 s. 8 ss. 3, which applies to the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, provides with regard to bills of exchange and promissory notes, whenever the last day of grace falls on a legal holiday or non-juridical day in the Province where any such bill or note is payable, then the day next following not being a legal holiday, or non-juridical day in such Province, shall be the last day of grace as to such bill or note.

(*a*) Carden v. Finley, 10 L. C. R. 255.
(*b*) Brown v. Harraden, 4 T. R. 148; Orridge v. Sherborne, 11 M. & W. 374; Byles on Bills 201; see art. 2347, Civil Code of Quebec.
(*c*) See, also, Con. Stat. L. C. c. 64, s. 6 ss. 2.

Section 8 of the Statute provides that in all matters relating to bills of exchange and promissory notes, the following and no others shall be observed as legal holidays, or non-juridical days, that is to say:

1. In the Provinces of Ontario, New Brunswick and Nova Scotia,—

Sundays.
New Year's Day.
Good Friday.
Christmas Day.

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign.

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

And in the Province of Quebec the same days shall be observed as legal holidays, with the addition of—

The Epiphany.
The Annunciation.
The Ascension.
Corpus Christi.
St. Peter's and St. Paul's Day.
All Saint's Day.
Conception Day.

2. And in any one of the said provinces of the Dominion any day appointed by proclamation of the Lieutenant Governor of such province for a public holiday or for a fast or thanksgiving within the same.

An action cannot be commenced on a note before the expiry of the three days of grace, and when there is no intimation to the contrary, the inference is that the note was dated on the day when it was made. When a note is payable at a certain time after the date thereof, it would

seem that the date, irrespective of the time of making, must determine the time of bringing the action. (*a*)

Section 15 of the Con. Stat. of Ontario, chap. 42, provides that all protests of inland or foreign bills of exchange or promissory notes for dishonor, either by non-acceptance or non-payment, may be made on the day of such dishonor at any time after non-acceptance or in case of non-payment at any time, after the hour of three o'clock in the afternoon. When an indorsee of a note payable at a bank took it up there after three o'clock on the last day of grace it was held that an arrest of the party liable thereon on the same day at five o'clock was not too soon. It would seem from this case that under the clause of the statute just cited when a note is payable at a bank it may be sued at any time after three o'clock on the last day of grace. (*b*)

The Statute of Canada 35 Vic. c. 10, has defined the law as to the time when a note is payable when it falls due in a month not having as many days as are set forth in the date of the note. The statute provides that every bill of exchange or promissory note which is made payable at a month or months from and after the date thereof, becomes due and payable on the same numbered day of the month in which it is made payable, as the day on which it is dated, unless there is no such day in the month in which it is made payable, and in such case it becomes due and payable on the last day of that month with the addition in all cases of the days of grace allowed by law. For instance, a note dated the 10th of January, payable at one month, or at three months after date, would become due on the 10th of February or April respectively, and the last day of grace would be the 13th of each month in each case. But suppose the note dated on the 30th or 31st of a month, and that there is not the

(*a*) Hill v. Lott, 13 Q. B. U. C. 463.
(*b*) Sinclair v. Robson, 16 Q. B. U. C. 211.

same number of days in the month in which the note is payable, then the note would be payable on the last day of such month, and the last day of grace would be the third day of the succeeding month. To illustrate the operation of the statute, suppose a note dated on the 31st of January, 1874, at one month, the note would fall due on the 28th day of February, 1874, and the last day of grace would be the 3rd of March, 1874. The month or months during which the bill has to run are computed according to the calendar during the currency of the note, and when a note is made at one or more months after date, each month which elapses from the date, whether it is long or short, is held to be one of the months during which the bill has to run. This is in accordance with the interpretation of the word month given in "the Interpretation Act, 31 Vic. c. 1 s. 7, fourteenthly," where the word month is declared to mean a calendar month. The 35 Vic. c. 10 just cited, does not apply when the note is payable at any number of *days* after date. In such a case the time is computed according to the days, without reference to the months, and the day on which the note is made is excluded in the computation. Thus, a note made on the 1st of May, at sixty days, falls due on the 30th of June; so a note dated on the 1st February, at thirty days, would fall due on the 3rd of March, treating February as having twenty-eight days, and the last day of grace would be the sixth of March.

Though a note has some time to run at the time of insolvency of the makers, yet such insolvency, and the making of an assignment will render the note immediately exigible, and a claim may be filed in respect of it. Where an assignment in Ontario and the payment of a composition by the makers was proved, it was held that a note not due by its terms might be recovered on in the Province of Quebec. (*a*)

(*a*) Lovell v. Meikle, 2 L. C. J. 69.

Where no time of payment is specified in a promissory note it is payable on demand, and where such a note is payable with interest, on demand, it is in the nature of a continuing security, and does not become overdue by mere lapse of time, without demand of payment having been actually made. A letter written by the attorney of the indorsee to the maker, stating that the note in question, together with other notes, had been placed in his hands for collection, and requiring him to pay the interest and give new security for the principal, is not such a presentment of the note and demand of payment as would authorize the holder to treat the note as dishonored and at once resort to the indorser. (*a*)

A promissory note payable on demand is due from the day of its date and the Statute of Limitations runs against it from that time, and an action will lie on it without any previous demand, the only result being the costs. (*b*)

After a lapse of twenty years a promissory note payable on demand is presumed to have been paid. (*c*)

It seems that it is not absolutely necessary that the money payable by the note should be that current in the place of payment, or where the bill is drawn. Provided the note be for the payment of a sum certain in money, it is wholly immaterial in the money or currency of what country it is made payable, and a note made in the Province of New Brunswick payable there in United States' currency is a promissory note and may be recovered on as such. (*d*)

A note made in Canada, payable at a place in the United States, but not otherwise or elsewhere, is payable generally, and the law and currency of the place where it is made must govern. Such a note therefore would be pay-

(*a*) Thorne v. Scovell, 2 Kerr 557; see also art. 2,283 of the Civil Code of Quebec.
(*b*) Laroque v. Andres, 2 L. C. R. 335.
(*c*) Duffield v. Creed, 5 Esp. 52.
(*d*) St. Stephen B. Ry. Co. v. Black, 2 Hannay 139.

able in Canada funds; but if the note were payable in the United States the maker would not be bound to pay more than an amount equal to the foreign currency at maturity. (*a*)

Where a defendant sued on a note made in the United States, and payable on demand to a citizen of that country, tendered, after action brought, an amount in Canadian currency, equal, at the then current rate of exchange, to the amount of the note in American currency, with costs, judgment was, nevertheless, given for the amount of the note in Canadian currency, with costs. (*b*)

A note made and dated at Malone, New York, between American citizens, but payable to bearer, and held by a Canadian, must be paid in Canadian currency if sued here. (*c*)

The maker of a note or *bon* made in the United States, payable on demand, but without any place of payment being specified, if sued in Canada will be condemned to pay the full amount of the *bon* in Canadian currency. (*d*)

The fact that an indorser's name is erased or cancelled raises an inference that the note has been paid by him, and where an indorsee suing on a note produces it at the trial from his own custody, with an indorsement thereon which has been cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given to the jury for rejecting the inference that the note has been satisfied by the indorser whose name is thus cancelled. (*e*)

As to the appropriation of payments where there may be current accounts or several debts owing by one party to another, the rule is that the party paying may at the time of payment apply the money to the satisfaction of

(*a*) Hooker v. Leslie, 27 Q. B. U. C. 295.
(*b*) Daly v. Graham, 15 L. C. R. 137.
(*c*) M'Coy v. Dineen, 8 L. C. J. 339.
(*d*) Daly v. Graham, 8 L. C. J. 340.
(*e*) Peel v. Kingsmill, 7 Q. B. U. C., 864.

any debt he chooses; and if no choice is made by the debtor, then the creditor may decide to which debt the money shall be applied. When there is an account current and the party paying is silent, it is presumed that he intends the payment to apply to the earlier items. (*a*)

Where the debts are *distinct*, the creditor may, in the absence of any appropriation by the debtor, appropriate the payment to any debt he pleases, but he will be bound by any communication he may have made to the debtor of the way the payment is appropriated. (*b*)

The same rules apply to a payment by a third party. But where a third party pays money to the creditor for the debtor, the creditor cannot appropriate the payment to a particular debt without the consent of the person paying.

From these rules it will be understood that if A be liable to B upon three bills of $100 each, and pay him $100 without saying for which bill the payment is meant, B may wait to appropriate the payment till such time as he sues upon the other bills. It might be a matter of great advantage to him to be able to exercise this power, because he has all the intervening time to see which of the bills will be satisfied by other parties.

Where the maker of a note delivered to the payee a quantity of hay without making any specific appropriation of the amount towards paying the note, and in a subsequent demand of payment claimed no deduction on account of the hay, it was held that the delivery of the hay could not be considered as a payment on account of the note, but was only a set off against the note. (*c*)

At common law if a negotiable bill or note was lost or destroyed the owner could not recover, either on the

(*a*) Clayton's Case, 1 Meriv. 604.
(*b*) Ib.; Bodenham v. Purchas, 2 B. & Ald. 39; Simson v. Ingham, 2 B. & C. 65.
(*c*) Barlow v. Clark, 3 Kerr 485.

Bill or on the consideration for which it was given, and the debt was therefore discharged. But the drawer of an inland bill was, by the Statute 9 & 10 Wm. 3, chap. 17, s. 3, obliged to give another bill of the same tenor as the one first given, the person to whom it was delivered giving security, if demanded, to the drawer, to indemnify him against all persons whatsoever in case the bill alleged to be lost should be found again. And by the Con. Statutes of Ontario, chap. 42, s. 33, it is provided that in case an action be founded upon a lost bill of exchange or other negotiable instrument, then, upon an indemnity to the satisfaction of the Court or a Judge, being given to the defendant against the claims of any other person upon him in respect of such instrument, the Court or a Judge may order that such loss shall not be set up as a defence in such action.

A similar provision is made by the Stat. 23 Vic., chap. 33, s. 3, in the Province of New Brunswick.

These statutes would seem to apply only when the instrument is negotiable. If a non-negotiable note is lost it is conceived that an action would lie either on the bill or on the consideration. (*a*)

A person suing on a lost note, under the statutes, should, before he commences his action, tender an indemnity to the maker. If he neglects this it will be at the risk of having to pay costs to the defendant. (*b*)

In the Province of Quebec, Art. 2316 of the Civil Code, provides that payment of a lost bill of exchange may be recovered, upon the holder making due proof of the loss, and also, if the bill be negotiable, on giving security to the parties liable according to the discretion of the Court. In this Province the loss of a note sued on is sufficiently proved by the oath of the plaintiff. (*c*)

(*a*) Wain v. Bailey, 10 A. & E. 616; Price v. Price, 16 M. & W. 243.
(*b*) Banque, J. C. v. Strachan, 5 P. R. U. C. 159.
(*c*) Carden v. Reuter, 15 L. C. R. 237.

And the plaintiff or payee may prove the making and loss of the note by parol evidence, after first making affidavit himself of the loss. (*a*)

If a creditor take a bill or note payable at a future day from his debtor, or from a third party for the debtor, the debt is not paid, but no action can be brought for it till the bill or note is matured and dishonored.

If the bill or note is paid, or if it is lost or discharged by the negligence of the creditor, the debt is satisfied. (*b*) If it is in the hands of the creditor overdue and dishonored, he has his remedy, either on the bill or the original debt; and though he may have parted with the bill, the creditor will, in case it be dishonored, still have his remedy for the original debt.

We have spoken of the debt being *discharged* by the negligence of the creditor who has taken the bill; this refers to the case where the debtor, giving the bill for the debt, is drawer or indorser, and must have punctual notice of dishonour. If the debtor were *acceptor* or *maker* of a bill or note, he cannot be discharged by the creditor's negligence.

The law will be the same if the debtor request the creditor to take a bill or note of a third person, and the bill or note is dishonored; the creditor may sue his original debtor. The same where, not having the option of taking cash, he takes a bill of the debtor's agent. (*c*)

We have seen that where a bill or note made or become payable to bearer, is given, though without indorsement, for a pre-existing debt or past consideration to a creditor who is entitled to money, the creditor may still sue his debtor if the bill is dishonored. But if the payment of such a bill be made, not for a past debt, but for an immediate consideration, such as the sale of

(*a*) Carden v. Reuter, 9 L. C. J. 217.
(*b*) Sibree v Tripp, 15 M. & W. 23.
(*c*) Marsh v. Pedder, 4 Camp. 257; Robinson v. Read, 9 B. & C. 449.

goods then and there, the seller is supposed to consent to take the bill in exchange for the goods, and as he has not insisted on indorsement, he cannot sue the buyer if the bill turns out worthless, for the bill has been simply exchanged, with all its faults, for the goods.

But a bill may, in the same way, by agreement between the parties, be taken, not only upon such a bargain as that just mentioned, but for a pre-existing debt. In fact, a debtor may, by express agreement with his creditor, give him a bill payable to bearer without indorsing it, so as to be at once, and whether eventually paid or not, a satisfaction and payment of the debt.

But though, in the absence of an agreement, a creditor does not receive payment of a debt by simply taking the bill or note of his debtor, yet if his debtor be a firm, and he takes the separate note of one of the partners, he will be taken to have discharged the firm, and to rely solely upon the single partner, unless, of course, there were an express agreement that the others should remain liable. This is because, in the case of the bankruptcy of the *firm*, or the death of the partner, the creditor might be in a far better position than if he had the whole firm as his debtors, and this advantage amounts to a consideration.

Where a man has a lien on goods, and he tâkes a bill or note for the debt, the lien on the goods ceases, and he must give them up to the owner, unless there is an express agreement for him to keep them.

There are other circumstances under which a bill or note may be as much satisfied, and the remedies on it extinguished, as by means of payment strictly so called.

Although, as we have seen, part payment by the party owing a larger sum can never satisfy the whole debt, yet such part payment, if accompanied by an act done at the request of the creditor, will amount to such a consideration, as is capable of effecting this object.

If, for example, it be agreed between the acceptor and the holder of a dishonored bill for $100, that the acceptor shall pay 10 cents in satisfaction of the debt, this consideration will be insufficient; whereas, if to the payment of 10 cents it be agreed to add the delivery of a loaf of bread, the bill will be thereby discharged; and this may be done though an action has been brought. This is called "*accord and satisfaction.*"

Before maturity, a bill or note may be discharged either by deed or by other writing, or by word of mouth; in either case, *without any consideration.* If, however, the bill or note should not be given up, or a memorandum made on it, the holder may frustrate what he has consented to do, by transferring the bill or note to a *bona fide* holder for value, without notice.

After maturity a release (strictly so called) can only be effected by deed, for which, however, there need be no consideration, and this binds the releasor's transferees, who, though they have no notice of the release, yet cannot recover on the bill; for the bill being overdue, should put them on their enquiry.

A bill taken from one of two partners in his own name, may be a satisfaction for a joint debt. (*a*)

Foregoing a defence to a suit may be a satisfaction of a debt.

Taking a *bill* or *note* for a smaller sum may be a satisfaction for a larger sum, for the negotiable quality of the instrument confers an advantage, as does also the more effectual remedy afforded by law upon such instruments.

If a creditor takes the bill or note of a third person in *satisfaction and discharge* of a debt owing by another, the debt will then be extinguished, and it will not revive on the dishonor of the security; but it is always

(*a*) Thompson v. Percival, 5 B. & Ad. 925,

a question for a jury, whether the instrument be so taken, or merely by way of further security, or on account. (*a*)

A bill indorsed in blank to one of several acceptors, and in his hands when due, can neither be sued on by the holder, nor transferred by him so as to confer a right against any of the acceptors. (*b*)

Whenever the acceptor or maker of a bill or note is discharged, all the other parties are discharged, for the surety is always discharged by the discharge of the principal.

But there is no principle upon which, as a consequence of law, the satisfaction of a bill as between the indorsee and drawer operates as a satisfaction and discharge in an action by the indorsee against the acceptor, and such satisfaction will not avail between the indorsee and acceptor without its being further shewn that such satisfaction or payment was made on the acceptor's account, and that he adopted it at the time of payment or subsequently. (*c*)

The taking of a promissory note does not operate as a novation, and will not extinguish the original debt unless it be paid; and though an action on the note may be barred by the Statute of Limitations, the plaintiff may sue on the original consideration, for the statute does not apply in such case. (*d*)

Nor will the taking of a bill or note amount to a satisfaction of the debt for which it is given if it is void in its inception, or is destroyed, or the circumstances are such that the person giving it can never be liable upon it. Thus, where A was indebted to B, and drew his bill of exchange on C, and delivered it to B on account of the debt, but the bill and also the drawee perished at

(*a*) Sard v. Rhodes, 1 M. & W. 153; Hardman v. Bellhouse, 9 M. & W. 596.
(*b*) Steele v. Harmer, 14 M. & W. 831.
(*c*) Bank of Montreal v Armour, 9 C. P. U. C. 401.
(*d*) Brandoin v. Dalmasse, 7 L. C. R. 47.

sea before its acceptance, the drawer was held liable on the original consideration. (*a*)

A mere statement by the holder of a note, that he would accept an order for the amount thereof, will not amount to a satisfaction of the note where there is no acceptance in writing, and the note is not given up, and the order is obtained again some months after by the person presenting it. (*b*)

When the holder of a bill sues the drawer, acceptor, and subsequent indorsers in one action, and the indorsers appear, but the drawer and acceptor do not appear, and thereupon the plaintiff signs judgment against them, and abandons the action against the indorsers, but the latter do not sign judgment of *non pros*, nor is any discontinuance entered as to them, this will be no bar to a subsequent action against the indorsers. (*c*)

Issuing execution against either the body or goods of one party does not discharge the others; but discharging a party whose body has been taken in execution will operate as a discharge to all those parties to the instrument who stand as his sureties. Waiving the right of taking his goods in execution will not have the same effect. (*d*)

Judgment recovered on a bill or note is an extinguishment of the original debt as between the plaintiff and defendant; but it alone without actual satisfaction is no extinguishment as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant; (*e*) nor is it an extinguishment as between a party prior to the plaintiff, to whom the plaintiff, after the judgment, returns the bill and the defendant. (*f*)

(*a*) Boyd v. McLauchlan, 1 Kerr 210.
(*b*) Williams v. Marshall, 20 Q. B. U. C. 230.
(*c*) Bank U. C. v. Lizars, 11 C. P. U. C. 176.
(*d*) See Hayling v. Mulhall, 2 W. Bl. 1235; Pole v. Ford, 2 Chit. 125.
(*e*) Bayley, 335; Claxton v. Swift. 2 Show. 441.
(*f*) Tarleton v. Allhusen, 2 Ad. & E. 32.

Where several persons are liable as joint makers of a promissory note, the recovery of a judgment against any one of them will operate as a merger of the right of action against all, and the holder cannot afterwards proceed in an action for the amount of the bill against the other joint makers. (*a*)

Where the holder of a note brings a suit against the payee and indorser, and fails for want of proof of notice of dishonor to the defendant, this judgment will be no bar to an action by an indorsee of the defendant prior to the former holder, and not claiming in any way, by, through or under such holder, though the notice of dishonour relied upon by the indorsee is the same notice which the former holder failed to prove. (*b*)

Plaintiff having an account against defendant and W K, settled it by taking W K's notes, payable at a future day in favour of plaintiff and his partner, and gave a receipt at the foot of the account, stating that he had received payment by the notes (describing them), and the Court held the original debt was extinguished by the notes. (*c*)

If a bill or note be given by way of payment of a debt, no action can be brought for the debt till the maturity of the bill or note; also, if another bill or note be given, by way of renewal of a former bill or note, no action can be brought till the maturity of the second bill or note. (*d*)

Taking a bill of exchange is not, *per se*, a satisfaction of the debt, but operates only as a suspension of the plaintiff's right to recover on the consideration of the bill until he has done all that is necessary to procure satisfaction of the debt by means of the bill. (*e*)

(*a*) Hollowell v. MacDonell, 8 C. P. U. C. 21.
(*b*) Smith v. Burton, 11 C. P. U. C. 273.
(*c*) Thompson v. Keith, East T. 1864; Steven's Digest; N. B. Reports, 77.
(*d*) Kearslake v. Morgan, 5 T. R. 513; Kendrick v. Lomax, 2 C. & J. 405.
(*e*) Emerson v. Gardiner, 1 Allen 451.

An agreement to renew a note cannot be inferred from the fact of the holders' not returning a renewal note sent them, when on receipt of the renewal note they declined to renew. (*a*)

Where the maker of a note, after it becomes due, deposits with the holder the notes of other parties as collateral security, upon an agreement that the holder shall not sue upon the principal note until the collateral notes become due, this will form no defence to an action on the principal note, and the only remedy would be a cross-action against the holder for the breach of agreement. (*b*)

The general rule is that where a security of a higher nature is taken for the amount of a bill or note, the latter merges in the former, and no action can afterwards be maintained on the bill or note. But the liability on a bill or note will not thus be extinguished unless all the parties to it are parties to the higher security, so that the note or bill will be in its entirety merged, and the remedy on the higher security will be co-extensive with the remedy on the note. If, therefore, one of the parties to a bill give the holder thereof a mortgage, this will not extinguish the liability of the others. (*c*) But if the higher security is given by one of two joint-makers of a note, and the note is merged as to the person giving the security, it will also be merged as to the other. Thus, where one of the joint makers of a note, after it fell due, by indenture covenanted with the plaintiff to pay him $319, the amount of the note, with interest at 15 per cent., in one year, and delivered the indenture to the plaintiff, who accepted it, the note was held to have merged in the speciality, though it did not appear that the latter was accepted in satisfaction. (*d*)

(*a*) Lyman v. Chamard, 1 L. C. J. 285.
(*b*) Durand v. Stevenson, 5 Q. B. U. C. 336.
(*c*) Gore Bank v. M'Whirter, 18 C. P. U. C. 293; see also Fraser v. Armstrong, 10 C. P. U. C. 506.
(*d*) M'Leod v. M'Kay, 20 Q. B. U. C. 258.

Where a creditor took from his debtor a note of a third party, indorsed by the debtor as a security for a portion of his debt, and afterwards took a mortgage from his debtor for the whole sum due him, and appointed a day for payment more distant than that on which the note was to fall due, with the usual covenant in the mortgage to pay the money, the Court held that the remedy against the debtor, as indorser of the note, was extinguished by the taking of the mortgage for the same debt, there being no reference in the mortgage to the note as being an outstanding security for the same debt. (*a*) But where the higher security is taken as collateral security, and there is an intention shown on its face that the lower security is not to be merged, full effect will be given to the intention of the parties. (*b*) Where the right to sue on the note is expressly reserved in the mortgage or specialty there will be no merger of the note. (*c*)

When a note is held as collateral security to a mortgage, the mortgagee may sue on the note and on the mortgage at the same time, and even the indorsee of such a note may recover thereon, though he takes it after it becomes due and sues thereon at the same time that his indorser, the mortgagee, is prosecuting a suit to foreclose the mortgage. (*d*)

The liability on a promissory note will be extinguished by taking a chattel mortgage for the same debt, though by a verbal understanding between the parties the chattel mortgage was to be held as a collateral security. (*e*)

(*a*) Mathewson v. Brouse, 1 Q. B. U. C. 272.
(*b*) Murray v. Miller, 1 Q. B. U. C. 353; see also Gore Bank v. M'Whirter, 18 C. P. U. C. 293.
(*c*) Com. Bank v. Cuvillier, 18 Q. B. U. C. 378.
(*d*) Shaw v. Boomer, 9 C. P. U. C. 458.
(*e*) Parker v. M'Crea, 7 C. P. U. C. 124.

CHAPTER VI.

OF PRESENTMENT AND ACCEPTANCE.

Every bill should be presented by the holder for acceptance without delay, for if the bill be accepted he has the acceptor's security; and if the acceptance be refused, then the prior parties become *immediately* liable.

For this purpose, in the event of refusal, notice of non-acceptance, *i. e.* dishonor, should at once be given.

Though presentment for acceptance is always desirable, and though upon non-acceptance prior parties are *always* chargeable, yet it is only in case of bills payable *at sight*, or a certain period *after sight*, that such presentment is absolutely *necessary*.

It is, however, clearly the duty of the holder to present a bill, drawn payable at a certain number of days after sight, to the drawee within a reasonable time for acceptance, and if acceptance is refused it is the duty of the holder to give notice of the non-acceptance to all prior parties. Notice of non-acceptance and non-payment should be given to the drawer and indorser of the bill, and where notice of non-payment only was given to an accommodation indorser of such a bill, he was held discharged for want of notice of non-acceptance, and the Court declared that the fact of the drawee having no effects of the drawer in his hands, and of the

indorser being an accommodation indorser only, did not vary the rule. (*a*)

By Art. 2,290 of the Civil Code of Lower Canada, bills of exchange payable at sight, or at a certain period after sight, or after demand, must be presented for acceptance, so that the law in the Province of Quebec is similar to the law in the other Provinces of the Dominion.

To procure the drawee's acceptance, the bill should be taken within a reasonable time, at business hours, to the place of business of the drawee, or his residence as described on the bill, or his other known place of abode, or such other place as he may have removed to in the neighborhood, and it must there be presented to the drawee or his authorized agent.

If the drawee have absconded, such presentment is excused. It is likewise excused by illness, or any other accident not attributable to negligence in the holder.

The drawee may keep the bill twenty-four hours for deliberation, but if he keeps it longer prior parties should have notice, in order to make them chargeable.

If the drawee be dead, the bill should be presented to his personal representative.

In the Province of Quebec the presentment is made by the holder, or on his behalf, to the drawee or his representative, at his domicile or place of business, or if the drawee be dead or cannot be found and is not represented, presentment is made at his last known domicile or place of business. The presentment must be made within a reasonable time from the making of the bill, according to the usage of trade and the discretion of the Courts. (*b*)

Presentment of bills payable at or after sight is excused by their being put in circulation. (*c*)

(a) Gore Bank v. Craig, 7 C. P. U. C. 344.
(b) See Articles 2290–1 of the Civil Code.
(c) Mullman v. D'Eguino, 2 H. Bl. 565.

Where a bill of exchange is payable at a certain time after date it need not be presented for acceptance, but may be held till due and then presented for payment; and where a bill is payable at a particular place, but is not accepted or presented for acceptance, presentment for payment at that place on the day it falls due is sufficient to charge the drawer, as the obligation of notifying the drawee of the place of payment lies on the drawer. (*a*)

In a case where the declaration alleged that on the 27th day of August, 1870, C. & J. Lortie made their draft at three days on J. Redpath & Son, Montreal, which they handed to Harris, who on the 29th indorsed it over to Schowb, *et al;* that the latter presented it for acceptance on the first of September following, which was refused, and the draft was protested for non-acceptance on the 8th of September, the Court held that the plaintiff did not use legal and sufficient diligence in and about the presentment and protest of the draft, and the action was dismissed. (*b*)

As to presentment for payment of bills and notes, a personal demand on the drawee or acceptor is not necessary. It is sufficient if the bill be exhibited and payment be demanded at his usual residence or place of business, of his wife or other agent, for it is the duty of the acceptor, if he is not himself present, to leave provision for the payment. (*c*) And it is the duty of the maker of a note to find the holder wherever he may be and tender him the amount before action, and the fact that the holder resides out of the country will not alter this obligation. Thus, it has been held that the amount of a note payable on demand by a debtor, in the Province of Quebec, to a foreign creditor, was

(*a*) Richardson v. Daniels, 5 O. S. 671.
(*b*) Harris v. Schowb, 1 Revue Critique, 478.
(*c*) Matthews v. Haydon, 2 Esp. 509.

recoverable with costs in that Province by the creditor, without proof of any demand before institution of action. (*a*)

But a bill or note payable at or after sight must be presented, in order to charge the acceptor or maker. (*b*)

By Art. 2306 of the Civil Code of Lower Canada, every bill of exchange must be presented by the holder, or in his behalf, to the drawee or acceptor for payment on the afternoon of the third day after the day it becomes due, or after presentment for acceptance if drawn at sight, unless the third day is a legal holiday or non-juridical day, when the presentment must be on the next day thereafter, not being a legal holiday or non-juridical day. If the bill be payable at a bank, presentment may be made there either within or after the usual hours of banking. But every bill or note payable at a bank, or other stated place only, shall at maturity be presented for payment at such bank or place only. (*c*)

And by Art. 2307 of the Civil Code, if a bill of exchange be made payable at any stated place, either by its original tenor or by a qualified acceptance, presentment must be made at such place. If the bill or note be payable generally, presentment is made at maturity to the acceptor or maker, as the case may be, either personally or at his residence, or office, or usual place of business, or, if by reason of his absence and not having any known residence or office, or place of business, or of his death, such presentment cannot be so made, it may be made at his last known residence or office, or usual place of business, in the place where the acceptance or note bears date. (*d*)

By the Con. Stat. of Lower Canada, chap. 64, s. 9, every such bill and note shall be held to be payable

(*a*) Shuter v. Paxton, 5 L. C. J. 55.
(*b*) Dixon v. Nuttall, 1 C. M. & R. 307.
(*c*) Con. Stat. L. C. c. 64, s. 15.
(*d*) Art. 2308; Con. Stat. L. C., c. 64, s. 15, s-s. 2.

generally, unless it is expressed in the body thereof that the same is payable at a bank or other stated place; and every acceptance of a bill shall be deemed and taken to be a general acceptance, unless the same is expressed to be payable at a bank or other stated place.

But when the acceptance or the promise is made payable at a bank or other stated place, as aforesaid, it is deemed and taken to be a qualified acceptance or promise, and is payable at such stated place only, and the acceptor or maker shall not be liable to pay such bill or note, except in default of payment, when such payment is duly demanded at such bank or other stated place.

This statute is similar to that in force in Ontario, except that in the latter Province the acceptance or promise is not qualified unless it is expressed to be payable "at a bank or at any other particular place only, and not otherwise or elsewhere;" but when so stated, the acceptor or maker is not liable without a presentment at the stated place.

On the statute in force in Quebec, it has been held that a promise to pay at a specified place is not a promise to pay generally, and that there is no liability on the part of the maker of a promissory note payable at a specified place, unless proof be given of a presentment and demand of payment at such specified place, and of a neglect or refusal there to pay the amount of the note. (*a*)

As we have already seen, if a bill be accepted payable at a particular place only, and not otherwise or elsewhere, or a note be made so payable in the body of it, it must be presented at that place at maturity in order to charge the acceptor or maker; and, in the Province of Quebec, such presentment is necessary when the note is payable at a stated place, without the addition of the words, and "not otherwise or elsewhere."

(*a*) O'Brien v. Stevenson, 15 L. C. R. 265.

Except in the cases in which presentment is necessary under the statutes in force in Ontario and Quebec, the acceptor of a bill or the maker of a note is always liable upon it, whether presented or not; but presentment is necessary in order to charge parties secondarily liable.

The undertaking of an indorser is conditional to pay if the maker does not, and there must be a presentment, or what is equivalent to a presentment, to the maker before the indorser can be called upon to pay, even when the note is indorsed to the plaintiff after it has matured. When the plaintiff takes the note after it becomes due, he cannot, of course, present it on the day it became due, but he should first call on the maker to pay, and on his failure to do so, may proceed against the indorser. (*a*)

In the Province of Ontario, when a note is payable at a particular place, but the words "and not otherwise or elsewhere" are omitted, it is not necessary in an action against the indorser to shew a presentment at that place. (*b*)

A presentment at the stated place would be sufficient whether the maker was to be found or not, but a presentment to the maker at any place is all that would be required in order to charge the indorser. (*c*)

But there must be such a presentment to the maker, as the law requires, on the day the note falls due. Under our statute the effect of the omission of the words, "and not otherwise or elsewhere," is to make the note payable generally. The result is that, as against the indorser, a presentment at the particular place specified is not required; but the statute does not alter the rule of law that a note or bill must be presented at maturity to the party primarily liable thereon, in order to charge the indorsers. Such presentment is in all cases required. When the instrument is payable generally, the presentment, in order to

(*a*) Davis v. Dunn, 6 Q. B. U. C. 327.
(*b*) Com. Bank v. Culver, 3 Q. B. U. C. 363; Bank U. C. v. Parsons, 3 Q. B. U. C. 383.
(*c*) Com. Bank v. Johnston, 2 Q. B. U. C. 126, 2 O. S. 126.

charge the indorser, may be at the place specified, or at the residence or place of business of the party primarily liable; when the acceptance or promise is qual fied under the statute, in order to charge the indorser the presentment can only be at the particular place specified, and the instrument must be presented there at maturity in order to charge either the indorser or the party primarily liable thereon.

In the Province of Ontario, a note made payable at a particular place does not require any special presentment if it is in the hands of the holder on the day it matures at the place where it is payable. When the note is payable at a particular place, it is the maker's duty to provide funds for it at the place where it is payable; and the holder residing at such place is not obliged to go through the empty form of presentment any more than if under precisely similar circumstances it would be necessary to do so were the note lying at a bank, they being the holders thereof. (*a*)

It has been held in the Province of New Brunswick, that when a note is made payable at a particular place, as against the maker, it will be sufficient to present it at that place at any time before action brought; and it need not be presented on the very day it falls due. (*b*)

And it has been held in the Province of Quebec, that, as against the maker of a note no demand of payment is necessary before bringing an action, though the note is payable at a particular place.

The only effect of the want of a previous demand would be this, that the defendant might reply to the action that he had funds at the place of payment and that he would pay the note there, or he might bring the money into court, and, in consequence of the want of a previous demand, throw the costs of the action upon the plaintiff.

(*a*) Harris v. Perry, 8 C. P. U. C. 407.
(*b*) Ratchford v. Griffith, 2 Kerr 112.

But evidence of no funds at the place of payment will excuse the plaintiff from proving a previous demand, in order to entitle him to his costs in such a case as the above; and a partial payment is a waiver of all objection as to want of demand of payment. (*a*)

It is quite clear that at the present day, in the Province of Quebec, the maker would not be liable without a presentment of the note at maturity at the place where it is payable. But if there was such a presentment, and the maker's liability thereby fixed, the case goes to shew that the want of a demand of payment before bringing an action on the note would only affect the costs. The case in New Brunswick agrees with the present law in Ontario, when the promise to pay is general; in such a case it is conceived that the maker might be sued without a presentment at maturity or demand of payment before suit, and the only result would be that the plaintiff might be saddled with costs.

When funds are provided at the place indicated to meet the note, which is not presented for payment, the maker must urge the same specially by exception, and adduce evidence thereof. (*b*)

Where the maker provides that the note shall be payable at a bank or other place, it will be a sufficient presentment to him to present the note at such bank or other place. (*c*)

The law in the Province of Quebec is the same as the law here, that as between the holders and indorsers of a promissory note, the note must be presented for payment, so as to bind them on the day the statute makes it payable, and at the place where it is payable; but, as between the holder and the maker, it is enough to present it at any time within the period fixed by the Statute of Limita-

(*a*) Rice v. Bowker, 3 L. C. R. 305.
(*b*) Mount v. Dunn, 4 L. C. R. 348.
(*c*) Bank U. C. v. Sherwood, 8 Q. B. U. C. 116.

tions and before action brought; (*a*) provided, of course, the instrument is not payable at a stated place.

The consequence of a bill or note not being duly presented for payment to the acceptor or maker is that all the antecedent parties will be discharged from their liability, whether on the instrument or on the consideration for which it was given. The acceptor or maker, however, still continues liable, and indeed presentment is not in general necessary for the purpose of charging him, the action itself being held to be a sufficient demand, and that though the instrument be made payable on demand. (*b*)

When a promissory note is payable at either of two places, presentment at either of them will suffice. (*c*)

Presentment of a note at the maker's place of business is sufficient, although there is no person there at the time. The maker of a note was proved to have occupied an office up to the first of May, after which there was no direct evidence of occupation, but his desk remained there as before. The Court held, in the absence of any proof of his having changed his office, that presentment of a note there after the 1st of May was sufficient. (*d*)

A presentment for payment before the expiration of the days of grace is premature. But where, in an action by the payee against the acceptor of a bill of exchange, payable at a particular place, which became due on the 3rd of November, the plaintiff averred presentment for payment on the 2nd: it appeared in evidence that the bill had been presented on the 2nd, and that on the 3rd, the day it became due, the defendant expressly refused to pay it to the plaintiff's agent, who called again, but it did not appear that the note was again produced; the Court held that *proof* of presentment on the 3rd was inadmissible,

(a) McLellan v McLellan, 17 C. P. U. C. 109.
(b) Rumball v. Ball, 10 Mod 38; Norton v. Ellam, 2 M. & W. 461.
(c) Beeching v. Gower, Holt, N. P. C. 313.
(d) Kinnear v. Goddard, 4 Allen. 559.

but that the refusal to pay on the 3rd rendered the actual presentment of the bill on that day unnecessary. (*a*)

There is no positive authority requiring a note to be presented at the maker's place of business instead of his residence; and if the maker of the note has absconded and his place of business is closed, a presentment at his last place of residence will be sufficient. (*b*)

As we have already seen, there must, even when the promise is not qualified, be a presentment at the residence or place of business of the maker; and the circumstance that he is lying dangerously ill, and cannot be seen on business, will not excuse the want of presentment there. Under such circumstances a presentment to any inmate of his house, who is not his agent in the matter, will not be sufficient. A subsequent promise to pay by the indorser in ignorance of such a defect in the presentment, but with knowledge of his discharge for want of due notice of dishonor, is a waiver of the want of notice, but not of the presentment. (*c*)

In an action against the indorser of a note the plaintiff must shew that it was presented at a reasonable hour. As to bankers, it is established with reference to a well-known rule of trade, that a presentment out of the hours of business is not sufficient; but in other cases the rule of law is that a bill must be presented at a reasonable hour, which is generally understood to mean by or before seven or eight o'clock in the evening. Where a note was payable at a "store," and the only evidence was that when the holder went to the store it was closed, the Court held, in the absence of any evidence of the nature of the business carried on at the store, it might be inferred that it was closed in the due course of business, and therefore that the presentment was not made at a reasonable time. (*d*)

(*a*) Chandler v Beckwith, Berton's N. B. Reports, 268.
(*b*) Robinson v. Taylor, 2 Kerr 198.
(*c*) Nowlin v. Roach, 2 Kerr 337.
(*d*) Patterson v. Tapley, 4 Allen 292.

The presentation of a promissory note at the closed door of a bank, after its usual office hours, is not a sufficient presentation for payment. (*a*)

It is not absolutely necessary in all cases to exhibit the note to the maker at the time of the presentment; and where the maker of the note was insolvent, it was held that the non-exhibition of the note to him at the time of the protest did not invalidate it, and that notice of such protest would render the indorsers liable. (*b*)

The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment, for many means may remain of obtaining payment by the assistance of friends or otherwise. (*c*)

By Art. 2309 of the Civil Code of Lower Canada, if a bill, payable generally, be accepted before and become due after the appointment, duly notified, of an assignee to the estate of the acceptor in the case of an insolvent trader, presentment for payment may be made either to the insolvent or to the assignee personally, or at the residence or office or usual place of business of either of them.

As to the circumstances which will excuse neglect to present for payment: When a bill is payable at sight presentment for payment and acceptance are identical, at all events, as to time; and, therefore, presentment for payment will, as well as that for acceptance, be excused by putting such bills in circulation. (*d*)

If the maker of the note has absconded or removed from Canada, presentment is dispensed with; but if the maker has only removed from one place in Canada to another, it must be shewn that application has been made at the place to which he is gone, and that with due diligence he could not be found before bringing the action. (*e*)

(a) Watters v. Reiffenstein, 16 L. C. R. 297.
(b) Venner v. Fulvvve, 13 L. C. R. 307.
(c) Russel v. Langstaffe, Doug. 496; Lafitte v. Slatter, 6 Bing. 623.
(d) Camidge v. Allenby, 6 B. & C. 373.
(e) Browne v. Boulton, 9 Q. B. U. C. 64.

If the bill or note has been actually lost or seized by the Crown, under a form of execution called an extent, presentment is also dispensed with.

If the note is payable at a bank and they are the holders thereof at maturity, proof of there being no funds in their hands would be sufficient. (*a*)

And absence of effects in the drawee's hands will, as against the drawer, dispense with the necessity of presenting for payment, but not as against a subsequent indorser. (*b*)

A promise to pay a bill or note made after the same should be presented, will dispense with proof of presentment. Thus, in an action on a promissory note payable at a bank to the order of the maker, and indorsed by him, there was no proof of presentment for payment at the bank; but the Court held that a subsequent promise to pay made by defendant admitted that all had been done by the plaintiffs to entitle them to recover, and rendered defendant liable. (*c*)

A bill of exchange was drawn by defendant on T, in Bangor, payable in Boston, and accepted generally by T, who had no place of business in Boston. T died before the bill was due. There was no presentment in Boston, but presentment was made at T's place of business in Bangor, and answer given that there was no administration and no person authorized to pay acceptances. About six weeks after the bill was due the defendant wrote to the plaintiff (indorsee) regretting the non-payment, requesting time for payment, and to be dealt leniently with, and offering notes at four and six months, which the plaintiff refused. The Court held that, as it did not appear that when the defendant made the offer he was aware the bill had not been presented in Boston, the promise was no waiver of the presentment. (*d*)

(*a*) Truscott v. Lagourge, 5 O. S. 134.
(*b*) Terry v. Parker, 6 Ad. & E. 502; Saul v. Jones, 1 E. & E. 59.
(*c*) St. Stephen B. Ry. Co. v. Black, 2 Hannay 139.
(*d*) Dana v. Bradley, East T. 1852, Steven's Digest, N. B. Reports, 69.

Where the defendant, an absconding debtor on the day a note became due, wrote to the plaintiffs stating his inability to pay, and requesting further time, the Court held this rendered proof of presentment unnecessary, although the notes were payable at a particular place. (*a*)

Where a note was payable at a particular place, although no averment of its being presented there for payment appeared upon the record, the Court, after verdict for the plaintiff and proof at the trial of a subsequent promise, refused a non-suit. (*b*)

Whether due diligence has been used in the presentment of a bill of exchange to the drawee is a mixed question of law and fact, and where the question has been properly left to the jury the Court will not interfere with their verdict, unless it clearly appears that they have come to a wrong conclusion. (*c*)

When a note is made in a particular place, payable "at any bank" or other place, this means any bank or other place in the city or town where the note is made, for it would be absurd to suppose that the makers are required to keep funds for the payment of the note in banks all over the world. (*d*)

Acceptance in its ordinary signification is an engagement by the drawee to pay the bill, when due, in money. (*e*)

Before acceptance the drawee is not liable to the holder. (*f*)

In Canada, the acceptance of bills of exchange, whether inland or foreign, must be by writing on the bill; or if there be more than one part to such bill, then on one of the parts. (*g*)

(*a*) McDonnell v. Lowry, 3 O. S. 302.
(*b*) McIver v. McFarlane, Taylor 113.
(*c*) Perley v. Howard, 2 Kerr 518.
(*d*) Baldwin v. Hitchcock, 1 Hannay 310.
(*e*) Clark v. Cock, 4 East, 72; Russell v. Phillips, 14 Q. B. 891.
(*f*) See Frith v. Forbes, 32 L. J. Chy. 10.
(*g*) Con. Stat. Ontario, chap. 42, s. 7; Rev. Stat. N. B., chap. 116, s. 4; Art. 2292 Civil Code Quebec.

By the statute in force in England, the acceptance is not only required to be in writing on the bill, but it is also required to be signed by the acceptor. It is certainly advisable in every case to have the acceptance signed by the acceptor, but in the Provinces of Ontario, Quebec and New Brunswick, it would seem that it is not absolutely necessary; and when the acceptance is not signed it is a question for the jury whether it is complete. (*a*)

A bill of exchange was drawn, payable in three equal instalments. When the first instalment became due the holder presented it at the bank, where it was payable; the cashier paid the first instalment and returned the bill to the holder, with the following indorsement: "Paid on the within, $471, August 12, '61;" and the Court held this an acceptance for the remaining instalments. (*b*)

In the Province of Nova Scotia the acceptance must not only be in writing on the bill, but it must also be signed by the acceptor, or some person duly authorized by him; (*c*) and the law in the latter Province is the same as the English law.

In the other Provinces there must be some words written on the bill implying an acceptance thereof. A cheque is treated as an inland bill of exchange; and as to a cheque it has been held that the mere initialing it by the cashier of the bank on which it is drawn will not amount to an acceptance thereof within the statute; (*d*) and it is conceived that no marking which cannot be held to be a writing within the statute will amount to an acceptance.

A bill can only be accepted by the drawee and not by a stranger, except for honor. (*e*)

If the drawee be incompetent to contract, as being an infant or married woman, the holder may treat the bill as dishonored. (*f*)

(*a*) See Dufaur v. Oxenden, 1 M. & R. 90.
(*b*) Berton v. The Central Bank, Hil. T. 1863; Steven's Digest, N. B. Reports 78.
(*c*) 28 Vic. c. 10 s. 5.
(*d*) Commercial Bank v. Fleming; Steven's Digest, N. B. Reports 93.
(*e*) Nichols v. Diamond, 9 Exch. 157; Polhill v. Walter, 3 B. & Ad. 114.
(*f*) Chit. 9th Ed. 283.

There cannot be two or more acceptors of the same bill successively liable. For example, if a bill was drawn upon A, it could not be accepted by A and also by B. (*a*) But if the bill be drawn upon several persons, every one must accept, otherwise the bill may be treated as dishonored. (*b*)

The acceptance will, however, be binding on such of them as do accept. (*c*)

As we have already seen, one partner may, by an acceptance in the firm name, bind the firm; and, as in other cases of negotiable instruments signed in blank, an acceptance written on the paper before the bill is made, and delivered by the acceptor, will also charge the acceptor to the extent warranted by the stamp. (*d*)

A bill may be accepted after the period at which it is made payable has elapsed, and the acceptor will then be liable to pay on demand. So a bill may be accepted after a previous refusal to accept. (*e*)

But when an acceptance appears on a bill without any statement of the time when it was placed there, the presumption is, that it was accepted before maturity and within a reasonable time of its date. (*f*)

The holder is entitled to require from the drawee an absolute engagement in writing to pay in money, according to the tenor and effect of the bill, without any condition or qualification.

By Art. 2293 of the Civil Code of Lower Canada, the acceptance must be absolute and unconditional; but, if the holder consent to a conditional or qualified acceptance, the acceptor is bound by it. If the drawee offer a qualified acceptance, the holder may either refuse or accept the offer. If he means to refuse it he may note the bill, and

(a) Jackson v. Hudson, 2 Camp. 447.
(b) Dupays v. Shepherd, Holt's Reports, 297.
(c) Owen v. Von Uster, 10 C. B. 308.
(d) See Armfield v. Allport, 27 L. J. Exch. 42.
(e) Wynne v. Raikes, 5 East. 514.
(f) Roberts v. Bethell, 12 C. B. 778.

should give notice of the dishonor to the antecedent parties. If he intends to accept it he must give notice of the nature of the acceptance to the previous parties; and, it should seem, must obtain their consent or they will be discharged. (*a*)

But he must not protest or note the bill, or give a general notice of dishonor, for he would thereby preclude himself from recovering against the acceptor. (*b*)

Acceptances are of three kinds: general, special, and qualified.

A general acceptance is where the word "accepted," or a word of similar effect, is written on the bill, followed by the acceptor's signature, without condition or qualification.

A special acceptance is where the word "accepted" is followed by words which restrict the payment of the bill to a particular place; as, for instance, if in the Province of Quebec, the acceptance were made payable at the Bank of Montreal, and in the Province of Ontario, payable there "only and not otherwise or elsewhere."

A qualified acceptance is where a man accepts a bill for only a portion of the amount for which it is drawn: as if a bill were drawn for $200, and were accepted for $100 only. (*c*) Or where, in the acceptance, the acceptor varies the time of payment: as if the bill were drawn payable in three months, and were accepted payable at six months. (*d*) Or if a bill is accepted "on condition of its being renewed for three months;" (*e*) or with other words to the like effect appearing on the face of the bill, this would be a partial acceptance.

There is also a kind of acceptance called *conditional*, by which the bill is made payable only on the happening of a certain event: as an acceptance "to pay as remitted for,"

(a) See Sebag v. Abitbol, 4 M. & Sel. 462.
(b) Sprout v. Matthews, 1 T. R. 182.
(c) See Wegerloffe v. Keen, 1 Stra. 214.
(d) Walker v. Atwood, 11 Mod 190.
(e) Russell v. Phillips, 14 Q. B. 891.

"to pay when in cash for the cargo of the ship 'Thetis,' "to pay when goods consigned to him (the drawee) were sold." (*a*)

As the statute requires acceptances to be in writing, the condition (if any) on which the acceptance is made should properly appear on the face of the bill; and if it so appeared, any party taking the bill would be bound by the condition. It was held in England, prior to the passing of the statute requiring acceptances to be in writing, that when the acceptance was in writing and absolute on its face, it might be made conditional by another contemporaneous writing. (*b*)

It is conceived that an agreement on a distinct paper, contemporaneous with the acceptance, rendering it conditional, would still be good as between the parties to the agreement; but it is clear that it would not be available as against an indorsee ignorant of the existence of such an agreement. (*c*)

A mere oral condition, at least if contemporaneous with the acceptance, is inadmissible in evidence to qualify the absolute written engagement, even as between the original parties, for this would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles. (*d*)

If the bill be drawn so many days "after sight," the *date* of the acceptance should be appended, and time will count from the day of acceptance.

None of these acceptances will be complete unless accompanied by a delivery of the bill to the person presenting it for acceptance. If the drawee have written an acceptance across the bill, he can cancel it at any time

(*a*) Banbury v. Lessett, 2 Stra. 1211; Julian v. Shobrooke, 2 Wils. 9; Smith v. Abbott, 2 Stra. 1152; Smith v. Vertue, 9 C. B. N. S 214.
(*b*) Bower Bank v. Monteiro, 4 Taunt. 844.
(*c*) Ib.
(*d*) Adams v. Wordley, 1 M. & W. 374; see also Moore v. Sullivan, 21 Q. B. U. C. 445; Hammond v. Smith, 16 Q. B. U. C. 371.

while the bill is in his possession, or at all events till he has intimated his intention to accept. (*a*)

In the Province of Quebec, when a bill has been accepted and delivered to the holder, the acceptance cannot be cancelled otherwise than by the consent of all the parties to the bill. (*b*)

By Art. 2294 of the Civil Code of Lower Canada, it is provided that the signature of the drawer is admitted by the acceptance, and cannot afterwards be denied by the acceptor against a holder in good faith. Such is also the law in the other Provinces. (*c*)

The acceptor also admits the capacity of the payee to receive, and consequently to indorse, and cannot afterwards shew his inability to do so, or that she is a married woman, &c. (*d*)

But if the bill when accepted is *already indorsed* in the name of an existing person, and the name turns out to have been forged, the acceptor may shew this fact when sued on the acceptance by the indorsee, and it will then be a question whether the acceptor meant to give currency to the bill in spite of the forgery, in which case he will be liable upon it. (*e*)

Where the drawing is by procuration, the acceptor only admits the authority to draw, but not that to indorse. (*f*)

When the bill is drawn in a fictitious name, the acceptor undertakes to pay to an indorsement by the same hand. (*g*)

If the acceptor's name be written by some other person, and the acceptor afterwards gives currency to the bill by admitting it to be his own, or treating it as such, or ratifying the act, he is liable.

(*a*) Cox v. Troy, 5 B. & Ald. 474.
(*b*) Art 2295 Civil Code.
(*c*) Price v. Neal, 3 Burr. 1354; Prince v. Brunatte, 1 Bing. N. C. 435; Bass v. Clive, 4 M. & Sel. 13.
(*d*) Drayton v. Dale, 2 B. & C. 293; Smith v. Marsack, 6 C. B. 486.
(*e*) Smith v. Chester, 1 T. R. 655; Beeman v. Duck, 11 M. & W. 251.
(*f*) Robinson v. Yarrow, 7 Taunt. 455.
(*g*) Cooper v. Meyer, 10 B. & C. 468; Phillips v. Im Thurn, 18 C. B. N. S. 694.

An acceptor may be discharged by a holder *expressly* renouncing his claim, and for the *whole* amount, and this may be before or after the bill is due. The renunciation may be verbal, or in writing, or by cancelling the acceptance. But if it be verbal, or by writing separate from the bill, and before due, it will not affect the right of any person to whom the holder may transfer for value and without notice. (*a*)

If a third person cancel the acceptance, the acceptor will only be discharged if it was done by the consent of the holder. (*b*)

The holder may of course lose his claim on the acceptor by taking a new security in the place of the old one: so easy is this that, if there are two joint acceptors, the separate note of one of them may be a renunciation of the holder's rights against the other. (*c*)

By Art. 2296 of the Civil Code of Lower Canada, when a bill has been protested for non-acceptance or non-payment, it may, with the consent of the holder, be accepted by a third person for the honor of the parties to it, or of any of them. The law is the same in the other Provinces of the Dominion.

A general acceptance *supra protest*, which does not express for whose honor it is made, is considered as made for the honor of the drawer. (*d*)

Any person may accept a bill *supra protest*, and the drawee himself, though he may refuse to accept the bill generally, may yet accept it *supra protest* for the honor of a drawer or of an indorser; and where a bill has been accepted *supra protest* for the honor of one party, it may by another individual be accepted *supra protest* for the honor of another. (*e*)

(*a*) Foster v. Dawber, 6 Exch. 851; Whatley v. Tricker, 1 Camp. 35.
(*b*) Sweeting v. Halse, 9 B. & C. 365.
(*c*) Evans v. Drummond, 4 Esp. 89.
(*d*) Chitty, 9th Ed. 244.
(*e*) Byles on Bills, 9th Ed. 256.

The holder of a dishonored bill, who is offered an acceptance for the honor of some one of the preceding parties to the bill, should first cause the bill to be protested, and then to be accepted *supra protest*. At maturity he should again present it to the drawee for payment; and if payment by the drawee be refused the bill should be protested a second time for non-payment, and then presented for payment to the acceptor for honor. (*a*)

The acceptor *supra protest* becomes liable to all parties on the bill subsequent to him, for whose honor the acceptance was made. (*b*)

The acceptor *supra protest* admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honor he accepts. (*c*)

By acceptance *supra protest* the party for whose honor it was made, and all parties antecedent to him, become liable to the acceptor *supra protest* for all damages he may incur by reason of the acceptance. (*d*)

By Art. 2317 of the Civil Code of Lower Canada, payment may be made of a bill of exchange after protest by a third person for the honor of any party to it, and the person so paying has his recourse against the party for whom he pays, and against all those liable to such party on the bill. If the person paying do not declare for whose honor he pays, he has his recourse against all the parties to the bill.

An acceptor *supra protest* is bound to give notice of his acceptance without delay to the party for whose honor he accepts, and to other parties who may be liable to him on the bill. (*e*)

The method of accepting *supra protest* is said to be as follows: The acceptor *supra protest* must personally appear

(*a*) Hoare v. Cazenove, 16 East. 391; Williams v. Germaine. 7 B. & C. 477.
(*b*) Hoare v. Cazenove, *ubi supra*; Art. 2296 Civil Code, Quebec.
(*c*) Phillips v. Im Thurn, 18 C. B. N. S. 694.
(*d*) Byles, 9th Ed. 259.
(*e*) Art. 2297 Civil Code, Quebec.

before a notary public, with witnesses, and declare that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand, thus: "Accepted *supra protest* in honor of A B, &c.;" or, as it is more usual, "Accepts S. P." (*a*)

(a) Byles on Bills, 9th Ed. 255.

CHAPTER VII.

OF PRINCIPAL AND SURETY.

Without an elaborate definition of the word "Principal," it will be understood that the principal debtor is the man who is primarily liable as the person himself owing the money; and the surety is, in relation to the principal, one who in some way or other may be obliged to pay the money in default of the principal; *i. e.* the surety is the person secondarily liable.

This relationship may attach to a person either by his becoming a party to a bill or note, or by an independent contract.

First, as to the relation of principal and surety arising upon the instrument itself.

The acceptor of a bill and the maker of a note are the principals, being the persons primarily liable upon the instrument.

All the other parties are sureties to the principals; but as between themselves they are not merely co-sureties, but each prior party is a principal to those who follow him.

Looking at the matter from the holder's point of view, the acceptor is, at maturity, his principal debtor, and the drawer and indorsers are all the acceptor's sureties; the indorsers are again sureties for the drawer, and the third indorser is surety for the second indorser, (the *first* indorser being the drawer.)

When the acceptor of a bill or maker of a note is discharged, all the other parties are discharged, for the surety is always discharged by the discharge of the principal.

And where the arrest and discharge of the acceptor of a bill operates, so far as he is concerned, as a discharge of the debt, the drawers are thereby prejudiced, and are also discharged. (*a*)

But if the acceptance is merely for the accommodation of the drawer, the latter will not be discharged. (*b*)

Where the holder of a note dies, leaving the payee and indorser one of his executors, he thereby discharges him from the debt; and in discharging him, the testator also discharges all indorsers subsequent to the payee, who are merely sureties to the payee. The executors, therefore, could not recover in an action against any indorser subsequent to the payee. (*c*)

A discharge to prior parties is a discharge to subsequent parties, but a discharge to subsequent parties is not a discharge to prior parties.

This is because the subsequent parties may, if compelled to pay the bill or note, sue the prior parties; but the latter cannot, on such payment, sue the subsequent parties.

And where the subsequent parties cannot, on payment, sue the prior parties, the rule does not apply. Thus, where the maker and payee of a note made and indorsed it solely for the accommodation of a subsequent indorser and without any consideration to the maker, and the plaintiff took the note up after it became due, and afterwards compromised with the maker by taking part of the sum for which the note was made, and thereupon discharged the maker, this was held

(*a*) Hamilton v. Holcomb, 11 C. P. U. C. 93.
(*b*) S. C., 12 C. P. U. C. 38.
(*c*) Jenkins v. Mackenzie, 6 Q. B. U. C. 544.

no discharge to the persons for whose accommodation the note was made, for they could have no recourse against the maker. (*a*)

Where the holder sues in one action the various parties liable on the note or bill under the Statute of Ontario, chap. 42, and obtains judgment against them, he may discharge the drawers or indorsers after an arrest under a *capias ad satisfaciendum*, without losing his remedies against the other defendants liable in priority to those discharged. (*b*)

It will thus be seen that obtaining a judgment under the statute against the several parties liable on a bill or note does not alter their relative rights as between themselves. On a similar principle it is no defence for the maker of an accommodation note to shew that no notice of dishonor was given to the payee and indorser, for the maker could never sue at law upon the note: his only remedy would be for money paid to the indorser's use. (*c*)

So a party who pays value for a bill, originally an accommodation bill, and has no notice of the fact when he pays value, may, on his subsequently becoming aware of the fact that the bill was originally given for accommodation only, release the drawer without releasing the acceptor. (*d*)

But, if the acceptor be insolvent, the holder may prove under the assignment, the discharge in this case being by act of law, and not of the holder himself; and he may for the same reason sue the drawer and indorsers. The fact of the bill being an accommodation bill, even if the holder knew it, would make no difference. (*e*)

In the case of a note, the relations are the same, the

(*a*) Sifton v. Anderson, 5 Q. B. U. C. 305.
(*b*) Holcomb v. Henderson, 2 E. & A. Reps. 230.
(*c*) Grant v. Winstanley, 21 C. P. U. C. 257.
(*d*) City Glasgow Bank v. Murdock, 11 C. P. U. C. 138.
(*e*) Browne v. Carr, 2 Russ. 600; Langdale v. Parry, 2 D. & R. 337.

indorsers being sureties for the maker. It makes no difference if the note be given gratuitously. (*a*) But this is, of course, subject to the rule that no man can sue on a bill or note the person from whom he gratuitously received it.

The holder may be as negligent as he pleases in suing, prosecuting his suit, obtaining judgment, and issuing execution against the person primarily liable, and he may still, until the suit is barred by the Statute of Limitations, sue the persons liable as sureties.

But, if the holder once, by a binding contract, part with or suspend, for however short a time, the *right* of suing to judgment, or of obtaining the fruits of a judgment against the person primarily liable, those liable as sureties are discharged, unless the loss or suspension of the rights against the principal took place with their sanction; for the surety always has a right to pay off the debt and recover.

Thus, an agreement by the holder of a note to give time to the maker, without the consent of the indorser, will discharge the latter. (*b*)

And an undertaking to the maker to "hold over and return the notes" on a certain contingency will amount to such an agreement, and will discharge the indorsers if they are not parties to it. (*c*)

But to effect the discharge of the sureties the agreement to give time must, whether written or verbal, be such as binds the creditor; and where there is no agreement by which the holder binds himself to give time to the principal debtor, but a mere forbearance or indulgence without consideration, the surety will not be discharged. (*d*)

(a) Carstairs v. Rolleston, 5 Taunt. 551.
(b) Arthur v. Lier, 8 C. P. U. C. 180.
(c) Bedell v. Eaton, 2 Kerr 217.
(d) Thompson v. McDonald, 17 Q. B. U. C. 304.

The giving of time must be by some party interested in the note, and in an action against the indorser a plea of time given to the maker of the note is bad, unless it expressly shews that when the time was given the plaintiff was the holder of the note. (*a*)

If on giving time to the principal the right against the surety is expressly reserved, he will not be discharged. Thus, in an action by the indorsee against the acceptor of a bill the defendant pleaded on equitable grounds that he was an accommodation acceptor for the drawer, which the plaintiffs knew, and that upon the receipt of collateral security the plaintiffs gave time to the drawer without the defendant's consent. It was held a good answer, that when the time complained of was given it was expressly understood and agreed that the plaintiffs should reserve all the rights against the acceptor. (*b*)

Where the maker of a note gives a mortgage to the holder, which provides expressly that it shall "operate and take effect as a collateral security only;" this does not amount to a giving of time to the maker, so as to discharge the indorser, his surety, though the mortgage is due and payable after the maturity of the note; and in such case the holder of the note may sue the indorser thereon before the mortgage falls due, and there will be no merger of the note in the mortgage security. (*c*)

As we shall hereafter see, the law is the same if a new bill is taken from the person primarily liable by way of collateral security only.

Where the maker of a note, in consideration of time given, agrees, without the consent of the indorser, to pay a sum larger than he would be liable for on the note itself, or than he would by law be liable to pay if

(*a*) Commercial Bank v. Johnston, 2 O. S. 126.
(*b*) Bank U. C. v. Jardine, 9 C. P. U. C. 332.
(*c*) Shaw v. Crawford, 16 Q. B. U. C. 101.

the holder had merely let it lie over for the time given, the indorser will be discharged. Thus, in an action against the maker and indorser, the latter pleaded that it was agreed between the plaintiff and the makers by their President, without the knowledge and consent of the indorser, that the plaintiff should give the makers time for the payment of the said note for a good consideration, to wit: interest thereon at the rate of 14 per cent. per annum, and that the makers, by their President, agreed to pay such interest for the extension. The plea was held a good defence to the action. (*a*)

So it seems that any act between the creditor and the principal, which is substantially to the prejudice of the surety, and is done without his consent, will discharge the surety, as in certain cases the release of a security held by the creditor. (*b*)

If the holder, when he takes the bill, knows that any of the parties thereto are sureties for the others, he must in all dealings with the principal consider the rights of the sureties, and anything done to the prejudice of the surety will discharge him. But it is essential that the holder should know *at the time he takes the bill* that the party is a surety. If he does not acquire such knowledge until afterwards, he may then give time to the principal without discharging the surety. (*c*)

If the holder of the bill is aware at the time he gives time to the principal that the bill is only an accommodation bill, all the equities of the surety attach; and by giving time to the principal the accommodation acceptor is released. (*d*)

A bargain may, however, be made not to sue for a certain time, with a proviso that if the money be not paid, the creditor may have a judgment as soon as he

(*a*) Farrell v. Oshawa Mfg. Co., 9 C. P. U. C. 239.
(*b*) Grant v. Winstanley, 21 C. P. U. C. 257.
(*c*) Bank U. C. v. Thomas, 11 C. P. U. C. 515.
(*d*) Bank U. C. v. Ockerman, 15 C. P. U. C. 363.

might in the regular course. This will leave untouched the liability of the sureties. (*a*)

The same rules apply equally to suretyships contracted by agreement, independent of the bill. These agreements, usually called guarantees, can only be made in writing, and cannot be made binding, unless they are either made by deed, or there is some consideration. But it is not necessary that the consideration should appear on the face of the instrument. (*b*)

The taking a new bill or note from the person primarily liable, payable at a future day, discharges the sureties, for it interferes with the right of the surety *at any time* to pay off the debt, and recover against his principal. (*c*)

This is the same whether they are sureties on the bill, or by independent contract.

If, however, the second bill be taken only by way of collateral security, *i. e.* if the right to sue on the first be not thereby suspended, the sureties, whether on the bill itself, or by independent contract, are not discharged. (*d*)

Taking a new bill from, or suspending the remedy against a subsequent party, never discharges a prior party.

The holder of a bill may sue all the parties at the same time, or one after the other, and a judgment against any will not be a satisfaction as to the rest. (*e*)

It is presumed, also, that the drawer and indorsers of an unaccepted draft will be discharged if the holder gives the drawee a longer time to accept than according to the tenor of the draft.

(*a*) Kennard v. Knott. 4 M. & Gr. 474; Michael v. Myers, 6 M. & Gr. 702.
(*b*) 26 Vic. c. 45, of Ontario; 23 Vic. c. 31 s. 1, of New Brunswick.
(*c*) Gould v. Robson, 8 East. 576.
(*d*) Calvert v. Gordon, 7 B. & C. 809; Pring v. Clarkson, 1 B. & C. 14.
(*e*) Claxton v. Swift, 2 Show. 441.

A covenant not to sue entered into by a creditor with the principal debtor, without the surety's consent, does not discharge such surety. (*a*)

Where a debtor assigns for the benefit of creditors generally, and there is a clause contained in the deed reserving all rights and remedies against third parties, but at the same time releasing the assignor from his liability: this operates as a covenant not to sue, and not as a release. (*b*)

If the holder of a bill of exchange signs a deed of composition of the debt of the acceptor or principal debtor thereon, without a special reservation of his rights as to the drawers and indorsers, he discharges them. (*c*)

In an action by an indorser, who has paid his indorsee, against the maker of a note, it is not a good defence to allege that the indorsee, whilst holder of the note, granted delay to the maker by taking his note and renewing it from time to time; nor can such indorser be compelled, under the circumstances, to return or account for such renewed notes, or any of them. (*d*)

If a man becomes surety or indorses a note for another, for the purpose of enabling the latter to obtain an advance of money from a third person, who knows that the security or indorsement has been so obtained; if the advance is not made, the surety or indorser would be discharged as to such third person, and the latter could not apply the note to a pre-existing debt against the maker, or as security for some new arrangement entered into between them, to which the surety was not a party. (*e*)

But if it be agreed between the holder and the principal debtor that the sureties shall remain liable, they

(*a*) Hall v. Thompson, 9 C. P. U. C. 257.
(*b*) Ib
(*c*) Com. Bank v. Wilson, 11 C. P. U. C. 581.
(*d*) Masaue v. Crebasse, 7 L. C. J. 211.
(*e*) Greenwood v. Perry, 19 C. P. U. C. 403.

will then remain so; for it is presumed the sureties can then at any time pay off the debt, and recover against the principal debtor, and it is on the continuance of this right that the continuance of the surety's liability depends. (*a*)

But this is subject to the rule that if one person, *jointly* liable, be discharged, the other joint contractors are discharged also.

Again, if the surety consent to the principal debtor having time to pay, the former will not be discharged; so also if, *after* the time has been bargained for between the principal debtor and creditor, the surety ratify the course adopted, he will not be discharged, but will have *waived* his right. (*b*)

Both the prior consent and the subsequent ratification may be verbal as well as in writing. It is very easy to see what will constitute a *consent;* but a surety should be very careful that what he says does not amount to a *ratification.* If the surety says, "I know I am liable," or, "I will pay if he does not," this will constitute a ratification; (*c*) but merely saying, "It is the best thing that can be done," has been held not to do so. (*d*)

It sometimes happens that a person, in order to obtain credit, procures another to join him in making a *joint* note, or, *jointly* accepting a bill. In this case, the relation of principal and surety is only by arrangement with one another, and differs from that which appears on the face of the instrument, or is created by an independent contract with the creditor; for as both are *jointly* liable, the discharge of *either* operates as the discharge of both. (*e*) Whereas, in ordinary cases, the surety may be discharged, and the principal held liable.

(*a*) Burke's Case, 6 Ves. 809; North v. Wakefield, 13 Q. B. 258.
(*b*) Clark v Devlin, 3 B. & P. 365; Smith v. Winter, 4 M. & W. 467.
(*c*) Stevens v. Lynch, 12 East 38.
(*d*) Withall v. Masterman, 2 Camp 179.
(*e*) Nicholson v. Revill, 4 Ad. & E. 675.

One of the joint makers of a note, cannot set up as a defence, that he made the note with the plaintiff's knowledge, only as a surety for the other maker; and that the plaintiff gave time to the other maker, without his knowledge or consent, and that he was thereby discharged. (*a*)

But if there is an express agreement by the holder, at the time of taking the note, that he will treat the one maker as surety for the other, the joint maker who is surety under the agreement, may set up at law any defence to which, as a surety, he would be entitled; (*b*) and he is in general, entitled to the same privileges as an ordinary surety.

Thus if one of two joint makers of a note is a surety for the other, under an agreement made at the time of signing, he may on being compelled by action to pay the whole debt and costs, recover contribution against his co-surety, or co-maker, and he is not estopped as between himself and his co-maker, from setting up such agreement. (*c*)

But a joint maker of a note, or acceptor of a bill, will not be allowed as against drawers, payees, or indorsees, to set up the defence that he was a surety only for the maker or acceptor, and is on that account, discharged by time, without his consent having been given to his principal. (*d*)

It has been held in the Province of New Brunswick, in an action on a joint and several promissory note, that it is no legal defence that one of the makers signed the note as a surety, and that the other maker had given the plaintiff a bill of sale of property, for the purpose of paying the note, which he had appropriated to the payment of another debt. (*e*)

(*a*) Davidson v. Bartlett, 1 Q. B. U. C., 50.
(*b*) Ball v. Gilson, 7 C. P. U. C., 531.
(*c*) Blake v. Harvey, 1 C. P. U. C. 417.
(*d*) Nafis v. Soules, 2 C. P. U. C. 412.
(*e*) Morrison v. Kyle, 2 Rev. Critique 487; Stevens' Dig. N. B., Reps. 65.

But in equity, if one joint maker is in fact a surety for the others; and after the note matures, the payee, in consideration of a certain sum paid to him, gives time to the other makers, without the consent of the surety, the latter will be discharged as to any person taking the note, after it becomes due, with knowledge of the facts. (*a*)

When a person makes a note, which is placed by the payee in the hands of another, to secure him against accruing liability, as surety to the payee, the maker cannot resist payment at maturity, in an action at the suit of the surety, on the ground, that as yet the latter has been compelled to pay nothing for the payee; or on the ground that the payee promised to give the maker further time for payment. (*b*)

When a surety has paid an overdue bill, he has his remedy against his principal; nay, if he pay by instalments, he may bring a separate action for each instalment.

If one become insolvent and can pay nothing, each of the others is, at law, only liable to contribute to the extent of his original proportion; but in equity each is liable for as large a proportion as if the bankrupt or insolvent had never been reckoned among the number. (*c*)

Where there are several sureties for the whole amount, each is liable to the creditor for the whole, but, among one another, each is only liable for his share; therefore, if one pay more than the others, he may sue the others for contribution.

Co-sureties for the same debt are liable to mutual contribution, although they contract independently, and indeed, without knowledge of each other. Accommo-

(a) Perley v. Loney, 17 Q. B. U. C., 279.
(b) Ross v. Tyson, 19 C. P. U. C. 294.
(c) Browne v. Lee, 6 B. & C. 689; Swaine v. Ware, 1 Chs. Rep. 149.

dation indorsers of a negotiable security, are to be considered as co-sureties, irrespective of the order of their liability on the instrument itself. Each surety will be presumed to undertake an equal liability with his fellows, in the absence of any limitation of his liability, but there is nothing to prevent him qualifying this by contract. (*a*)

Where a firm of two or more persons, indorse in the partnership name, the liability as sureties, is a joint liability, and not the several liability of each partner; and therefore, the firm will be considered as one individual, in determining their liability to their co-sureties. (*b*)

By the statute of Canada, 26 Vic. c. 45, which applies to the Province of Ontario only, every surety who pays the debt of his principal, is entitled to have assigned to him, or a trustee for him, every judgment specialty, or other security which is held by the principal, in respect of the debt or duty, whether the judgment, or specialty, shall or shall not be deemed at law, to have been satisfied by the payment of the debt. (*c*)

The surety is entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and on proper indemnity, to use the name of the creditor in any action or proceeding at law, or in equity, in order to obtain from the principal debtor, or any co-surety indemnification for the advances made, and loss sustained by the surety. The law is precisely the same in Nova Scotia. (*d*)

The acceptor for honor is a surety for the person for whose honor he accepts, whether drawer or indorser, and for all parties antecedent to him.

(*a*) Mitchell v. English 17 Grant, 303; Clipperton v. Spettigue, 15 Grant, 269.
(*b*) Clipperton v. Spettigue, *ubi supra*
(*c*) See also Grant v Winstanley, 21 C. P. U. C. 257.
(*d*) See 28 Vic., c. 10, s. 4, of that Province.

It is not till the bill has been presented for payment to the drawee, when due, that the acceptor for honor becomes primarily liable to all parties subsequent to him for whose honor he accepts. When the bill accepted for honor has been presented for payment to the drawee and dishonored, the holder may sue the acceptor for honor.

But the latter is, as between himself and the person for whose honor he accepted, and parties antecedent to that person, a mere surety; and therefore, when he has paid the bill, he can compel any of such parties to reimburse him.

And the holder must not discharge the person for whose honor the bill was accepted, or any person prior to him, for then the acceptor for honor, being but a surety, will be discharged.

It is the general understanding among mercantile men, that each prior indorser on a note, is a surety for each subsequent one; and this understanding is correct. The successive indorsers of a promissory note, merely on proof that it was made for the accommodation of the maker, are not necessarily to be regarded as co-sureties, and so liable to contribution; but in the absence of any agreement to the contrary, the parties on such proof may be considered as having entered into a contract of suretyship, in the terms which the note and indorsements are known to create, and the first indorser having paid the note, cannot recover contribution from the second. (*a*)

But the liability of the indorsers, as between themselves, according to the order in which they stand on the instrument, may be modified by express agreement, and it is not absolutely necessary that such agreement should be in writing, (*b*) and when the second indorser

(a) Ianson v. Paxton, 23 C. P. U. C. 439, in appeal, reversing the case below, 22 C. P. U. C. 505.
(b) But see Elder v. Kelly, 8 Q. B. U. C. 240.

indorses as surety for the payee and first indorser, who is not to become liable; the second indorser will be liable to the first, notwithstanding their respective positions on the note. (*a*)

If the indorsement was intended by all parties as a security to the payee, and it was not intended that the payee should be liable to such subsequent indorser, effect will be given to the agreement of the parties. (*b*)

When a note payable to A B, or order, is indorsed by C D, at the makers' request, as surety to A B, and for his benefit, A B may recover on the indorsement against C D; though when the latter indorsed, A B had not indorsed, and though in fact A B does not indorse until after action brought. (*c*)

Where the payee and indorser of a note, is sued by his immediate indorsee, it will be a good defence for the former, to show that the note was intended to have been made to the indorsee, or order, and indorsed by him to the indorser, to secure a debt due to the latter by the maker; but that by mistake itwas made payable to the indorser or order, and that he thereupon indorsed it to the indorsee, in order to enable him to sue the maker, and on the understanding that the indorsees would have no recourse against him, as indorser. (*d*)

The payee of a note, whose name is indorsed in blank thereon, may recover from a subsequent indorser, if such subsequent indorser indorsed as surety to the maker for the payee. Where the real transaction is that the payee discounts the note for the benefit of the maker, he may sue any persons who indorse as suretics to the maker, though their names are subsequent to that of the payee. (*e*)

(*a*) Moffat v. Rees, 15 Q. B. U. C. 577.
(*b*) Wordsworth v. MacDougall, 8 C. P. U. C. 403.
(*c*) Peck v. Phippon, 9 Q. B. U. C. 73.
(*d*) Blain v. Oliphant, 9 Q. B. U. C. 473.
(*e*) Gunn v. McPherson, 18 Q. B. U. C. 244.

Though the order of indorsement is such that the plaintiffs would be liable on the note as prior indorsers to the defendants, yet if the circumstances shew that the defendants will have no right of action against the plaintiffs, notwithstanding their relative positions as indorsers, they may recover against the defendants. Thus, where the payees indorsed to the defendants, but at the date of the note the maker was indebted to the plaintiffs, and it was agreed between them that in consideration that the maker would procure defendant to indorse the note and become surety to the plaintiffs (the payees), the latter would give time to the maker until the note matured, and the note was made in pursuance of such agreement; and the defendant, for the accommodation of the maker, indorsed it to the plaintiffs with the intention thereby of becoming surety to them as indorser, and the maker delivered the note so endorsed to the plaintiff, who thereupon gave time as agreed upon; it was held that the plaintiffs could recover. (*a*)

The law seems to be well settled that if the maker of a promissory note for a debt due by him to the payee requests a third party to indorse it, that he may be surety to the payee, and he does indorse it for such purpose, then the payee can, as such indorsee, recover against such indorser. (*b*)

But the mere fact of writing the name on the back of the note, is not necessarily an indorsement to the payee, and to constitute such an indorsement, it ought to be clearly shewn that the indorser either indorsed it after the payee had indorsed it, for the purpose of being transferred to the payee as security to him from the indorsee, or that he indorsed it with the intent to be a security to the payee for the amount named therein,

(*a*) Foster v. Farewell, 13 Q. B. U. C. 449.
(*b*) Smith v. Richardson, 16 C. P. U. C. 210.

though it may not have been indorsed by the payee, and the payee of a promissory note, indorsed in blank, cannot by merely writing his name above that of the indorser, maintain an action, as indorsee against the latter, unless he shows that he has received authority from the indorser, so to do, with the express object of creating between them, the relationship and consequent liability of indorser and indorsee. (*a*)

The order of signatures by indorsement upon a note, is a mere presumption of the undertakings of the indorsers, with respect to one another, and this presumption may be rebutted by proof of a contrary understanding or covenant. (*b*)

Where a note is made payable to A or order, but is only indorsed by B as surety to the maker, A cannot recover in an action against B, the latter being subsequent to A on the note. (*c*)

(*a*) Robertson v. Hueback, 15 C. P. U. C. 298.
(*b*) Day v. Sculthorpe, 11 L. C. R. 269.
(*c*) Jones v. Ashcroft, 6 O. S. 154.

CHAPTER VIII.

OF NOTICE OF DISHONOR.

When acceptance of a bill is refused on presentment for that purpose, or when payment of a bill or note, on its being presented when due, is refused by the acceptor or maker, the holder cannot sue the drawer and indorser of the bill, or the indorser of the note, unless each of them receives, within a certain time, notice of dishonor.

The object of the notice is both to apprise these parties of the fact of dishonor, and to let them know that they will be called upon to pay.

It is advisable to give the notice in writing, though it is sufficient if only verbal.

There is no precise form of words required in giving notice of dishonor; all that is necessary is to apprise the party liable, of the dishonor of the bill in question, and to intimate that he is expected to pay it. (*a*)

But, as we shall hereafter see, it should show the holder of the bill or note, and that the latter looks to the party to whom the notice is given, for payment. (*b*)

And in the Provinces of Ontario and Quebec, it is necessary that the notice should show that the bill or note has been protested, for non-acceptance or non-payment. (*c*)

(*a*) See East v. Smith, 4 Dowl. & L. 744.
(*b*) See the Con. Stats. Ontario, Chap. 42, S. 21.
(*c*) See Con. Stat. L. C. C. 64.

If the notice is such that the defendant cannot be mistaken as to the bill referred to, it will be sufficient, though not in all particulars strictly accurate. Thus notice of dishonor to the indorser of a promissory note, is not avoided by a mistake in the description of the note; *e. g.*, stating it as a note of £1,000, payable 1st January, 1841, whereas, it was dated 1st January, 1840; the note being in other respects correctly described, and there being no other note to which the notice could have applied. (*a*)

So where a notice of non-payment of a note received by defendant, the first of four indorsers, stated the date and parties correctly, but described it for £28, instead of £25, it was held to be a question for the jury, whether the defendant was misled by the notice, and if he was not misled, that the notice was sufficient. (*b*)

Though there is an error in the date of the notice of dishonor, yet if the indorser is not thereby misled, the notice will be sufficient. Thus where a note was properly presented and protested, but the notice of dishonor, being dated the 20th November, stated the note to have been that day presented and protested for non-payment, whereas, in fact, the note was presented and protested on the 19th, the court held that the proper question for the jury, was whether the indorser had been misled by the mistake in the notice. (*c*)

Where notice of dishonor of a note sent to an indorser stated the amount accurately, but stated incorrectly the day when it became due, and no evidence was given of any other similar note falling due on the day stated, the notice was held sufficient, the defendant not having been misled. (*d*)

(*a*) Robinson v. Taylor, 2 Kerr, 198.
(*b*) Thompson v. Cotterell, 11 Q. B. U. C. 185.
(*c*) Low v. Owen, 12 C. P. U. C. 101.
(*d*) Thorn v. Sandford, 6 C. P. U. C. 462.

If there be more than one bill to which the notice may apply, it lies on the defendant to prove that fact. (*a*)

In case of mis-description of an instrument, as by calling a note a bill, or *vice versa*, or transposing the names of the drawer or acceptor, etc., it is no objection unless mistake or inconvenience has arisen, which lies on the defendant to prove.

All that is required is that there should be no reasonable doubt of the identity of the note referred to in the notice. Thus, in the Province of Quebec it was held, in an action against an indorser of a promissory note payable to the order of the maker, and indorsed by him to such indorser, that the following notice of dishonor, addressed to maker and indorser conjointly, was sufficient in the absence of any proof by defendant of the existence of another note: "Your (W. V. Courtney's) promissory note for £30 currency, dated at Montreal the 2nd September, 1856, payable three months after date to you or order, and endorsed by you, was this day at the request of A B, of this city, merchants, protested by me for non-payment." (*b*)

It will be observed that though in this case there is an inaccuracy in the description of the note, yet the notice in its essentials follows the form given in the Con. Stats. of the Province of Quebec, c. 64, at page 531. The form there given of notice of protest for non-payment of a note is as follows:—

Montreal, 12th January, 1874.

To A B,

At————

Sir,—Mr. C D's promissory note for $1,000, dated at Montreal, in the Province of Quebec, the ninth day of September, in the year of our Lord, 1873, payable four months after date to E F or order, and endorsed by you,

(*a*) Shelton v. Braithwaite, 7 M. & W. 436.
(*b*) Handyside v. Courtney, 1 L. C. J. 250.

was this day at the request of G. H. protested by me for non-payment.

J. K.,
Not. Pub.

Section 22 of the Statute in force in Quebec provides that the several notings, protests, notices thereof, and services of notices, shall be in the forms of the several schedules of forms to the Act subjoined. It is apprehended that the only safe course is to follow the forms given in the several statutes in all their essentials, and that the cases already referred to do not go further than relieve against mere inaccuracies of description.

The form of notice of dishonor prescribed by the Con. Stats. of Ontario, chap. 42, s. 21, is as follows:—

Toronto, January 12th, 1874.

To Mr. A B,

Sir,—Take notice that a bill of exchange, dated on the 9th day of September, 1873, for the sum of $1,000, drawn by C D on and accepted by E F, payable four months after the date thereof at the Bank of Toronto, in Toronto, and indorsed by you and C D, was this day presented by me for payment at the said Bank, and that payment thereof was refused, and that G H, the holder of the said bill, looks to you for payment thereof; also take notice that the same bill was this day protested by me for non-payment.

Your obedient servant,

A. H.,
Notary Public.

In England it is held that the notice need not state on whose behalf it is given, nor who is the holder of the bill or note; but under the statute referred to in Ontario, it is conceived that the notice must show the holder of the instrument and on whose behalf payment is applied for.

Where a note was payable to defendant or order at the residence of Hiram Dell, Strathroy, only, and not otherwise or elsewhere, and a notice of non-payment was sent by Hiram Dell, dated Strathroy, 13th October, 1857, to the defendant at Whitby, the notice was held to convey a sufficient intimation to the defendant that Hiram Dell was the holder of the note when it fell due. (*a*)

When a note is not payable at a bank or other particular place, it is necessary that the notice of dishonor should shew that the note has been presented to the maker and dishonored. (*b*)

But where the note is payable at a bank and they are the holders thereof at the time of its dishonor, it is not necessary for the notice to state that the note was presented and dishonored. (*c*)

The same rule applies when the note is payable at the office of a private individual, who is the holder thereof when the notice is sent. (*d*)

The person giving the notice of dishonor, though he need not be the actual holder, must be not only a party to the bill or note but one himself, liable or capable of being liable to pay the money. Thus, a notice is insufficient if given by a party who, not having himself received notice in due time, is discharged by the negligence of the party antecedent to him. (*e*)

But a notice by the holder, or by a party who is liable to be sued and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. (*f*)

An agent authorized to receive payment of a note may give notice of dishonor; and where a note indorsed in blank is left at a bank for collection, notice of dishonor

(*a*) Harris v. Perry, 8 C. P. U. C. 407.
(*b*) Bank of Montreal v. Grover, 3 Q. B. U. C. 27.
(*c*) Bank of Upper Canada v. Street, 3 Q. B. U. C. 29.
(*d*) Blinn v Dixon, 5 Q. B. U. C. 580.
(*e*) Chapman v. Keane, 3 A. & E. 193; Harrison v. Russoe, 15 M. & W. 231.
(*f*) Bayley, 6th Ed. 251.

may be given by the bank, though it has no interest in the note. (*a*)

So the cashier of a bank with whom a note is left for collection has authority to give notice of dishonor; (*b*) and it seems an agent, such as a banker or attorney, may give the notice of dishonor in his own name. (*c*)

Where a note is made payable to and indorsed by several persons, though not in partnership, notice to one is notice to all, for they are partners in the transaction, and the payment or discharge of one is the payment or discharge of all. (*d*)

And where partners are jointly liable on the bill, notice to one is sufficient. (*e*)

When a note is indorsed by an individual in his own name, a notice sent to a firm, of which he is a member giving notice of dishonor, as if the firm were indorsers, will not, it seems be sufficient. (*f*)

All parties are entitled to receive notice of dishonor, save the maker of a note and the acceptor of a bill; and the safest course for the holder of a dishonored bill is to give notice to all the parties to the bill within the time within which he is, by law, required to give notice to his immediate indorser. (*g*)

Notice may be given to the clerk of a man of business, at his office, and notice to an agent for the general conduct of business, is sufficient notice to the principal, but notice to a man's attorney or solicitor, is not sufficient. (*h*)

But a verbal message left at the drawers' house, with his wife, has been held sufficient. (*i*)

(*a*) Howard v. Godard, 4 Allen 452.
(*b*) Girvan v. Price, 3 Allen 409; Wilson v. Pringle, 14 Q. B. U. C. 230.
(*c*) Woodthorpe v. Lawes, 2 M. & W. 109.
(*d*) Bank Michigan v. Gray, 1 Q. B. U. C. 422.
(*e*) Porthouse v. Parker, 1 Camp. 83.
(*f*) Bank of Montreal v. Grover, 2 Q. B. U. C. 27.
(*g*) Rowe v. Tipper, 13 C. B. 249.
(*h*) Crosse v. Smith, 1 M & Sel. 545.
(*i*) Housego v. Cowne, 2 M. & W. 348.

If the party be dead, notice should be given to his personal representatives, and if there be no personal representative, a notice sent to the residence of the deceased party's family is sufficient. (*a*)

If a party be insolvent, he must still have notice, and so should his assignees, if appointed, and in case the insolvent have absconded, notice should be given to the messenger in possession.

By the law in the Province of Quebec, notice given to the duly appointed assignee, in insolvency, of the party liable on the bill or note, is as valid and effectual as if given to the insolvent personally. (*b*)

As a general rule, a man transferring by delivery, without indorsement, a bill or note payable to bearer, is not entitled to notice. (*c*)

To one who has merely guaranteed the payment of a bill or note, notice need not be given unless he has contracted to receive it, or would be prejudiced by the absence of it. (*d*)

If a man is liable on a bond or mortgage, or other independent instrument, and also as indorser of a bill or note for the same consideration he may be sued on the deed without notice of dishonor of the bill. (*e*)

Where the person giving the notice, and the person to whom it is sent, both live in the same place, the notice must be given so as to be received the next day after dishonor, or after receipt of notice of dishonor.

Where they both live in different places, the notice must arrive as early as a letter would arrive, if posted on the next day after dishonor, or after receipt of notice of dishonor.

(*a*) Merchants' Bank v. Birch, 17 John's Reps. 25
(*b*) Con. Stat. L. C. c. 64 s. 13. s. s. 2
(*c*) Van Wart v. Woolley, 3 B. & C. 439; Swinyard v. Bowes, 5 M. & Sel. 62.
(*d*) Warrington v. Furbar, 8 East. 242; Swinyard v. Bowes, 5 M. & S. 62; Hitchcock v. Humphrey, 5 M. & G. 559.
(*e*) Murray v. King, 5 B. &. Ald. 165.

This is the best course for the holder to adopt, for it makes sure that each of the parties receives notice in due time. This time is reckoned on the supposition that each party, from the holder upwards, gives notice to the party from whom he has taken the bill, and the time allowed for each notice is dependent on whether the giver and recipient of it live in the same or in different places.

Now, it is plain that if the holder gives notice only to *his* indorser, the power of the holder to sue any other party will depend on whether the indorser is prudent or diligent enough to give notice to the person from whom *he* received the bill, and so on through all the parties up to the drawer.

So that if the holder has not himself given notice to the person whom he sues, it will be necessary to prove the due transmission of notice through each of the prior parties, and that too, in proper time—for the diligence of one is not to compensate for the negligence of another.

If any party is himself discharged for want of punctual notice, a notice from him can in no case bind another party.

When the parties to the bill do not reside in the same place, notice by a special messenger within the time in which it would have been received by post, is sufficient.

The plaintiff and defendant resided about three miles distant from each other, and the mail ran between both places, and closed at the place where the plaintiff resided, on Monday, Wednesday, and Friday of each week. The bill declared on was presented on the morning of the 4th, being the last day of grace, and not paid, there being no mail on the 5th; notice was served on the defendant by a special messenger, on the morning of the 6th, before it could have reached him had it been mailed on that day, and the court held that the notice was served in good time. (*a*)

(a) Chapman v. Bishop, 1 C. P. U. C. 432.

The Consolidated Statutes of Ontario, chapter 42, s. 16, provides that the notice of dishonor shall be deemed to be duly served for all purposes upon the party to whom the same is addressed, by being deposited in the Post Office nearest to the place of making presentment of such bill or note, at any time during the day whereon such protest was made, or the next juridical day then following.

But the statute only provides one mode by which notice may be sent, and it is not absolutely necessary that the notice should be mailed in the place of presenting the note. Where the maker and indorser lived in Griersville, where the note was payable, and the note was duly presented there; but the notice was mailed in Meaford, a village about five miles from the place of presentment, the notice was held sufficient. (*a*)

Under the Statute in force in the Province of Quebec, Con. Stat. L. C. c. 64, the service of notice of protest for non-acceptance or non-payment may be made within three days next after the day on which the bill or note is protested, and if this is done, the service has the same effect as if made on the day of protesting the note.

In that Province, the bill may be presented for payment if unpaid at the expiration of the forenoon of the last day of grace; and in default of payment it may be protested for non-payment. But, under section 16 ss. 2, of this statute, no presentment and protest for non-payment of any bill or note, shall be sufficient to charge the parties liable on such bill or note, unless such presentment and protest are made in the afternoon of the last day of grace. (*b*)

And it has been held in the Province of Quebec, that the omission to state in a notarial protest, that it was made in the afternoon of the day of protest is fatal, and in such case the indorser is discharged. (*c*)

(*a*) Taylor v. Grier, 17 Q. B. U. C. 222.
(*b*) See also Article 2319 of the Civil Code.
(*c*) Joseph v. Delisle, 1 L. C. R. 244.

This statute, however, does not apply in the Province of Ontario. (*a*)

If the notice of dishonor is mailed at the post-office of the place where the indorser resides, the notice has the same effect as if sent by a special messenger, for in the ordinary course of Post Office business, which the court will notice judicially, the indorser obtains his notice with as much certainty as if the letter were mailed at any other Post Office. (*b*)

In the Province of Ontario, where a note is protested on the last day of grace, a notice of non-payment deposited in the Post Office on the day after, between eight and nine o'clock in the evening, will be sufficient, though the notice bears the post mark of the following day, if letters posted at that hour, are not in the usual course of business stamped till the following day. The day, for the purpose of posting notices, does not end at sun-down, or after dark, but signifies any time within the twenty-four hours. (*c*)

A notice of protest sent by a notary, which from misdirection has not reached its destination so soon as it would otherwise have done, is nevertheless a sufficient notice, if being posted sooner than was necessary, it has in fact been received within the period allowed by law for giving notice of dishonor. (*d*)

Where the indorser of a note maturing on the 11th February gave the holder the following memorandum, "My note maturing the 10th instant, good for ten days after date," the note referred to was maturing on the 11th. No other note existed. It was held that this memorandum extended the time for giving notice of dishonor for ten days from the maturity of the note, and that a protest given on the 24th of February was sufficient to render the indorser liable. (*e*)

(*a*) Ridout v. Manning, 7 Q. B. U. C. 35.
(*b*) Com. Bank v. Eccles, 4 Q. B. U. C 336
(*c*) Wilson v. Pringle, 14 Q. B. U. C. 230.
(*d*) Bank B. N. A. v. Ross, 1 Q. B. U. C. 199.
(*e*) Burnett v. Monaghan, 1 Revue Critique 473.

When a bill is in the hands of an agent as an attorney or banker, he is considered as a separate party as regards time for giving notice, and consequently he has a day to give notice to his principal, and the latter another day to give notice to the antecedent parties. (*a*)

Where the holder is suing the drawer of a bill upon which there has been several intermediate indorsers, it is not necessary for the holder to show notice given from each indorser within the regular period. (*b*)

On the dishonor of a foreign bill which passes through several hands before it reaches the plaintiff, it is not incumbent on the latter to shew that he received notice in time. If he send it by the first practicable conveyance after he would himself be entitled to notice, this is sufficient. A bill drawn in Saint John, New Brunswick, was dishonored in London, England, on the 16th of October (a Saturday). The plaintiffs resided at Wolverhampton, in England, but were not then the holders. The then holder resided in London, but as the 16th was a Saturday he was not bound to send notice to the plaintiffs till the 18th. The plaintiffs, therefore, would not receive it till the 19th; but even if they had received it earlier, the Court held that they were not bound to transmit notice to the drawer until they were themselves entitled to it; and, it appearing that they had sent notice by the first mail after the day when they should have received notice from the holder in London, that this was sufficient. (*c*)

Where a bill drawn on persons residing in Dublin, Ireland, was protested for non-payment on the 3rd November, 1841, notice thereof to the indorsers, who resided at Saint John, in the Province of New Brunswick, where the bill was drawn, on the 22nd December following, was held not to be in due time, it appearing that mails left Great

(*a*) Robson v. Bennett, 2 Taunt. 388; Bray v. Hadwen, 5 M. & Sel. 68; Firth v. Thrush, 8 B. & C. 387.
(*b*) Bayes v. Joseph, 7 Q. B. U. C. 505.
(*c*) Tarratt v. Wilmot, 1 Allen 353.

Britain for the Province on the 4th and on the 19th of November, and that a notice sent by the mail of the 19th would have reached Saint John about the 4th December. (*a*)

A promissory note made in Ontario, payable in Montreal, is an inland note, being in effect payable generally under our statute (Con. Stats. U. C. c. 42), and may be properly protested on the day after the third day of grace, and the presentment at the place of payment may be proved by a notarial act. (*b*)

It was held that a promissory note made between parties in Nova Scotia, payable in the Province of New Brunswick, was a foreign bill, and that a protest thereof was necessary. It is not now necessary that a copy of the protest should be sent, but the notice of dishonor must state that the bill has been protested. (*c*)

In the Province of Quebec there is no distinction between foreign and inland bills of exchange. (*d*)

Delivering a notice of non-payment to an indorser by leaving it with an out-door servant cutting fire wood in the indorser's yard, who is not known or proved to have been an inmate of the indorser's family, is insufficient. But if the evidence lays a foundation for belief that the indorser actually received the notice, then he would be liable. (*e*)

Where the indorser of a note (the defendant) and several of his brothers lived with their mother, and the proof of service of notice of dishonor was an entry in a book by a deceased clerk of a notary, whose business it was to serve notices of dishonor and to make entries thereof in a book, and who had been directed to serve the notice at the residence of the defendant, "Served on brother at residence,"

(*a*) Bank N. B. v. Knowles, 2 Kerr 219.
(*b*) Bradbury v. Doole, 1 Q. B. U. C. 442.
(*c*) Delaney v. Hall, 2 Thomson 401.
(*d*) Knapp v. Bank Montreal, 1 L. C. R. 252.
(*e*) Com. Bank v. Weller, 5 Q. B. U. C. 543.

the Court held in the absence of evidence that any brother of the defendant had any other residence than at their mother's house, that it was a fair presumption that notice had been served there, and that the Judge was warranted in leaving it to the jury to find whether it had been duly served. (*a*)

The usual way of giving notice, particularly where the parties live at a distance, is by post, for it not only has the advantage of the distinctness of a written communication, but if the letter is properly addressed and miscarries, the sender of the notice does not lose his rights and has merely to prove the posting of the notice.

Thus, it has been held that if the holder does what the law considers sufficient for giving notice he can recover, though the notice should in fact miscarry. Under the old law, where the indorser lived in one township where there was a post-office, but there was a post-office nearer to the indorser in an adjoining township, and the latter post-office was the longest established, a notice posted to the indorser at the latter post-office in due form was held to be sufficient, though the notice was not in fact received by the indorser. (*b*)

In the Province of Quebec, notice to any party entitled thereto, of the protest for non-acceptance or non-payment, shall be sufficient, if such notice is given to such party personally, or at his residence, office or usual place of business; and in case of death or absence, at his last residence, office or place of business, or if the notice directed to such party is deposited in the nearest post-office communicating with the residence or office, or place of business aforesaid, of such party, and the postage thereon be prepaid. (*c*)

The Con. Stats. Can. c. 57 s. 6, provides that all protests

(a) Canby v. Wright, Mich. T. 1872, Stevens' Digest, N. B. Reports, 71.
(b) Bank of Upper Canada v. Smith, 3 Q. B. U. C. 358; S. C. affirmed, 4 Q. B. U. C. 483.
(c) Con. Stat. L. C. c. 64 s. 13.

of bills of exchange and promissory notes shall be received in all courts as *prima facie* evidence of the allegations and facts therein contained.

Section 7 of this Statute provides that any note, memorandum or certificate, at any time made by one or more notaries public, either in Ontario or Quebec, in his own handwriting, or signed by him at the foot of or embodied in any protest, or in a regular register of official acts kept by him, shall be presumptive evidence in Ontario of the fact of any notice of non-acceptance or non-payment of any note or bill having been sent or delivered at the time, and in the manner stated in such note, certificate or memorandum.

Section 8 provides that the production of any protest on any note or bill, under the hand and seal of any one or more notaries public, either in Ontario or Quebec, in any court in Ontario shall be presumptive evidence of the making of such protest. Sections 7 and 8 of this Statute have the effect of making the certificate of a notary evidence of the sending or delivery of a notice of non-payment, &c., and they also make the production of a protest *prima facie* evidence of presentment for payment or acceptance. (*a*)

The form of protest given in the Statute of Ontario, Con. Stats. c. 42 s. 21, sets out the serving of notice, according to law, upon the several parties thereto, by depositing in the post-office at ———, being the nearest post-office to the place of the said presentment, letters containing such notices, one of which letters was addressed to each of the said parties severally, adding the superscription and address of the letters. The sixth section of the Statute of Canada, before referred to, only applies to Ontario; but under this section, in the Province of Ontario the protest is *prima facie* evidence of the giving of notice

(*a*) Codd v. Lewis, 8 Q. B. U. C. 242.

of dishonor, for the form of protest used contains an allegation to that effect.

Indeed, it has been held that the certificate of a notary on the adjoining half sheet of the protest that he had served on the indorser a notice of non-payment of the note protested, was sufficient evidence of notice to the indorser of non-payment of the note. (*a*)

The notarial certificate is only to be received in evidence of such facts as the notary may properly do, and if the notary has no authority to give notice of dishonor, his certificate to the effect that he had given notice would not be sufficient. (*b*)

It is impossible, however, to hold, since the passing of the statute referred to, by which the production of a protest is made *prima facie* evidence of the allegations and facts therein contained, that the notary is not a proper person to give notice. (*c*)

And we may, therefore, safely conclude that in Ontario the protest in the ordinary form is *prima facie* evidence of the sending of notice of dishonor to the parties entitled thereto.

Where a notarial certificate of protest of a note due 25th of June was dated on the 26th of June, and certified that the notary had sent notice to the indorser, not saying when it was sent, the Court held that the notice of non-payment was sufficiently proved, for by the certificate the notice must have been given either on the 26th or on the 25th. If on the 26th, it would be in proper time; and if on the 25th, it would also be sufficient, for notice given on the day the bill is payable will be good if the bill is not afterwards paid. (*d*)

A notarial certificate that a note has been duly protested is sufficient, without alleging that the note has been

(*a*) Russell v. Crofton, 1 C. P. U. C. 428.
(*b*) Ewing v. Cameron, 6 O. S. 541.
(*c*) See Bank B. N. A. v. Ross, 1 Q. B. U. C. 204.
(*d*) Wood v. Hutt, 9 Q. B. U. C. 344.

presented, for it could not be duly protested without being presented. (*a*)

In the case of *Ross* v. *McKindlay*, (*b*) the Court expressed an opinion that a notarial protest from Quebec, certified by the notary as a true copy from his notarial book, was sufficient without any notarial seal.

And a protest without seal is admissible evidence of the facts therein contained, under the sixth section of the Statutes of Canada, chap. 57, already cited. (*c*)

Where a note is dated and made payable at any place in the United States, the production of a protest of a notary of that place is no evidence in this country of the facts therein stated. A protest, to be evidence in our courts, must be made in conformity with the seventh section of the Con. Stats. Can. c. 57; in other words, this statute only applies to protests made by notaries in Ontario and Quebec. (*d*)

To prove the sending of notice without reference to the statute, it is necessary to call as a witness the person who posted it, and also the writer, or some one else who can speak to its contents.

It will be sufficient proof of posting, however, if the writer of the notice deposes to putting it in a box or on a table for posting, and a servant afterwards deposes that he always posts all the letters so placed. (*e*)

An action by the payee against the drawer of a dishonored bill of exchange was discontinued on terms of the acceptor paying the costs, and placing the amount of the bill to the payee's credit with a person to whom he was indebted; and on the representation of the acceptor that this had been done the bill was given up to him. The Court held *in trover* against the acceptor for the bill, that the jury might presume from these facts that the

(*a*) Blain v. Oliphant, 9 Q. B. U. C. 473.
(*b*) 1 Q. B. U. C. 507.
(*c*) Russell v. Crofton, 1 C. P. U. C. 428.
(*d*) Griffin v. Judson, 12 C. P. U. C. 430.
(*e*) Shilbeck v. Garbett, 7 Q. B. 846.

payee had given notice of dishonor to the drawer, inasmuch as the acceptor had admitted the liability of the drawer in the action against him. (*a*)

Upon a plea denying notice of non-payment, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week after, and there was some slight proof of his having applied to the plaintiff for further time for payment, though it was not clear whether the application referred to the note in question or another. The jury were directed that the evidence was insufficient, but they nevertheless found for the plaintiff; and the Court, though agreeing with the direction, refused to interfere. (*b*)

A plea by one of two indorsers, who at the time of indorsing were partners, that neither he nor his partner, who had suffered judgment by default, had due notice of the non-payment of the note, is not disproved by the fact of the partner of the party pleading having suffered judgment by default, and so allowing judgment to go by default does not operate as against the partner pleading as an admission of notice. (*c*)

In the Province of Quebec the service of the notice of dishonor is attested under the signature of the notary, on a duplicate of the notice; and when this is done, it is taken in all courts as *prima facie* evidence of the allegations and facts therein contained. (*d*)

In an action against the indorser of a promissory note the duplicate notice of protest must be produced and fyled, and the certificate of the notary that he has served due notice upon the indorser is insufficient. (*e*)

In case there is no notary in the place or he is unable or refuses to act, any Justice of the Peace in Quebec

(*a*) McDonald v. Everitt, 3 Kerr 569.
(*b*) Leith v O'Neill, 19 Q. B. U. C. 233.
(*c*) Pengnet v. McKenzie, 6 C. P. U. C. 308.
(*d*) Con. Stat. L. C. c. 64, s. 14.
(*e*) Seed v. Courtenay, 3 L. C. R. 308.

may make such noting and protest, and give notice thereof in the same manner, and his acts in that behalf have the same effect as if done by a notary, but such Justice must set forth in the protest the reason why the same was not made by the ministry of a notary. (*a*)

The annexing of a copy of the promissory note to the protest, or affixing it to the notarial act, is sufficient. The certificate of the notary, signed by him, of notice sent, *indorsed* on the protest, instead of being written "on the foot of or embodied in the protest," sufficiently complies with our Act. (*b*)

In an action against the drawer of a foreign bill, the protest is evidence of an acceptance payable at a particular place, and of due presentment at that place. (*c*)

In an action on a promissory note drawn and payable in the Province of Quebec, the law of that Province must govern in regard to the sufficiency of the notice of non-payment by the maker to charge the indorser. (*d*)

When the note is made and indorsed in Ontario, but made payable in Quebec, the law of the latter Province is to govern the time within which notice of non-payment is to be sent. (*e*)

The Statute of Canada, 37 Victoria chap. 47 sec. 1, provides that notice of the protest or dishonor of any bill of exchange or promissory note, payable in Canada, shall be sufficiently given if addressed in due time to any party to such bill or note entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature on such bill or note, designated another place, when such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be

(*a*) Art. 2304 of the Civil Code.
(*b*) Lyman v. Boulton, 8 Q. B. U. C. 323.
(*c*) Tarratt v. Wilmott, 1 Allen, 353.
(*d*) City Bank v. Ley, 1 Q. B. U. C. 192.
(*e*) Mathewson v. Carman, 1 Q. B. U. C. 259.

sufficient, although the place of residence of such party be other than either of such before-mentioned places. By virtue of this statute a person may, when becoming a party to a bill or note, prescribe under his signature the place to which notice of dishonor to him must be sent; and if the party specifies no place the notice of dishonor may be sent to the party at the place where the note is dated, whether the party resides there or not.

The law in the Province of Ontario, prior to the passing of the statute, was that the notice of dishonor might be sent in writing to the residence or place of business of the party for whom it was intended, or it might be served in writing or delivered by word of mouth to the party personally. It is apprehended that the statute is merely for the convenience of the holder in cases where he is unable to ascertain the residence or place of business of the party entitled to notice, and that it does not abolish the former, but merely prescribes additional methods of giving notice. It would seem, as the law now stands, when the holder knows the residence or place of business of the party he may send a written notice by post, according to the Con. Stat. of Ontario, chap. 42, or he may serve a written notice on the party personally, or give him verbal notice of the dishonor; or he may, where it is more convenient, send a notice in writing to the party entitled at the place where the note is dated, unless some other place is specified on the note itself, under the signature of the party entitled, when notice must be sent to such place. Whether it is not in the latter case imperative on the holder to send notice to the place designated, admits of very great doubt on the terms of the statute. It is conceived that the safer course, when a place is designated on the note pursuant to the statute, is to send notice to the place designated. Under the law prior to this statute, if the notice reached the party it

did not matter whether it were rightly addressed. If rightly addressed, the Court would treat it as having reached the party entitled, though the evidence proved the contrary, for the party was not permitted to suffer by the failure of the post.

Where the holder desires to avail himself of the provisions of the Act referred to, he must prove that the notice was *addressed* in due time to the proper place. This is all he is called upon to prove, but in the absence of such proof it is conceived he would have to support his notice on general principles, independent of the statute.

If all the formalities of the law are complied with in posting or serving notice, this is sufficient, though the notice never reach the party; and where the letter is not properly addressed or despatched, it is conceived that proof that it actually came into the hands of the party entitled in proper time would make the notice good.

When the letters containing notice of dishonor are not properly addressed, it must be shewn that they were posted in proper time, and that they came into the hands of the proper party in proper time. Thus, where the letter was addressed, "Administrator of William Stinson's estate, Belleville," instead of to the administrator by name, it was held that such proof as above mentioned was necessary. (*a*)

Where the notice is not properly addressed there must be clear evidence that it came into the hands of the proper party; but if such evidence is furnished the notice will be sufficient, though there is a mistake in the description of the party. A notice of protest left by a notary with the payee and first indorser of a note personally, is sufficient, although the notice is addressed

(*a*) McKenzie v. Northrop, 22 C. P. U. C. 383.

to "C. C. Payette, Sir," and such indorser is a married woman, described as "Catherine Godin *dite* Chatliton," separated as to property from Eugene Payette, her husband. (*a*)

A notice of protest, addressed to a female indorser as "Sir," is bad where there is no evidence that she received the notice. (*b*) But such a notice is sufficient if proved to have been duly served upon her. (*c*)

The notice must be so addressed as to reach the party entitled in due course of post. A notice of non-payment, addressed to no one by name, nor to any street, or house, or place of business, but merely "to the executrix or executor of the late Mr. Jones, Toronto," is bad, for the Court could not assume that the postmaster would take the trouble to enquire who were the executors or executrix of Mr. Jones, or that the matter was so public and notorious that the letter was sure to reach the proper party without delay. (*d*)

It has been held that notice sent to the indorser at the place where the note was dated, is sufficient diligence, such place being sufficient indication of the indorser's domicile to warrant the holders in seding notice there, the indorsement being unrestricted.

In the case of a protest of a note dated at Montreal, and payable at a bank in Albany, in the State of New York, a notice of protest mailed at Albany addressed to an indorser at Montreal, (protest being made, and notice mailed according to the laws of the State,) is not sufficient where the postal arrangements between the two countries at the time are such, that letters could not pass through the post without the pre-payment of postage from Albany to the line. (*e*)

(*a*) Mitchell v. Browne, 15 L. C. R. 425
(*b*) Seymour v. Wright, 3 L. C. R. 454.
(*c*) Mitchell v. Browne, 9 L. C. J. 168.
(*d*) Bank B. N. A. v Jones, 8 Q. B. U. C. 86; see also Balloch v. Binney, 3 Kerr, 440.
(*e*) Howard v. Sabourin 5, L. C. R. 45, affirming S. C., 2 L. C. R. 519.

Where a party proposes to give a note indorsed by another, and states the place of his residence, and the note is afterwards indorsed and delivered to the maker, the indorser thereby constitutes the maker his agent for the purpose of informing the creditor of the place of his residence, and a notice to the indorser of non-payment, mailed by the creditor to the place named by the maker, will be sufficient, although the place stated is not the proper place for sending notice. (*a*)

So, where the agent of the indorser is asked by the holder's agent where the indorser resides, and the agent gives an erroneous direction, which the holder's agent writes in pencil under the indorser's name, notice of non-payment sent to the indorser at such supposed place of residence, will be sufficient. (*b*)

Under the old law, it was held that it must be shown that the defendant lived at the place to which the letter was addressed. In a case where this was not shown, the Court held that a notice of dishonor put in the post office at St. John, and directed as follows:—"Mr. Daniel Duff, near Blake's Mills, Nashwaalk," was not sufficient, without proof that a letter thus directed would probably reach the defendant in due course, through the medium of the post office. (*c*)

A notice of non-payment of a note sent to an indorser through the Toronto post office, (the place where the note was dated,) addressed to him in "York Township" in which he resided, was held sufficient, there being no evidence as to whether there were one or more post offices in that Township, nor any proof that a letter for any other purpose would have been usually addressed in any other manner, or ought in the common course of things to have been directed to any certain post

(*a*) McMurrich v. Powers, 10 Q. B. U. C. 481.
(*b*) Vaughan v. Ross, 8 Q. B. U. C. 506.
(*c*) Robinson v. Duff, 2 Kerr, 206.

office in the Township, or in any other Township near him. The City of Toronto, being in the Township of York. (*a*)

It is immaterial that a notice of dishonor is dated on Sunday, if given on the following Monday, in due course, the note falling due on the preceding Saturday and the days of grace expiring on Sunday. (*b*)

Notice may be dispensed with and excused by a prior agreement on the part of the party otherwise entitled to it, that it shall not be necessary to give him notice. (*c*)

Where, before the note matures, the indorser, believing that the maker will not pay, recovers a judgment against him for the amount of the note on other securities, and makes the debt his own, and then writes to the holder, before maturity, that he has no intention to evade his liability, notice of dishonor is dispensed with. (*d*)

If the drawer has at no time during the currency of the bill, had effects in the acceptor's hands, and can have no remedy thereon against the acceptor, or any other person; *e. g.*, if the bill was accepted for the drawer's accommodation, and has always remained an accommodation bill, it is not necessary to give him notice of dishonor. (*e*) But the drawer must have no remedy on the bill against the acceptor, or any other person; and if the bill is drawn for the accommodation, not of the drawer, but of the acceptor, the drawer will be entitled to notice; for on paying the bill he can sue the acceptor. (*f*) So if the bill were for the accommodation of an indorser, the drawer will be entitled to notice; for on payment he can sue the indorser. (*g*)

(*a*) Bank Upper Canada v. Bloor, 5 Q. B. U. C. 619.
(*b*) Blinn v. Dixon 5 Q. B. U. C. 580.
(*c*) Phipson v. Kneller, 4 Camp 285.
(*d*) Beckett v. Cornish, 4 Q. B. U. C. 138.
(*e*) See Bickerdike v. Bollman, 1 T. R. 406.
(*f*) Ex parte Heath 2 Ves. & B. 240; Cory v. Scott, 3 B. & Ald. 619.
(*g*) See Wilks v. Jacks, Peake 202.

Though the acceptor, at the time of dishonor, have no effects of the drawer in his hands, yet if he ever had any after the drawing of the bill, or if without effects the drawer had any reasonable ground for expecting that the bill would be honored, he is entitled to notice. (*a*)

A drawer who himself made a bill payable at his own house, has been held not entitled to notice, for it might be presumed to be for his own accommodation. (*b*)

In the Province of Quebec the drawer cannot avail himself of the want of protest and notice, unless he proves that provision was duly made by him for the payment of the bill. (*c*)

The holder's ignorance of a party's residence will excuse notice of dishonor, provided due diligence be used to find such residence; and due diligence is a question for a jury. (*d*)

Although a bill be lost, notice of dishonor must be given, for the bill may be paid, with or without an indemnity, and may be even sued upon if an indemnity is given to the satisfaction of the Court. In the Province of Quebec the want of protest and notice is not excused by the loss of the bill or by the death or bankruptcy of the drawee or of the party entitled to notice. (*e*)

The death or dangerous illness of the holder or his agent, or other accident, not attributable to the holder's negligence, which incapacitates him from attending to business, will excuse the giving of notice while the incapacity continues. In the Province of Quebec the want of protest and notice is excused when they are

(*a*) Orr v. Maginnis, 7 East, 359; Legge v. Thorpe, 12 East, 171; Blackhan v. Doren, 2 Camp. 503
(*b*) Sharp v. Bailey, 9 B. & C. 44.
(*c*) Art. 2383 of Civil Code; Knapp v. Bank Montreal, 1 L. C. R. 252.
(*d*) Bateman v. Joseph, 12 East, 433.
(*e*) Art. 2325 of the Civil Code.

rendered impossible by inevitable accident, or irresistible force. They may also be waived by any party to the bill, in so far as his rights only are concerned. (*a*)

Where, after the time for giving notice of dishonor, there is an absolute promise to pay, deliberately made, with full knowledge of the *facts*, this will prevent the defendant from setting up that a notice was not given. (*b*)

And if the indorser of a bill or note promise to pay it, with full notice that he is not legally liable, he will be bound to do so, though he is at the time actually discharged from want of presentment and notice of dishonor. (*c*)

In an action by indorsee against indorser of a note, an averment of presentment and notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice. (*d*)

It makes no difference that the promise is made under a mistake of law, for all are presumed to know the law; but it will not be binding if made under a mistake of fact. For example, if at the time the man made the promise to pay an overdue bill he supposed the bill to have been presented, while in truth it had not, the promise would not waive his right to insist on want of notice. (*e*)

Where there are several notes the promise to pay must have direct reference to the bill or note in question. The plaintiff sued the drawer of a bill of exchange for $1,000 upon it, and two notes of $1,000 and $500 respectively. No notice of dishonor of the bill had been given, but the plaintiff's agent swore that

(*a*) Art. 2324 of the Civil Code.
(*b*) Shaw v. Salmon, 19 Q. B. U. C. 512.
(*c*) Watters v. Lordly 2 Kerr. 18.
(*d*) McCarthy v. Phelps, 30 Q.B.U.C 57; but see Bank B. N. A. v. Ross, 1 Q.B.U.C. 199.
(*e*) Bilbie v. Lumley, 2 East, 469; Goodall v. Dolley, 1 T. R. 712.

after its maturity, in conversation with him respecting the whole liability, defendant appeared willing to pay if time were given, and said that if he and his brother (the acceptor) got time it would be all right. He said, however, that this bill was never particularly mentioned, and no promise made relating to it specifically; and the Court held this insufficient to dispense with notice. (*a*)

The promise to pay need not be made to the plaintiff, but may be made to another party to the bill, or to a stranger: (*b*) and a promise made to a solicitor authorized to collect the debt is of the same effect as if made to the creditor himself, for the solicitor is the agent of his client for this purpose. (*c*)

If a party to a bill or note promise, before it is due, to pay it if dishonored, this does not dispense with notice; for it presumes notice will be given, and promises nothing but what the law would enforce. (*d*) But if he tell the holder that he will call at the acceptor's and see if the bill is paid at maturity, this amounts to a consent to dispense with notice. (*e*) An agreement to dispense with notice binds the parties to the agreement, but leaves unaltered the necessity of sending notice to the others.

A promise to pay the note, made after action brought, will dispense with proof of notice of dishonor, as well as if made before, for the promise is not the ground of action, but is relied on only as an admission of liability. (*f*)

Thus where the defendant, an indorser, pleads the want of presentment, and no notice of non-payment, the holder of the note will, nevertheless, be entitled to

(*a*) Bank of Montreal v. Scott, 24 Q. B. U. C. 115.
(*b*) Potter v. Rayworth, 13 East, 417; Ganson v. Mets, 1 B. & C. 198.
(*c*) Johnson v. Geoffrion, 13 L. C. R. 161.
(*d*) Pickin v. Graham, 1 C. & M. 725.
(*e*) See Phipson v. Keller, 4 Camp. 285.
(*f*) Burke v. Elliott, 15 Q. B. U. C. 610.

recover against him, by proving his promise to pay, made after action brought, and after issue is joined, for the admission operates as evidence of a previously existing fact, which it otherwise would have been necessary to prove. (*a*)

A promise by the indorser to pay the note after his discharge for want of protest, may be proved by parol evidence, and this, though the promise was also contained in a letter which has been destroyed. (*b*)

In the Province of Quebec, whenever acceptance of a bill of exchange is refused by the drawee, the bill may be forthwith protested for non-acceptance, and after due notice of such protest to the parties liable upon it, the holder may demand immediate payment of it from such parties, in the same manner as if the bill had become due and had been protested for non-payment. The holder is not bound afterwards to present the bill for payment, or if it be so presented, to give notice of the dishonor. (*c*)

The holder of any bill of exchange, instead of protesting upon the refusal to accept, may, at his option, cause it to be noted for non-acceptance by a duly qualified notary; such noting to be made underneath or to be indorsed upon a copy of the bill, and kept upon record by the officiating notary. (*d*)

When a bill which has been noted for non-acceptance as provided in the last preceding article, is afterwards protested for non-payment, a protest for non-acceptance need not be extended; but the noting with the date thereof, and the name of the notary by whom the same was made, must be stated in the protes for non-payment. (*e*)

(a) McCuniffe v. Allen, 6 Q. B. U. C. 377.
(b) Johnson, v. Geoffrion, 7 L. C. J. 125; 13 L. C. R. 161.
(c) Art 2298 of the Civil Code.
(d) Ib. 2299.
(e) Ib. 2300

Upon every bill noted or protested for non-acceptance, the words "Noted for non-acceptance," or, "Protested for non-acceptance," as the case may be, together with the date of noting or protesting, and his fees and charges must be written or stamped by the officiating notary, and subscribed by him with his name or initials as such notary. (*a*)

When a bill is noted for non-acceptance, the holder is not bound to give notice of the same in order to hold any party liable thereon. But whenever a bill so noted is afterwards protested for non-payment, the notice of such protest must contain a notice of the previous noting for non-acceptance. (*b*)

The noting and protesting of bills of exchange for non-acceptance and the giving notice thereof, are done by the ministry of a single public notary, without witnesses in the manner and according to the forms prescribed by the Act intituled "An Act respecting Bills of Exchange and Promissory Notes," (*c*) Con. Stat. L. C. c. 64.

(*a*) Art 2301 of the Civil Code, Quebec.
(*b*) Ib. 2302.
(*c*) Ib. 2303.

CHAPTER IX.

OF THE ALTERATION AND FORGERY OF BILLS AND NOTES.

It is a rule that all instruments in writing, and bills of exchange, and promissory notes among the number, are rendered void by any alteration in a material part, whether made by a party to the instrument, or by a stranger, unless all parties consent thereto. (*a*)

It is held in England, that even if the consent of all parties has been obtained to an alteration in a material part, such alteration, nevertheless, avoids the bill, under the stamp laws, for it is become a new and different instrument, and therefore requires a new stamp, which stamp cannot there be affixed. (*b*)

It is apprehended that the law is different in this country. If by alteration a new instrument is created, it surely may be stamped as effectually under our Statutes, as a note not stamped when issued. As will be hereafter seen, the Statutes in force in Canada allow any holder of an instrument which is not properly stamped, to pay double duty, and thereby render the instrument valid. There is no analagous provision in the English Statutes.

If the alteration is material, and the party affected by it does not consent to it, there is an end of his liability, but if he does consent to remain liable, it would seem

(*a*) Davidson v. Cooper, 11 M. & W. 778; 13 M. & W. 343.
(*b*) See Bowman v. Nichol, 5 T. R. 537.

that the instrument might be re-stamped, and rendered valid under our Statutes.

There are two cases in which an alteration, though in a material part, will not vacate the instrument: first, where such an alteration is made before the bill is issued, or become an available instrument, and secondly where the bill is altered to correct a mistake, and in furtherance of the original intention of the parties. (*a*)

But a bill cannot be altered after an attempt to negotiate it with a holder for value, (*b*) and if either payee or indorsee have given value for it, so that the drawer is liable, an alteration, though before acceptance, vacates the bill. (*c*)

But a mere accommodation bill may be altered before it comes into the hands of a holder for value, as it is not an available instrument until some person has given value for it. (*d*)

If A and B exchange acceptances, this will be a negotiation of each acceptance for value, and neither acceptance can be altered, even while in the hands of the original parties, without any consideration but the exchange. (*e*)

If an alteration is merely for the purpose of correcting a mistake, or to make the bill what it was originally intended to be, it will not be avoided. Thus it has been held as against a party who indorsed a note and thereby evinced an intention to negotiate it, that the insertion of the words "or order," to carry out that intention, with the consent of all parties, did not vitiate the instrument. (*f*)

So, a *bona fide* holder of a bill of exchange, accepted payble to ——— or order, may insert his own name as

(*a*) See Downes v. Richardson, 5 B. &. Ald. 674; Catton v. Sampson, 8 Ad. & E. 136.
(*b*) Calvert v. Roberts, 3 Camp. 343.
(*c*) Walton v. Hastings, 4 Camp. 223.
(*d*) Downes v. Richardson, *ubi supra*.
(*e*) Cardwell v. Martin, 9 East, 190; Cowley v. Dunlop, 7 T. R. 565; see Wood v Shaw, 3 L. C. J. 169; ante p. 43.
(*f*) Kershaw v. Cox, 10 East, 437; Byrom v. Thompson, 11 A. & E. 31.

payee, and indorse it, and the bill may be sued on as payable to the party who has inserted his name. (*a*)

But a material alteration of note made after it is issued, not in pursuance of the original intention of the party affected, and, without his consent, will invalidate it. Thus where a note was made by A, payable to B, without the words "or order," and indorsed by B, it was held that the insertion by the holder of the words "or order," after the issue of the note, rendered it void as against B, for there was no evidence that he at any time agreed to the insertion of words which would render the note negotiable. (*b*)

So the addition of the words "interest to be paid at six per cent. per annum," written at the corner of the note and not in the body, is a material alteration, avoiding the note. (*c*)

A material alteration of a bill or note renders it void, even in the hands of a *bona fide* indorsee for value. Thus where the holder of a bill sued B, the acceptor, and C, the indorser, as upon a bill "dated 1st of June, 1847, payable *four* months after date;" and the bill, when produced at the trial, appeared in fact to have been "dated Nov. 1st, 1841, and payable *three* months after date," and to have been altered by erasure, and made to read as declared upon. The Court held that the alterations were material to the contract and fatal to the holder's recovery, though an indorsee for value, and not shown to have been in any way privy to the alterations. (*d*)

But where a note is made or a cheque drawn in such a careless manner that it may be altered or increased if it is altered, and the alteration is not in any way apparent, the maker or drawer will be liable to any

(*a*) Atwood v. Griffin, R. & M. 425.
(*b*) Lawton v. Millidge, 2 Kerr, 520.
(*c*) Warrington v Early, 23 L. J. Q. B. 47.
(*d*) Meredith v. Culver, 5 Q. B. U. C. 218.

bona fide holder into whose hands it may afterwards come, though as between the original parties to the note the alteration might be a forgery, rendering the note void. (*a*) But if the alteration is apparent on the face of the paper, it is conceived that the maker or drawer would not be liable to a subsequent holder; though, as we shall hereafter see, as between banker and customer, if the latter, by his careless manner of drawing a cheque, invites a forgery, he must bear the loss if the banker pays the cheque.

Where the word "months" was omitted in a note after the word "three," and was inserted by the holder, without the knowledge of the indorser, it was held that this was not an alteration, and that the indorser was liable. (*b*)

An alteration in the place of payment is a material alteration under our statutes, (*c*) where it is made without the consent of the party affected. But a similar alteration with the consent of the parties would not invalidate the instrument, either at common law or under the Stamp Act. (*d*)

The alteration of a promissory note by the holder, by placing the figure 1 before the figure 4 in the date, after it had become due, vitiates the same, and the amount cannot be recovered from either the maker or indorser. (*e*)

A memorandum, put by an indorser at the foot of a promissory note, without the maker's authority, does not amount to an alteration of the note, nor affect the maker's liability, as it forms no part of his contract. (*f*)

A joint note, made by two persons, appeared on its face to have been altered in the date. The note was

(*a*) Garrard v. Hadden, 7 C. L. J. N. S. 112.
(*b*) Laine v. Clarke, 1 Revue Critique 475.
(*c*) Burchfield v. Moore, 3 E. & B. 683.
(*d*) Stevens v. Lloyd, M. & M. 292; Jacobs v. Hart, 6 M. & S. 142.
(*e*) Gladstone v. Dew, 9 C. P. U. C. 439.
(*f*) Cunard v. Tozer, 2 Kerr, 365.

delivered to the plaintiff by an agent of one of the makers [defendants] in its altered state; the other defendant was called as a witness, and stated that he could not write or read writing, beyond his own name, and could not say that the note had been altered since he signed it. The Court held this sufficient for the jury to infer that the alteration was made before the note was signed. (*a*)

A material alteration by the drawer and payee of the bill, or the payee of a note, though it avoids the instrument, does not extinguish the debt. (*b*) But an alteration by an indorsee not only avoids the security as against all parties, but also extinguishes the debt due to the indorsee from the indorser; (*c*) for if the indorsee could compel payment from his indorser, the latter would bear the whole loss, being unable to recover from any other party.

A party is not liable on a substituted bill given in renewal of an altered bill, unless he knew of the alteration at the time of giving the substituted bill. (*d*)

Where an alteration appears on the face of a bill or note, it lies on the plaintiff who sues on it to show under what circumstances it was made, so as to satisfy the jury whether it was a mere correction of an error, or was made before the instrument was issued, or was a material alteration made after the bill or note was complete. (*e*)

It is therefore advisable that persons drawing a bill or making a note should make every correction, as far as possible, explain itself, as by passing the pen through a word meant to be omitted, instead of erasing or completely obliterating it.

(*a*) Street v. Walsh, Trin. T. 1862, Stevens' Digest, N. B. Reports 79.
(*b*) Sutton v. Toomer, 7 B & C. 416; Atkinson v. Hawdon, 2 Ad. & E. 628.
(*c*) Alderson v. Langdale, 3 B. & Ad. 660.
(*d*) See Bell v. Gardiner, 4 M. & G. 11.
(*e*) Henman v. Dickinson, 5 Bing. 183; Knight v. Clements, 8 Ad. & E. 215.

And if it is impossible to do this, as in the case above stated, of the acceptor refusing to accept unless the date or time of currency be altered, it is advisable in practice either to get a new stamp and draw the bill afresh, or, at least, to append a note at the back of the bill, signed by the acceptor, stating the alteration to have been at his request, and before acceptance.

With reference to the amount, if a change should be required, we have already seen, under the head "qualified acceptance," that the acceptor may reduce the amount by accepting for part only.

Forgery is defined as the fraudulent making or alteration of a writing to the prejudice of another man's right, or as the false making or making *malo animo* of any written instrument for the purpose of fraud and deceit. (*a*)

The forgery of bills or notes or of any part of them, and the uttering of them, knowing them to be forged, are respectively felonies punishable by imprisonment in the Penitentiary for life, or for any term not less than two years. (*b*)

Fraudulently obliterating or altering the crossing of a cheque is felony punishable in like manner. (*c*)

By section 27 of the same statute, the fraudulent signing of a bill or note for any other person by procuration or otherwise without lawful authority or knowingly uttering the same, is also a felony.

The most common species of forgery is fraudulently writing the name of an existing person. But the misapplication of a genuine signature, as by writing over it a promissory note for a large sum of money is as much forgery as the making of a false signature. (*d*)

(*a*) Clarke's Crim. Law, Canada, 356.
(*b*) Stat. of Canada, 32 & 33 Vic. c. 19, s. 25
(*c*) Ib. s. 28.
(*d*) Rex v. Hales 17 St. Tr. 161.

To sign the name of a fictitious or non-existing person is forgery where it is signed with intent to defraud. (*a*)

But there is nothing criminal in merely assuming the name of a fictitious person. If done innocently without any fraudulent intent it is clear it would not be a forgery, and even assuming and using a fictitious name, though for the purpose of concealment and fraud, will not amount to forgery, if it was not for that very fraud or system of fraud of which the forgery forms a part. (*b*)

The adpotion of a false description and addition where a false name is not assumed is not forgery. (*c*)

If a clerk be intrusted to fill up a blank cheque, signed by his master, with a particular sum, and he fraudulently insert a larger sum, it is a forgery of the cheque, (*d*) and every fraudulent alteration, whether by subtraction, addition or substitution, is forgery. (*e*) The statute already referred to extends to an *altering* as well as forging.

A promissory note was made by A, payable two months after date to the order of B, and after indorsement by the latter, A altered the note by making it payable three months after date, and then discounted it at a bank in London, Ontario. The Court held that the altering by A of the note while it was in his possession, after indorsement, was a forgery of the note and not of the indorsement, though the note was made by A. (*f*)

A man may make a promissory note for any sum he pleases, and in favor of any person, and payable to him, or to his order or to bearer, or on demand,

(*a*) Rex v. Francis, Bayley 6th Ed. 572; Russ & Ry. 209; Sheppard's case, 1 Leach 226.
(*b*) Rex v. Bontien, R. & R. 260.
(*c*) Webb's case, R. & R. 405.
(*d*) Reg v. Wilson, 1 Den. C. C. 284.
(*e*) Rex v. Elsworth, Bayley, 6th Ed. 574.
(*f*) Reg v. Craig, 7 C. P. U. C. 239.

or at any time after date, at any place, and so long as it remains simply as *his own* promissory note, in his own possession, and charging no other person but himself with liability, he may alter it at his own free will, in all or any particulars. But that right of alteration ceases when another person becomes interested in the note, either by acquiring it as his own property, or by becoming a party to, or responsible for its payment, and an alteration then made prejudicial to any such person, and under circumstances which afford ground for inferring an intent to defraud, is a criminal act. (*a*)

When the signature of a bill is genuine, an uttering by another person, with a representation that he is the person whose signature is on the bill, is not forgery or a felonious uttering. (*b*)

A *bona fide* holder for value cannot sue upon a forged bill or note, or even keep it against the man whose name is forged. (*c*)

Therefore, if the acceptor or maker pay a person who derives his title through a forgery, the payment is no discharge; that is, the acceptor or maker may be obliged to give up the instrument to the true owner, and may be sued either upon it or upon the consideration. But as we have already seen, if the alteration of a bill or note is not in any way apparent, the maker or drawer will be liable thereon to a *bona fide* holder, though as between the original parties the alteration may be a forgery, rendering the bill or note void. If a bill or cheque be altered and made payable for a larger sum than that originally inserted, should the drawee, banker or acceptor pay it, he cannot charge the drawer for more than the original sum; (*d*) nor would the acceptor or maker, if he had paid it, be able to take credit for it in his account

(*a*) Reg. v. Craig, 7 C. P. U. C. 241.
(*b*) Rex v. Hevey, 1 Leach 241.
(*c*) Burchfield v. Moore, 3 E. & B. 683; Johnson v. Windle, 3 Bing. N. C 225.
(*d*) Hall v. Fuller, 5 B. & C. 750.

with the drawer or payee. But in case any act of the drawer facilitated or gave occasion to the forgery, he must bear the loss himself; as, if a customer of a bank drew a cheque for fifty dollars, and left room for the words "three hundred and" to be placed before the fifty, then the banker, on paying the cheque *bona fide*, may take credit for the payment. (*a*)

It is a general rule of law that money paid under a mistake *as to facts* may be recovered back, though it is otherwise as to money paid under a mistake of *law*. This principle regulates the dealings with forged instruments; thus, if a forged note be discounted the transferee may recover back the money on discovering the forgery, if, as would usually be the case, he were guilty of no negligence, and believed the signature to be genuine. (*b*) But any fault or negligence on the part of him who pays the money on the note will disable him from recovering; thus, a banker is bound to know his customer's handwriting, and an aceptor of a bill the handwriting of the drawer, and each of them, in paying a forged cheque or draft, must, in ordinary cases, bear the loss. (*c*)

(*a*) Young v. Grote, 4 Bing. 253; see Ingham v. Primrose, 7 C. B. N. S. 82.
(*b*) Bruce v. Bruce, 5 Taunt. 495; Ib. 488; Gurney v. Womersley, 4 E. & B. 133.
(*c*) Price v. Neal, 3 Burr. 1354, Smith v. Mercer, 6 Taunt. 76.

CHAPTER X.

OF INTEREST AND DAMAGES.

When a bill or note is on its face made payable with interest, the interest runs from the date of the instrument, and not merely from its maturity. (*a*)

Thus a promissory note, dated the 24th August, 1857, payable, with interest, "from 1st August last," bears interest from the 1st August, 1856. (*b*)

It has been held in the Province of Quebec that where a party fails in paying a note payable on demand, interest runs from the date of the note. (*c*)

Where a note is payable on demand, with lawful interest, it carries interest from the date. (*d*)

Where interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt. In such case, by the usage of trade, the bill or note carries interest from maturity; but a jury are not bound to give more than nominal interest, or indeed any interest at all, the interest being in their discretion. (*e*)

But where a note on its face bears interest from date, the interest is part of the debt, and not merely damages for detaining the debt. (*f*)

(*a*) See Richards v. Richards, 2 B. & Ad. 447.
(*b*) Calhoun v. Colpitts, Mich. T. 1862, Stevens' Digest, N. B. Reports 79.
(*c*) Dechantal v. Pominville, 6 L. C. J. 88.
(*d*) Hopper v. Richmond, 1 Stark. 507.
(*e*) Brewerton v. Parker, 17 L. T. N. S. 325.
(*f*) Crouse v. Park, 3 Q. B. U. C. 458.

It has been held in the Province of Ontario that where a note is, on its face, drawn at a certain rate of interest over six per cent., it bears the same rate of interest after maturity as before. (*a*)

And in such case the rate of interest agreed upon by the parties is the proper amount to be allowed by the jury as interest, when allowing interest in the nature of damages from the time the note matured to the time the judgment is entered. (*b*)

In a very recent case in the Appellate Court for England and Ireland it was held that on a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest after the day could not be implied, and that the interest after the day fixed would be awarded as damages only, there being no specific contract for the payment of interest at the same rate after maturity. (*c*)

To apply the law of this case to bills and notes, after the maturity of a bill or note expressly payable with interest at a certain rate, the amount of interest to be allowed would be in the discretion of the Court, and though *prima facie* the rate of interest stipulated for before maturity might be taken, and generally would be taken, as the measure of interest payable after maturity, yet it would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of interest and damages. Where a reasonable and usual rate of interest is stipulated for before maturity, it would be proper to allow the same rate afterwards, but where the rate before maturity is excessive and extraordinary, the

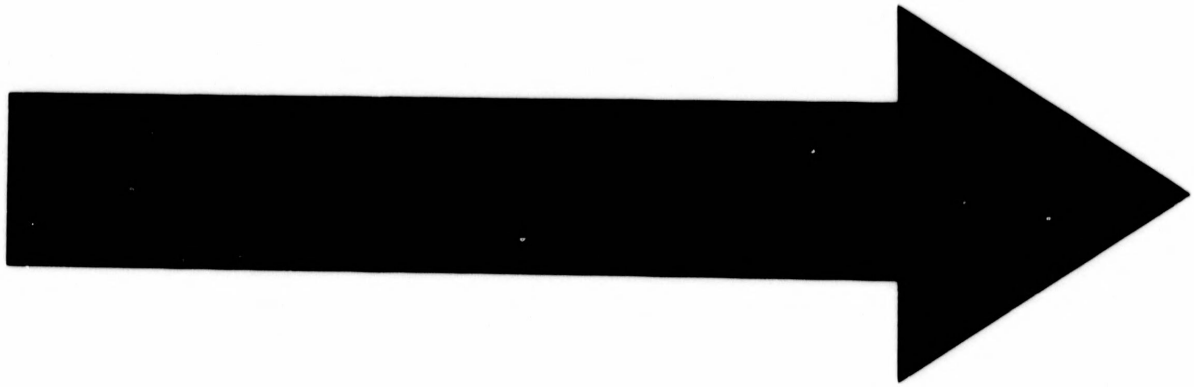
(*a*) Howland v. Jennings, 11 C. P. U. C. 272; see also Montgomery v. Boucher, 14 C. P. U. C. 45; Young v. Fluke, 15 C. P. U. C. 360; Keene v. Keene, 3 C. B. N. S. 144.
(*b*) Montgomery v. Boucher, 14 C. P. U. C. 45.
(*c*) Cook v. Fowler, L. R. 7. E. & I. app. 27.

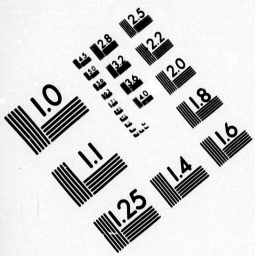
Court may, in the exercise of their discretion, allow only a reasonable rate of interest after maturity.

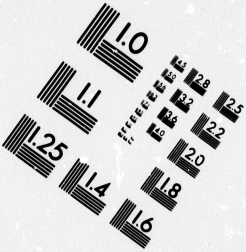
The rate of interest stipulated for in *Cook v. Fowler* was sixty per cent., and in the two cases referred to in Ontario the rate stipulated for before maturity was only twenty per cent. All the cases agree that after the maturity of the instrument the interest is payable as damages, and the cases in Ontario only decide that the rate of interest stipulated before maturity is the proper measure of damage after. As in this Province any rate of interest may be recovered which is agreed upon, it is submitted that the cases in Ontario are not over-ruled by the recent case in England.

It is a proper precaution in making a note or bill to insert the rate of interest in the words "with interest at —— per cent." In practice among mercantile men the interest is generally deducted when the note is discounted, and this may be lawfully done. (*a*) When the interest is deducted at the time of the discount it is of no consequence whether the note is expressly payable with interest or not, provided it is promptly paid at maturity, but if not paid at maturity it will only bear interest at the rate of six per cent. A verbal agreement made between the parties at the time of giving a bill or note, that after maturity it should bear interest at a higher rate would not alter the rule, as proof of the agreement would be inadmissible. So a written agreement, though good between the parties to it, would not avail as against a party ignorant of its existence. The safer course, therefore, is to express on the face of the note at the time it is made the rate of interest payable before and after maturity. This agreement will be binding on the immediate parties and all others into whose hands the instrument may come. It would only be necessary to insert on the face of the note such words as the following, "with

(*a*) See Art. 2332 Civil Code Quebec.







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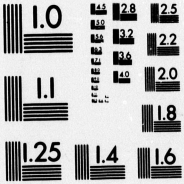

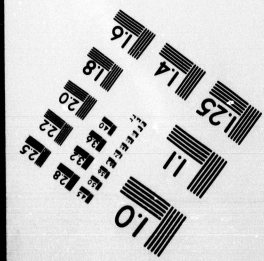

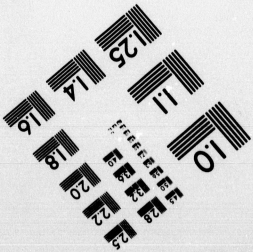

interest at —— per cent." For, as we have already seen, when the rate of interest is specified the note carries the same rate of interest after maturity as before.

Seven per cent. is the rate of interest which banks are allowed to charge, and such rate of interest may be received and taken in advance by the bank at the time of discount, but no higher rate of interest shall be recoverable by the bank. (*a*) When a bank charter provided that the rate of interest charged at the time of discount should continue after maturity until the note was fully paid, it was held that the bank could not avail itself of this clause when more than the legal rate of interest had been charged at the time of the discount; that the clause in the charter did not apply in such case, and as there was no rate of interest mentioned on the face of the note it must be treated as if there was no stipulation in regard to interest, and consequently only six per cent. could be recovered after maturity. (*b*)

It appears, therefore, from this case, that a stipulation in a bank charter allowing a bank to charge after maturity the same rate of interest charged at the time of the discount, can only become operative when the rate at the time of discount is within the limit allowed by law.

The 29 & 30 Vic. c. 10, s. 5, provides that no bank shall, after the passing of the act, be liable to any penalty or forfeiture for usury under the ninth section of chapter 58 of the Consolidated Statutes of Canada, and the 34 Vic. c. 5, s. 52 extends this clause to the Dominion.

This section exempts banking corporations not merely from liability to the pecuniary penalty imposed by the statute, but also from the loss or forfeiture under that statute of the security received by them for the moneys advanced, (*c*) and therefore a note discounted by a bank at a larger rate of interest than allowed by law, may,

(*a*) 34 Vic. c. 5 s. 52.
(*b*) Royal Can. Bk. v. Shaw, 21 C. P. U. C. 455.
(*c*) Com. Bank v. Cotton, 17 C. P. U. C. 447, s. c. Ib. 214.

nevertheless, be recovered on by them. But this statute has not a retrospective operation so as to enable a bank to recover upon usurious notes given before it was passed. (*a*)

In the Provinces of Ontario and Nova Scotia it is provided that interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it. And on the trial of any issue, or on any assessment of damages upon any debt or sum certain: 1. Payable by virtue of a written instrument at a certain time, the jury may allow interest to the plaintiff from the time when such debt or sum became payable; or, 2. If payable otherwise than by virtue of a written instrument at a certain time, the jury may allow interest from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of such demand. (*b*)

In the Province of Ontario, it is also provided that all inland bills or notes, if protested for non-payment shall be subject to interest from the date of the protest, or if interest be therein expressed, as payable from a particular period, then from such period to the time of payment, and in case of protest, the expense of noting and protesting, and the postage thereby incurred, shall be allowed and paid by the holder over and above the said interest. (*c*)

In both Ontario and Quebec, bills or notes drawn for an usurious consideration are not void in the hands of an innocent holder, for valuable consideration. (*d*)

In the Province of Nova Scotia, in all cases where interest is, or may be chargeable, or recoverable by law, or by any contract express or implied, and the rate of interest shall not have been agreed upon in writing, such

(*a*) Com. Bank v. Harris, 26 Q. B. U. C. 594; see, also, Bank of Montreal v. Scott, 17 C. P. U. C. 358.
(*b*) Con. Stats. Ont., c. 43; Rev. Stat. N. S. chap. 82, s. 4.
(*c*) Con. Stat. Ont. c. 42, s. 13.
(*d*) Ib. s. 8; Con. Stat. L. C. c. 64. s. 28; Art. 2335, Civil Code.

rate shall be six per cent. per annum. Any person may, nevertheless, stipulate and agree in writing, for any rate of interest, not exceeding seven per cent. per annum, for the loan or forbearance of money, to be secured on real estate, or chattels real. Any person may also stipulate in writing for, or may receive in advance, any rate of interest, not exceeding ten per cent. per annum where the security for the payment of the money consists only of personal property, or the personal responsibility of the party to whom forbearance is given, or others. (*a*)

In any action brought on any contract whatsoever, in which there is directly or indirectly taken or reserved a rate of interest exceeding that authorised by law, the defendant may, the same being duly pleaded, as in other cases, prove such excessive interest, and it shall be deducted from the amount due on such contract. (*b*)

Nothing in the act is to apply to, or affect any chartered Bank. (*c*)

In the Province of New Brunswick, the Provincial Statute 22 Vic., c. 21, s. 2, provides that no person shall take, directly or indirectly, more than six per centum per annum, for the loan or forbearance of money, but no contract for the payment of a greater rate of interest is to be deemed void. The excessive rate may be proved under the general issue, and it shall then be deducted from the demand. In New Brunswick, therefore, a note carrying on its face more than six per cent. interest, would not be void on that ground, but no more than six per cent. could be recovered in an action on the note.

In the Province of Quebec, it is provided that the non-payment of any bill or note, after the maturity thereof, and on or before the last day of grace, shall *ipso facto* entitle the holder to recover from the party liable on such

(*a*) 36 Vic. c. 71, Ss. 1 & 2 of Dominion.
(*b*) Ib. s. 3.
(*c*) Ib. s. 7.

bill or note, in addition to the principal sum thereof, legal interest thereon, from the last day of grace, whether such bill or note is protested or not; but nothing in the act contained shall prevent the recovery of any higher rate of interest, than six per cent., legally stipulated in any bill or note. (*a*)

As the law now stands in Ontario and Quebec, any person or persons may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount, which may be agreed upon. (*b*)

But six per cent. is the rate of interest, in all cases where, by the agreement of the parties, or by law, interest is payable, and no rate has been fixed by the parties or by law. (*c*)

The general banking act, 34 Vic. c. 5, s. 52, provides that the bank may in discounting at any of its places of business, branches, agencies, or offices of discount and deposit, any note, bill, or other negotiable security or paper, payable at any other of its own places, or seats of business, branches, agencies or offices of discount and deposit, in Canada, receive or retain in addition to the discount, any amount not exceeding the following rates per centum, according to the time it has to run, on the amount of such note, bill, or other negotiable security, or paper, to defray the expenses attending the collection thereof, that is to say:—under thirty days—one-eighth of one per cent.; thirty days or over, but under sixty days —one-fourth of one per cent.; sixty days and over, but under ninety days—three-eighths of one per cent.; ninety days and over—one-half of one per cent.

The Bank may, on discounting any note, bill or other negotiable security, or paper, *bona fide*, payable at any place in Canada, different from that at which it is dis-

(*a*) Con. Stat. L. C. c. 64, Ss. 7 & 8.
(*b*) Con. Stat. Can. c. 58, s. 3.
(*c*) Ib. s. 8; See further as to Usury, 35 Vic. c. 8, s. 2.

counted, and other than one of its own places, or seats of business, branches, agencies or offices of discount and deposit, in Canada, receive and retain in addition to the discount thereon, a sum not exceeding one half of one per centum on the amount thereof, to defray the expenses of agency, and charges in collecting the same.

Where interest is not expressly made payable by the terms of the instrument, it runs from the maturity of the bill or note. If a bill or note not expressly made payable with interest, be payable on demand interest runs not from the date of the instrument, but from the time of the demand. (*a*)

Where there has been no demand except the action, interest may be given from the service of the writ of summons. (*b*)

The indorser of a bill or note has been held liable to pay interest only from the time that he receives notice of dishonor; so the drawer of a bill is not liable for interest until he ascertains who is the holder. When he has found out who is the holder, he is bound to pay within a reasonable time. If he does not, he is liable to damages for not performing his contract; these damages are the interest on the bill. (*c*)

Interest was formerly computed only to the commencement of the suit. In the Province of Ontario, it is now computed to the time of the verdict, and in any suit or action, in which any verdict is rendered for any debt or sum certain, on any account, debt or promises, such verdict shall bear interest at the rate of six per cent. per annum, from the time of the rendering of such verdict if judgment is afterwards entered in favor of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended

(a) Blaney v. Hendricks, 2 Bla. 761, Barough v. White, 4 B. & C. 327.
(b) Pierce v. Fothergill, 2 Bing. N. C. 167.
(c) Walker v. Barnes, 5 Taunt. 240.

by the operation of any rule or order of Court, which may be made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict. (*a*)

Where a note, payable with interest, is paid by instalments from time to time, not always sufficient to cover the interest due at each time of payment, the usual mode of adding the interest to the principal, deducting the payment and charging interest on the balance, cannot be adopted; but the proper mode is to allow the payment made only to sink so much of the principal as the payment exceeds the interest due, and then compute interest on the balance. (*b*)

Interest ceases to run after a tender, by the party liable on a bill or note, of the amount due. (*c*)

A party who guarantees the due payment of a bill is liable for interest. (*d*)

Interest at the rate allowed by our law, is chargeable upon a note dated and payable in the United States, when an action is brought against the parties thereto residing in this country. (*e*)

Corporations not incorporated for the business of lending money, but only allowed by law to lend money which they have to invest, may charge the same rate of interest as a private individual. Thus, a municipal corporation may lend money at any rate of interest which may be agreed upon; and the reasons which make it necessary to limit the amount of interest to be charged by corporations engaged in the business of lending money, do not apply to municipal corporations. (*f*)

The Statutes of Canada, 36 Vic. c. 70, enact that any corporation constituted for religious, charitable or educational purposes, in the Province of Ontario or Quebec,

(*a*) 29 & 30 Vic., c. 42, s. 2.
(*b*) Barnum v. Turnbull, 13 Q. B. U. C. 277.
(*c*) Dent v. Dunn, 3 Camp. 296.
(*d*) Ackerman v. Ehrensperger, 16. M. & W. 99.
(*e*) Griffin v. Judson, 12 C. P. U. C. 430.
(*f*) Corporation N. Gwillimbury v. Moore, 15 C. P. U. C. 445.

authorized by law to lend or borrow money, may hereafter stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which may be agreed upon, not exceeding eight per cent. per annum.

The rate of damages allowed on protested bills of exchange, varies in the different Provinces of the Dominion.

In the Province of Ontario the rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange drawn, sold or negotiated within the Province, and although the same may not have been drawn on or by any person residing therein, shall, in the following cases, be as follows:

1. If the bill has been drawn upon any person, at any place in Europe or in the West Indies, or in any part of America not within the Province of Ontario, or any other British North American Colony, and not within the territory of the United States, ten per cent. upon the principal sum specified in the bill.

2. If the bill has been drawn upon any person in any of the other British North American Colonies, or in the United States, four per cent. upon the principal sum specified in the bill. (a)

In each of such last-mentioned cases, the bill shall also be subject to six per centum per annum of interest, on the amount for which the bill was drawn, to be reckoned from the day of the date of the protest to the time of repayment, and such aggregate amount, together with the expenses of noting and protesting and the postages, shall be paid to the holder at the current rate of exchange of the day when the protest for non-payment is produced and repayment demanded; that is to say, the holder of any such bill returned under protest for non-payment,

(a) Con. Stats. Ont. chap. 42 s. 9.

may demand and recover from the drawer or indorsers so much current money of this Province as shall then be equal to the purchase of another bill of the like amount, drawn on same place, at the same date, or sight, together with the damages and interest above mentioned, as also the expenses of noting and protesting the bill, and all other charges and postages incurred thereon. (*a*)

In case any promissory note, payable only at some place in the United States of America, or in some one of the British North American Colonies, not being Canada, and not otherwise or elsewhere, be made or negotiated within Upper Canada, and be protested for non-payment, the holder shall, in addition to the principal sum mentioned in the note, recover damages at the rate of four per cent. upon such principal sum, and also interest thereon at the rate rate of six per centum per annum, to be reckoned from the day of the date of the protest, and such aggregate amount, together with the expenses of protesting the note, and all charges and postages incurred thereon, shall be paid to the holder at the current rate of exchange of the day when the protest is produced and repayment demanded, that is to say: the holder of any such note returned under protest may demand and recover from the maker or indorsers thereof, so much current money of this Province as shall then be equal to the purchase of a bill of exchange of the like amount, drawn on the same place at the same date, or sight, together with the damages and interest above mentioned, and also the expense of protesting the note and all charges and postages incurred thereon. (*b*)

When the holder of a protested bill or note returned for non-payment, notifies the drawer, maker, or indorser of the dishonor thereof in person, or delivers notice

(*a*) Con. Stats. Ont. chap. 42 s. 10.
(*b*) Ib. s. 11.

thereof in writing to a grown up person at his or their counting house or dwelling house, and they disagree about the then rate of exchange for commercial bills, the holder and the drawer, maker or endorser so notified, or any of them, may apply to the president, or in his absence to the secretary of any Board of Trade or Chamber of Commerce in the city or town, in which the holder of such protested bill or note, or his agent, resides, or in the city or town nearest to the residence of such holder or agent, and obtain from such president or secretary a certificate in writing under his hand, stating the said rate of exchange, and the rate stated in said certificate shall be final and conclusive as to the then rate of exchange, and shall regulate the sum to be paid accordingly. (*a*)

In the Province of Quebec, any person who discounts or receives a bill of exchange payable in that Province, at a distance from the place where it is discounted or received, may take or recover, besides interest, a commission sufficient to defray the expenses of agency and exchange, in collecting the bill. Such commission not in any case to exceed one per cent. on the amount of the bill. (*b*)

Bills of exchange drawn, sold or negotiated within Lower Canada, which are returned under protest, for non-payment, are subject to ten per cent. damages, if drawn upon persons in Europe, or the West Indies, or in any part of America, not within the territory of the United States, or British North America. If drawn upon persons in Upper Canada, or in any other of the British North American colonies, or in the United States, and returned as aforesaid, they are subject to four per cent. damages, with interest at six per cent. in each case, from the date of the protest. (*c*)

(*a*) Con. Stats. Ont. chap. 42 s. 12.
(*b*) Art. 2333 of the Civil Code.
(*c*) Ib. 2336.

The amount of damages and interest specified in the last preceding article, is reimbursed to the holder of the bill, at the current rate of exchange of the day, when the protest is produced, and re-payment demanded; the holder being entitled to recover so much money as will be sufficient to purchase another bill, drawn on the same place, and at the same term, for a like amount, together with the damages and interest, and also the expense of noting and protesting, and of postages thereon. (*a*)

When notice of the protest of a bill, returned for non-payment, is given by the holder thereof to any party secondarily liable upon it, in person or by writing, delivered to a grown person at his counting house, or dwelling house, and they disagree as to the rate of exchange, the holder and the party notified, appoint each an arbitrator to determine the rate, these in case of disagreement appoint a third, and the decision of any two of them given in writing to the holder, is conclusive as to the rate of exchange, and regulates the sum to be paid accordingly (*b*)

If either the holder or the party notified, as provided in the last preceding article, fail for the space of forty-eight hours after the notification, to name an arbitrator on his behalf, the decision of the single arbitrator on the other part is conclusive. (*c*)

By the 22 Vic. Chap. 22, s. 1, of the Province of New Brunswick, whenever any bill of exchange drawn or indorsed within the Province, and payable in any part of North America, without the Province, or in Prince Edward Island, or in the island of Newfoundland, shall be returned protested, the party liable for the contents of such bill, shall upon due notice and demand, pay the same with damages, at the rate of two

(*a*) Art. 2337 of the Civil Code.
(*b*) Ib. 2338.
(*c*) Ib. 2339.

and one-half per cent. upon the contents thereof, with lawful interest and charges on the said contents, to be computed from the date of the protest to the time of payment. And whenever any bill of exchange so drawn or indorsed, and payable in Europe, or in the West Indies, or in any other place without the Province than at first recited, shall be returned protested, the party liable for the contents of such bill, shall on due notice and demand thereof, pay the same at the current rate of exchange, at the time of demand; and damages at the rate of five per cent. upon the contents thereof, with lawful interest and charges on the said contents, to be computed from the date of the protest to the time of payment, and such respective amounts of contents, damages, interests and charges shall be in full of all damages, charges and expenses.

By the revised statutes of the Province of Nova Scotia, Chap. 81, s. 1, a bill of exchange drawn by a person residing within the Province, and returned protested, shall if drawn upon a person residing within the Province, be subject to six per cent. per annum interest, from the date of protest to the time of payment. If drawn upon a person in any part of North America, without the Province, it shall be subject to five per cent. damages, and six per cent. per annum interest, from the date of the protest to the time of payment; and if drawn upon a person in any other country, it shall be subject to ten per cent. damages, and six per cent. per annum, interest, from the date of the protest to the time of payment.

The Con. Stats. U. C. chap. 42, gives damages on the usual protest for *non-payment* of bills of exchange, but damages cannot be claimed under the statute, by reason of the *non-acceptance* of such bills. (*a*)

(a) Bank Montreal v. Harrison, 4 U. C. P. R. 331.

A foreign bill may be referred to the master for the computation of the principal, interest, and costs, and ten per cent. damages. (*a*)

Under the Con. Stats. U. C. c. 42, sections 9 and 10, ten per cent. damages is recoverable on all bills drawn or negotiated in Ontario on England, and protested for non-payment. (*b*)

Four per cent. is the rate allowed on a bill or note drawn on a person in the United States. A note made here, payable in New York, but not there "only and not otherwise or elsewhere," is not within this statute so as to entitle the holder to four per cent. damages on protest for non-payment. (*c*)

The term negotiate, in reference to bills of exchange, means to transfer for a valuable consideration, and the sending of a bill by the drawer, residing out of Ontario, to the drawee, residing in the Province, and the acceptance of the bill by the latter, and the transmission of it back again, does not constitute a negotiation of the bill within Ontario, within the meaning of the statute in Ontario already referred to, and consequently in such case no damages can be recovered under the statute, but only the value of the bill at 24s. and 4d. to the pound sterling. (*d*)

Six per cent. damages is chargeable upon a protested bill of exchange drawn and accepted in Ontario, but payable in the United States. (*e*)

Where a bill of exchange is drawn in Ontario addressed to a person residing there and is payable in England, ten per cent. damages upon the amount of such bill can be collected under the statute. (*f*)

A promissory note made in Ontario for a sum of

(*a*) Com'l Bank v. Allan, 5 O. S. 574.
(*b*) Royal B. Liverpool v. Whittemore, 16 Q. B. U. C. 429.
(*c*) Meyer v. Hutchinson, 16 Q. B. U. C. 476.
(*d*) Foster v. Bowes, 2 P. R. U. C. 256.
(*e*) Am. Ex. Bank v. McMicken, 8 C. P. U. C. 59.
(*f*) Ross v. Winans, 5 C. P. U. C. 185.

money expressed to be sterling, payable in Glasgow, not adding the words "and not otherwise or elsewhere," is a note payable generally, and the plaintiff is not entitled to recover the difference in exchange on such a note. (*a*)

Where an action is brought on a sterling bill drawn by plaintiffs in London upon defendant in Ontario, and accepted by defendants in London (one of them being at the time in London) payable in London, the plaintiffs are entitled to recover the current rate of exchange. (*b*)

As against the several parties to a bill of exchange the rate of damages on non-acceptance or non-payment must be regulated by the law of the place where his contract is made. The drawer, therefore, is only liable to the damages provided by the laws of the country in which it is drawn, although it may be afterwards negotiated in another country. (*c*)

When a note is dated and made payable in the United States the rate of exchange on the day of the maturity of the note is to govern the amount the defendant has to pay, without reference to the rate of exchange at the time of the trial of the cause, or at any other time. (*d*)

The 10 per cent. damage allowed on protested bills of exchange is not to be considered as a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill which always includes exchange. (*e*)

(*a*) Wilson v. Aitkin, 5 C. P. U. C. 376.
(*b*) Greatorex v. Score, 6 U. C. L. J. 212.
(*c*) Astor v. Benn, Stuart, L. C. Appeals, 69.
(*d*) Judson v. Griffin, 13 C. P. U. C. 350.
(*e*) Nichols v. Raynes, 6 Q. B. U. C. 273; Con. Stats. Ont. c. 42 s. 10.

CHAPTER XI.

OF THE STATUTE OF LIMITATIONS.

By the 21 Jac. 1 c. 16, applicable to the Province of Ontario, all actions on simple contracts, which of course include those on bills, notes, cheques, &c., must be commenced within six years after the right to bring the action accrued. This is also the limitation in the Provinces of Nova Scotia and New Brunswick. (*a*) The 26 Vic. c. 45 s. 5, of the Province of Ontario, enacts that all actions of account or for not accounting, and suits for such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants, shall be commenced and sued within six years after the cause of such actions accrued. Such is also the law in Nova Scotia. (*b*) Merchants' accounts provided for in the latter statutes were excepted from the Statute 21 Jac. 1 c. 16. The 25 Vic. c. 20, of the Province of Ontario, provides that a plaintiff shall not, by reason of absence from Ontario, have any greater time to bring his action than if he were resident therein. A similar provision is contained in the statutes of Nova Scotia in regard to personal actions. (*c*) And lastly, in Ontario, by the 29 Vic. c. 28 s. 29, if an executor or administrator of a deceased party liable on

(a) Rev. Stat. N. B., chap. 140, s. 4; Rev. Stat. N. S chap. 154, s. 1.
(b) 26 Vic. c. 10 s. 6.
(c) 26 Vic. c. 10 s. 7.

a bill or note gives notice in writing to any holder of the bill or note, of whose claims he has notice, or to the attorney or agent of such holder, that the executor or administrator rejects or disputes the claim, the holder or creditor must commence his suit within six months after such written notice was given in case the note or some part thereof was due at the time of the notice, or within six months from the time the note or some part thereof falls due, if no part thereof was due at the time of the notice, and in default, the suit shall be forever barred.

In the Province of Quebec, all bills, whether foreign or inland, and all notes due and payable therein, are held to be absolutely paid and discharged if no suit or action is brought thereon within five years next after the day when such bills or notes became due and payable. (*a*)

After the expiry of the five years no action can be maintained on the note, even against a defendant making default. (*b*)

Where a note is made indorsed, and is payable in Quebec, it is subject to the Statute of Limitations of that Province, though the parties thereto may be residents of the Province of Ontario; and the Quebec Statute of Limitations must be construed in our courts as it is construed in the courts of that Province; and the right of action on such a note as the above is therefore barred in five years. (*c*)

A promissory note due and payable in Montreal is absolutely extinguished after the lapse of five years without suit, and cannot be sued here within the period

(*a*) Con. Stat. L. C. c. 64, s. 31; Art. 2260 of Civil Code.

(*b*) Giard v. Lamoreux, 16 L. C. R. 201; see also Giard v. Giard, 15 L. C. R. 494; Hervey v. Jacques, 20 Q. B. U. C. 366.

(*c*) Sheriff v. Holcombe, 13 C. P. U. C. 590; Affirmed in appeal, 2 E. & A. Rep. 516; See Hervey v. Pridham, 11 C. P. U. C. 229, in which the contrary was held, and that the remedy only was barred by this Statute.

allowed by our statutes, though made in this Province. (*a*)

The five years' prescription under the statute in force in Quebec is not interrupted by the defendant's absence of seven or eight years from Canada, and the plaintiff may proceed during such absence by calling the defendant in by advertisement. (*b*)

The limitation of five years under the statute is so absolute that no acknowledgment of indebtedness or partial payment will take the case out of the statute; and if no suit or action be actually brought on a note within five years after its maturity, it will be held to be absolutely paid and discharged. (*c*)

The five years' prescription under the statute applies to a note made in 1824, and not sued upon until 1853; (*d*) and it seems the prescription under the statute applies to all notes due and payable previous to the passing of the statute. (*e*)

A notarial note *en brevet* is not subject to this prescription. (*f*)

The expiry of the time prescribed by the Statute of Limitations, merely bars the remedy on the note; and where a note made more than five or six years, as the case may be, before action brought, is indorsed to a third party before the expiry of the time limited, the indorsee thereof, may after the expiry of the time, plead it as a set off to an action brought against him on a note made by him, to the person from whom he obtained the first note by indorsement. (*g*)

The Statute of 21 Jac. 1, c. 16, s. 3, is not a bar to a

(*a*) Darling v. Hitchcock, 25 Q. B. U. C. 463
(*b*) Darah v. Church, 14 L. C. R. 295.
(*c*) Bowker v. Fenn, 10 L. C. J. 120.
(*d*) Hoyle v. Torrance, 7 L. C. R. 312.
(*e*) Cote v. Morrison, 8 L. C. R. 252.
(*f*) De La Salle v. Bergevin, 16 L. C. R. 415; Pigeon v. Dagenais, 17 L. C. J. 21.
(*g*) Hays v. David, 3 L. C. R. 112.

set off, unless the six years have expired before the action is brought. (*a*)

But where the Statute provides not merely that no action shall be brought, unless within the specified time, but also, that if an action is not brought, the note shall be absolutely paid and discharged, such Statute extinguishes the debt, as well as bars the remedy, and it is conceived that when the debt is extinguished, such a set off as the above, could not be pleaded. Thus in regard to the Statute in force in Quebec, we have seen that it wholly extinguishes the debt. If it affected the remedy merely, a note which was barred in Quebec in five years, might be sued on in this Province, at any time within six years—the period fixed by our Statute.

If a note made in a foreign country contains a clause that it shall be void after the expiry of a certain time, no action could be maintained on it here, after the expiration of such time; and the law is the same, where such a proviso or condition is implied by law. Thus, as we have already seen, by the Statute of Limitations, in force in Quebec, the note is deemed absolutely paid and discharged, after the lapse of five years; and where an indorser of a note, made, indorsed and payable, in Montreal, who was however, a resident of Toronto, was sued there as such indorser after the lapse of five years from the maturity of the note, it was held that the action could not be maintained, the lapse of time operating under the Statute as an extinguishment of the debt, and not barring the remedy merely. (*b*)

A foreign Statute of Limitation is no defence to an action on a foreign contract in our courts, unless it have the effect of extinguishing the contract. If, for instance, the Statute of Limitations in Quebec, merely barred the remedy by action, unless pursued within five

(a) Walker v. Clements, 15 Q. B. 1046.
(b) Sheriff v. Holcomb, 2 E. & A. Reps. 516.

years, but did not extinguish all *right* of action, there is no doubt, a note barred by the five years limitation in Quebec, might be sued on in this Province within six years. (*a*)

But as the Quebec Statute actually extinguishes the contract, after the expiry of the prescribed period, effect must be given to the operation of the Statute in our courts. It is said that the modern Statutes of Limitation in England, cut off the right as well as the remedy. (*b*)

If the Statute of Limitations has barred the remedy on a bill, the holder cannot by transferring it to another person, give the latter any right to sue; for as transferee of an overdue bill, he can stand in no better situation than his transferor.

The time is counted, or in legal language, the statute *begins to run* on bills or notes, from the first day that an action could be brought upon them, though at that time an action and judgment would have been fruitless. (*c*)

Therefore, on a bill payable at a certain period after date, the statute runs not from the time the bill was drawn, but from the time it falls due; and where a bill is payable on a contingency, the statute only runs from the happening of the contingency. If a note be payable by instalments, and contain a provision that if default be made in payment of one instalment, the whole shall be due, the statute runs from the first default against the whole amount of the note. (*d*)

If the administrators of a party to a bill or note have not taken out letters of administration till after the bill or note became due, then the six years will only

(a) See Harris v. Quine, L. R. 4, Q. B. 653; 20 L. T. N. S. 947.
(b) Dundee Har. (Trustees) v. Dougall, 1 Macq. H. L. Cas. 317; De Beauvoir v. Owen, 5 Exch. 166.
(c) Emery v. Day, 1 C. M. & R. 245.
(d) See Hemp v. Garland, 4 Q. B. 519.

count against the administrator from the time of his taking out letters of administration. (*a*)

As upon a bill drawn payable at or after sight, there is no right of action till presentment, so without such presentment the statute does not begin to run. (*b*)

And where a note is payable at a certain period after sight, the statute runs from the expiration of that period after the exhibition of the note to the maker. (*c*)

If acceptance of a bill be refused, and afterwards at maturity it be not paid, the six years count from the refusal to accept. (*d*)

If a note is made payable at a certain period after demand, it is like a note payable after sight, the demand and the lapse of the specified time after demand are conditions precedent, and the statute runs when the time has elapsed. (*e*

But as a bill or note payable on demand simply, is due and payable immediately, the statute runs from the date of the instrument and not from the time of the demand. (*f*)

So, a note payable on demand, with lawful interest, is payable immediately, and therefore the statute runs from the date of the note. (*g*)

If an accommodation acceptor, having paid the bill, is suing the drawer, the former has six years from the time of paying the money. (*h*)

Where a cheque is given not in payment of any pre-existing debt, but merely as a loan of money, the statute begins to run on it only from the time it is actually paid, and not from the time of its delivery to the party. (*i*)

(*a*) Murray v. East Ind. Co. 5, B. & Al. 204.
(*b*) Holmes v. Kerrison, 2 Taunt. 323; Byles on Bills, 9th Ed., 331.
(*c*) Sturdy v. Henderson, 4 B. & Al. 592.
(*d*) Whitehead v. Walker, 9 M. & W. 506.
(*e*) Thorpe v. Booth, R. & M. 388.
(*f*) Christie v. Fousinch, 1 Selw. N. P. 136-361.
(*g*) Norton v. Ellam, 2 M. & W. 461.
(*h*) Reynolds v. Doyle, 1 M. & G. 753; Collinge v. Heywood, 9 Ad. & E. 633.
(*i*) Garden v. Bruce, L. R. 3 C. P. 300; 18 L. T. N. S. 544.

When the statute once begins to run it never stops, although circumstances should arise in which it is impossible to sue, as if, for example, the debtor die before action and no executor be appointed. (*a*)

When the statute once begins to run on a note no subsequent indorsement to any person, whether in or out of the Province, will stop its running. If, therefore, the holder of the note is within the Province when it falls due, the statute commences to run at that time, and it will run on from that time against any person to whom it is afterwards transferred. (*b*)

As the six years, in order to bar the remedy, must expire before the commencement of the action, the operation of the statute of limitations may be obviated by issuing a writ of summons against the debtor before the expiry of the prescribed period, and keeping the writ renewed from time to time until there is an opportunity to go on with the action. (*c*)

Certain acknowledgments and payments have the effect of preventing the operation of the statute, and of giving the plaintiff another six years within which to sue, counting from the date of such acknowledgment or payment, and they have this effect whether made *before*, or at any time *after* six years from the accrual of the original debt. But throughout the Dominion no acknowlegdment or promise by words only will suffice, and the acknowledgment must be made or contained by or in some writing signed by the party chargeable thereby. (*d*)

In case of persons liable jointly, or jointly and severally, as drawers, acceptors, makers, &c., no acknowledgment or promise will bind any one but the person

(*a*) Rhodes v. Smethurst, 6 M. & W. 351.
(*b*) Bradbury v Baillie, 1 Allen, 690.
(*c*) See Com. Law Pro. Act Ontario, s. 21.
(*d*) Con Stat. Ont. c. 44, s. 2; Rev. Stat. N. B. c. 140, s.5; Rev. Stat. N. S. c. 154, s. 2; Con. Stat. L. C. c. 67, s. 2.

making it, unless, of course, it were made with the authority of the person liable jointly with him, as it would often be in the case of ordinary partnerships, when the acknowledgment was signed in the name or on behalf of the firm. (*a*)

In Ontario, and Nova Scotia, also, if there are two or more joint acceptors, makers or indorsers, and one or more of them are residing out of either of said Provinces, the holder will have no longer time within which to sue any one of them residing in the same, than if they were all resident therein. (*b*)

In Ontario and Nova Scotia the acknowledgment or promise may be made by the duly authorized agent of the party chargeable, as well as by the party himself. (*c*)

The statute 21 Jac. 1, c. 16, which applies in the Province of Ontario, contains a provision that if any person entitled to the action shall, at the time of the cause of action accrued, be an infant, married woman, insane, imprisoned, or beyond the seas, then such person may bring the action within six years after the removal of the disability. In the Provinces of Nova Scotia and New Brunswick actions by and against infants, married women, persons insane, or out of the Provinces, may be commenced within the like period after the removal of the disability, as is allowed for bringing the action in ordinary cases. (*d*)

In Ontario the 25 Vic. c. 20 repeals the Statute of James as to persons out of the Province, and in Nova Scotia the 28 Vic. c. 10, s. 7, repeals the revised Statutes as to persons in a similar position. The 21 Jac. 1, c. 16, applicable to Ontario, does not give any longer time when the defendant is absent from the Province; nor

(*a*) Con. Stat. Ont., c. 44 s. 3; Rev. Stat. N. B. c. 140 s. 6; Con. Stat. L. C. c. 67 s. 2 Rev. Stat. N. S. c. 154 s. 2.
(*b*) 2d Vic. c 45 s 6 of Ontario; 28 Vic c. 10 s. 8 of Nova Scotia.
(*c*) 28 Vic. c. 45 s. 8 of Ontario; 28 Vic. c. 10 s 9 of Nova Scotia.
(*d*) Rev. Stat. N. B., c. 140 s. 11; Rev. Stat. N. S., c. 153 s. 10.

does the 25 Vic. c. 20, the latter statute only applying to the plaintiff's absence. The Statute 4 & 5 Anne, c. 16, s. 19 enacts that if at the accruing of the action the defendant be beyond the seas, the plaintiff may bring his action within six years after the defendant's return. Prior to the passing of the 26 Vic. c. 45, s. 6, in Ontario, if one of several co-defendants, jointly liable on a bill or note, were abroad, the statute did not begin to run against any of them. But, as we have already seen, the latter statute preserves the protection of the 21 Jac. 1, c. 16, to such of the defendants as are within this Province at the time the action accrued.

An acknowledgment to take a case out of the statute must be such an acknowledgment as implies a promise to pay. (*a*)

If the promise be conditional, the condition must be shown to have been performed; (*b*) and in no case can the creditor claim more than the promise gives him; and if the promise is to pay by instalments, it will not amount to an acknowledgment. (*c*)

But from a simple acknowledgment the law implies a promise. (*d*)

It is sufficient if the acknowledgment or promise ascertain, either expressly or by reference, the amount due; or if it leave the amount to be supplied by parol evidence. (*e*)

As a debt due from a testator's estate may exist, and yet the executor not be liable to pay, a mere acknowledgment of a debt by an executor is not sufficient to take a case out of the statute; there must be an express promise. (*f*) And it seems that a part payment by one

(*a*) Haydon v. Williams, 7 Bing. 163-166.
(*b*) Tanner v. Smart, 6 B. & C. 603.
(*c*) Buckmaster v. Russell, 4 L. T. N. S. 552; Phillips v. Phillips, 3 Hare 299.
(*d*) Hart v. Prendergast, 14 M. & W. 741.
(*e*) Lechmere v. Fletcher, 1 C. & M. 623; Bird v. Gammon, 3 Bing. N. C. 883.
(*f*) Tullock v. Dunn, 1 R. & M. 416.

executor will not take a case out of the statute as against his co-executor. (*a*)

The promise, acknowledgment or payment, to take a case out of the statute may be made by an agent; (*b*) and therefore by a wife acting as agent, and by one partner, even after the dissolution of the partnership, if he makes a payment; (*c*) or by an infant for necessaries. (*d*) But if an agent exceed his authority in making a payment it will not take the debt out of the statute. (*e*)

In Ontario, a payment by one joint maker, acceptor, or indorser, or his executor or administrator, will not take the case out of the statute as to those jointly liable with the person paying. (*f*)

In the other Provinces of the Dominion the law seems to be different; (*g*) and parties jointly liable on a bill or note are respectively agents for each other in regard to the making of payments to take a case out of the statute. (*h*) In a joint action, therefore, against the makers of a joint and several note, a payment by one will revive the debt against the others. (*i*)

Under the Statutes in force in Ontario, a payment of principal or interest made by one of two joint makers of a note will not take the case out of the statute as against the other, unless made expressly as his agent and by his authority, and such agency must be proved by the plaintiff apart from the fact of payment. But if there is a sufficient payment by one of the makers to take the case out of the statute as to him, judgment may be obtained against the person paying, by virtue of Section 4 of the Statute. (*k*)

(*a*) Scholey v. Walton, 12 M. & W. 510.
(*b*) Burt v. Palmer, 5 Esp. 145.
(*c*) Wood v. Braddick, 1 Taunt. 104.
(*d*) Willins v. Smith, 4 E. & B 180.
(*e*) Linsell v. Bonsor, 2 Bing. N. C. 241.
(*f*) Con. Stat. Ont., c. 44 s. 3.
(*g*) See Con Stat. L. C., c. 67 s. 2 ss. 2; Rev. Stat. N. B., chap. 140 s. 5; Rev. Stat. N. S., chap. 154 s. 2.
(*h*) Wood v. Braddick, 1 Taunt. 104.
(*i*) Perham v. Raynal, 2 Bing. 306; see also Sifton v. McCabe, 6 Q. B. U. C. 394.
(*k*) Creighton v. Allen, 26 Q. B. U. C. 627.

Mere knowledge on the part of the defendant, that his co-maker paid money on account of the note, and the assent of the defendant thereto, is not sufficient to take the case out of the statute as against the latter. (*a*)

A payment in order to take a case out of the statute should appear to be part payment of a larger sum, of which a portion remains due, and to be made on account of the debt sued for. (*b*)

Where a debtor owes some debts which are barred, and some which are not, and makes a general unappropriated payment: such payment will not take the barred debts out of the statute, unless the creditor, by notice, appropriates the payment to them. (*c*)

Giving a bill or note may amount to payment or acknowledgment; (*d*) so goods treated as money are a sufficient payment. (*e*)

When on one or both sides of an account there are items which are barred by the statute, and a settlement of the account takes place, and a balance is struck, the process of forming a balance by both parties is regarded as a mutual payment, and takes the case out of the statute as regards the balance, which may, therefore, be sued for by the person in whose favor it stands. (*f*)

The acknowledgment must be made before action brought. (*g*) But, as we have already seen, the promise, if before action, may be either before or after the expiry of the six years.

The acknowledgment need not be made to the plaintiff; nor, indeed, to any party to the bill or note. Thus, a

(*a*) Cowing v. Vincent, 29 Q. B. U. C. 427.
(*b*) Tippets v. Heane, 1 C. M. & R. 252; Worthington v. Grimsditch, 7 Q. B. 479.
(*c*) Mills v. Fowkes, 5 Bing. N. C. 455.
(*d*) Turney v. Dodwell, 3 E. & B. 136.
(*e*) Hart v. Nash, 1 C. M. & R. 337.
(*f*) Ashley v. James, 11 M. & W. 542; Bodyer v. Archer, 10 Exch. 333.
(*g*) Tanner v. Smart, 6 B. & C. 603; Rew v. Pettet, 1 Ad. & E. 196.

letter from one joint acceptor to his co-acceptor, or a deed between a party to the bill and a stranger, reciting that the bill is outstanding and unpaid, may amount to an acknowledgment against the persons writing the letter and executing the deed respectively. (*a*)

Payment may now be proved like any other fact. (*b*)

In the Provinces of Ontario, Quebec, and Nova Scotia no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing by or on behalf of the party to whom such payment has been made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of the statute. (*c*)

Mr. Justice Byles, in his work on bills advises that the debtor should write the memorandum of part payment whether of principal or interest on the back of the bill or note, and that he and the creditor should both sign it, and thus the rights of both will be protected. The expression, "other writing," in the statute only means any other writing containing the contract, and as an entry by a person deceased against his interest, is evidence in an action brought by his representatives, an entry of payment made by the deceased is admissible in an action on the bill by the representatives for the purpose of proving payment. But if the entry is on the bill or note itself, payment so proved, though admissible, would not by the express words of the statute be sufficient. If, however, the entry were on any other paper it seems it would not only be admissible but sufficient. (*d*)

The law of limitation as to a promissory note made in a foreign country and payable there, is to be governed by

(*a*) Peters v. Brown, 4 Esp. 46; Halliday v. Ward, 3 Camp. 32; Mountstephen v. Brooke, 1 B. & Ald. 224.
(*b*) Cleave v. Jones 6 Exch. 573.
(*c*) Con. Stat. Ont. c. 44 s. 7; Con. Stat. Que. c. 67 s. 4; Rev. Stat. N. S. c. 154 s. 4.
(*d*) Bradley v. James, 13 C. B. 822.

the law of the place where it is made, and not by the law of the place where the action is brought. The Statute of Limitations for the Province of Quebec, chap. 64 of the Con. Stats. of Lower Canada only refers to promissory notes due and payable there. (*a*)

(a) Wilson v. Deniers, 12 L. C. J. 222; 10 L. C. J. 261.

CHAPTER XII.

OF STAMPS.

The Statutes now in force respecting the stamping of negotiable instruments, are the 31 Vic., c. 9; the 33 Vic., c. 13, and the 37 Vic., c. 47. Under these statutes, every promissory note, draft or bill of exchange, for an amount not less than twenty-five dollars, is liable to stamp duty, as follows:—a duty of one cent, if the instrument amounts to, but does not exceed twenty-five dollars; a duty of two cents, if the amount thereof exceeds twenty-five dollars, but does not exceed fifty dollars; and a duty of three cents, if the amount thereof exceeds fifty dollars, but is less than one hundred dollars. On each such instrument for one hundred dollars or more, executed singly, a duty of three cents for the first hundred dollars, of the amount thereof, and a further duty of three cents for each additional hundred dollars or fraction of a hundred dollars, of the amount thereof. On each such draft or bill of exchange, executed in duplicate, a duty of two cents on each part of the first hundred dollars of the amount thereof, and a further duty of two cents for each additional hundred dollars, or fraction of a hundred dollars, of the amount thereof. On each such draft or bill of exchange, executed in more than two parts, a duty of one cent on each part, for the first hundred dollars of the amount thereof, and a further duty of one cent for each additional hundred dollars, or fraction of a hundred dollars, of the amount thereof.

Any interest made payable at the maturity of any bill, draft or note, with the principal sum, shall be counted as part of the amount thereof.

The bill or note is subject to duty, whether payment be required to be made to bearer, or to order. So a letter of credit is subject to duty, and also every receipt for money given by any bank or person, and entitling the person paying such money, or the bearer of such receipt to receive the like sum from any third person.

The exemptions from duty are:—Every bill of exchange, draft or order, drawn by any officer of Her Majesty's Commissariat, or by any other officer in Her Majesty's Imperial or Provincial service, in his official capacity; any note, payable on demand to bearer, issued by any chartered bank in Canada: any cheque upon any chartered bank, or licensed banker, or on any savings' bank—if the same shall be payable on demand—any post-office money order, or order on any post-office savings' bank —and

Any Municipal debenture, or coupon of such debenture shall be free of duty under the act. To these exemptions must also be added notes for any sum under twenty-five dollars, which do not require to be stamped. So under the 37 Vic., c. 47, s. 4, bills drawn and payable outside of Canada, are exempt from duty.

By section 4 of the 31 Vic, c. 9, the duty on any such Promissory Note, Draft, Bill of Exchange or part thereof, shall be paid by making it upon paper, stamped in the manner thereinafter provided, to the amount of such duty —or

By affixing thereto an adhesive stamp, or adhesive stamps, of the kind thereinafter mentioned, to the amount of such duty, upon which the signature or part of the signature of the maker or drawer, or in the case of a Draft or Bill, made or drawn out of Canada, of the acceptor or first indorser in Canada, or his initials, or some integral

or material part of the instrument shall be written, so as (so far as may be practicable,) to identify each stamp with the instrument to which it is attached, and to show that it has not before been used, and to prevent its being thereafter used for any other instrument—or

The person affixing such adhesive stamp, shall at the time of affixing the same, write or stamp thereon the date at which it is affixed, and such stamp shall be held *prima facie* to have been affixed at the date stamped or written thereon.

And if no integral or material part of the instrument, nor any part of the signature of the maker, drawee, acceptor or first indorser in Canada, be written thereon, nor any date be so stamped or written thereon, or if the date do not agree with that of the instrument, such adhesive stamp shall be of no avail; and any person wilfully writing or stamping a false date on any adhesive stamp, shall incur a penalty of one hundred dollars for each such offence.

By the 31 Vic., c. 9, s. 10, the stamps must be affixed by the maker of the note, or the drawer of the bill at the time of making or drawing, and in default, a penalty is incurred, and the duty payable on the instrument, or the duty, by which the stamps affixed fall short of the proper amount, is doubled.

In accordance with these principles, it has been held, where no stamps were affixed to a promissory note when made, and only stamps sufficient for single duty were affixed when the note was produced at the trial, that the note was void under the 31 Vic., c. 9, (*a*) for on the omission to affix the proper stamps at the time of making, double duty became necessary, and that not being paid, it was the same as if the note were not stamped at all.

It will thus be seen that the requisite stamps must be affixed at the time the instrument is made. Suppose,

(*a*) Travis v. Glasier, 2 Hannay, 215.

however, that the maker of a note neglects to stamp it, and it is sent to the payee unstamped. By reason of the default of the maker in such case the duty is doubled, and in order to satisfy the requirements of the statute the payee would be bound before using the note to affix double duty thereto; but suppose the payee affixed only single duty, and then indorsed the note to a third party, such party would take the note with apparently the proper stamps on it, and he would have a right to recover on it, provided he was ignorant of the fact that the note was not stamped by the maker. As soon, however, as he acquired knowledge of the fact that the note was not properly stamped in the first place, he would be bound to stamp it to the amount of double the original duty. On this point the 37 Vic., c. 47, s. 2, ss. 12, provides that any holder of such instrument may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed; and where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even although such knowledge shall have been acquired only during such suit or proceeding; and if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake,

and without any intention to violate the law on the part of the holder, that any such defects as aforesaid existed in relation to such instrument, then such instrument or any indorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake; but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid. (*a*)

In affirmance of the principle already mentioned it has been held that when a party desires to avail himself of an instrument not properly stamped when made, he must as soon as he becomes aware of the fact that the proper stamps were not affixed to the note by the proper parties, at the proper time, affix stamps to double the original duty. (*b*)

A promissory note stamped by the payees some weeks after its delivery to them, is null, and they cannot render it valid after suit brought by payment of double duty under the statutes, as they must have known it was not properly stamped at the time it came into their hands, and should have then paid the duty. (*c*)

But, as we have seen, the instrument may be stamped, though the knowledge of the defect is acquired during the trial or at any time during the progress of a suit or proceeding. (*d*) Under the old law it was held (in the Province of Ontario) not sufficient to stamp the note before commencing an action upon it. (*e*)

But in Quebec it was held under the 29 Vic., c. 4, s. 4, where a note had been stamped by the indorsers and not by the maker, and when it came into the hands of the holder it was doubtful whether the proper stamps had been

(*a*) See also 33 Vic., c. 13, s. 1.
(*b*) McCalla v. Robinson, 19 C. P. U. C. 113; See Kirby v. Hall, 21 C. P. U. C. 377.
(*c*) Murphy v. Cotram 17 L. C. R. 51.
(*d*) See Stevenson v. Kimpton, 12 L. C. J. 291.
(*e*) Henderson v. Gesner, 25 Q. B. U. C. 184; see also, Stephens v. Berry, 15 C. P. U. C. 548.

affixed, that the holder might, even after action brought, pay double duty and render the note valid. (*a*)

Prior to the passing of the 37 Vic. c. 47, the law was, that any *subsequent* party to the instrument, or person paying the same, might affix double duty and so render the instrument valid. (*b*)

Under the 33 Vic., c. 13, the Court of Queen's Bench in Ontario held, on two occasions, that the payee of a note was a subsequent party within the statute. (*c*) While the Court of Common Pleas in Ontario and the Supreme Court of New Brunswick held the contrary on three occasions. (*d*)

No doubt the word "subsequent" was eliminated from the late statute for the purpose of rendering the law uniform throughout the Dominion.

Though an attorney is the holder of a note for the purpose of collection, yet it seems he is not such a holder as is contemplated by the 37 Vic., c. 47, s. 2 ss., 12, for the holder there referred to must have a beneficial interest in the note. (*e*)

Therefore, an attorney receiving a note for collection cannot affix the proper stamps thereto, so as to make it available. It would, however, be very convenient if attorneys had such power, for in many cases a defective stamping might not be discovered until it reached a solicitor's hands. There is no doubt, however, that under a special authority from the real owner of a note it may be properly stamped by an attorney or solicitor. (*f*)

It is clear that when the stamps are obliterated by writing the date thereon, the date on the stamps must agree with that of the instrument; and as the person

Quebec Bank v. Sewell, 17 L. C. R. 3.

(*b*) 33 Vic., c. 13, s. 12.

(*c*) Woolley v. Hunton, 33 Q. B. U. C. 152; Joseph Hall Mfg. Co. v. Harnden, 34 U. C. 8.

(*d*) Escott v. Escott 22 C. P. U. C. 305; Reynolds v. Vaughan, 2 Pugsley, 159; Kennedy v. Adams, ib. 162.

(*e*) Reynolds v. Vaughan, 2 Pugsley, 159.

(*f*) See Woolley v. Hunton, 33 Q. B. U. C. 152.

affixing the stamp must, at the time of affixing the same, write or stamp thereon the date at which they are affixed, it is also clear that the stamps must be affixed and cancelled on the day the note is made, and the note must also be dated on the day it is made. A blank promissory note was sent to a bank agent to retire a previous note, and was received by the agent on the 27th of October, 1869. On the 2nd of November the agent dated it the 30th October, 1869, and affixed the proper stamps to it, which he obliterated on the same day, but marked the obliteration as of the 30th October, "30, 10, 69." The note was held invalid under the 31 Vic., c. 9, for if made on the 27th or 30th October, it had not then the stamps affixed; and if on the 2nd of November, the stamps bore a different date. (*a*)

It will thus be seen that in such a case as the above the stamp laws in effect prohibit the ante-dating or post-dating of a negotiable instrument. When the instrument is made on stamped paper, or when the stamp is obliterated by marking the initials of the party on the stamp, or by writing some integral or material part of the instrument thereon, it is not clear that the same rule would apply. When the instrument is made on stamped paper, the stamp would of course be obliterated at the time of making, and in the two latter cases the stamps must be obliterated at the *time of making, &c.;* but as a bill or note may be dated on one day and *made* on another, it is conceived that when the adhesive stamp is obliterated by writing the initials, or by writing on the stamp an integral or material part of the instrument, it would be sufficient if this were done on the day the bill or note was made, though it bore date on a day prior or subsequent. When the stamps are not cancelled on the day of making, or there is any other defect in the cancellation or affixing of the stamps, there is no doubt that a subsequent holder

(a) Hoffmann v. Ringler, 29 Q. B. U. C. 531.

in good faith may affix double duty and render the instrument valid under the 37 Vic., c. 47, s. 2.

The statutes make no distinction between notes insufficiently stamped and notes without any stamp, and it is quite clear that *all* the stamps affixed to the instrument must be cancelled according to law. Thus, where a note required ninety-six cents in stamps, and on the face of the note there appeared ninety cents in stamps duly cancelled, and on removing these stamps two others, one for three and one for nine cents, were found, but they were uncancelled, the Court held that the non-cancellation of some of the stamps on a note invalidates it, though the rest are duly cancelled, and they therefore declared the note void. (*a*)

The stamps will be of no avail unless they are cancelled or obliterated as required by the statute, and it seems, if the proper amount of stamps is on the note, but they are uncancelled, the note may be treated as if no stamps whatever were affixed thereto. In an action by indorsee against maker it appeared that the proper adhesive stamps were upon the note, but they had not been cancelled by stamping or writing the date thereon, and the Court held under 29 Vic., c. 4, s. 3, that the note was of no avail, and that the plaintiff could not recover. (*b*)

The stamps affixed must be the kind prescribed by the act or what are commonly known as "bill stamps," and affixing postage stamps or part postage stamps would be ineffectual. (*c*)

If the instrument has been properly stamped at the time of the signature, and initialed by the maker, but the stamps have been rubbed off, defaced, or improperly removed by some one else, no penalty would be incurred, and proof of these facts would be a good answer to a plea

(*a*) Lowe v. Hall, 20 C. P. U. C. 244.
(*b*) Young v. Waggoner, 29 Q. B. U. C. 35.
(*c*) Mason q. t. v. Mossop, 29 Q. B. U. C. 500.

setting up that the instrument is void for want of a stamp. (*a*)

Under the statutes a note not properly stamped is invalid, and of no effect at law or in equity, and such a note cannot be used as an acknowledgment to take a case out of the Statute of Limitations, or as evidence of an account stated. (*b*

An I. O. U. does not require a stamp under the statutes, and where an instrument was made in the following form: "Good to Mr. Palmer for $850, on demand," it was held that this instrument did not require a stamp. (*c*)

The Act does not require an instrument to be stamped which would not be valid for some purpose, independent of the Stamp Act, if it were not stamped; and it seems that the only instruments which require stamps are such as in law are considered promissory notes, drafts, or bills of exchange. It was, therefore, held that no penalty could be recovered under 27 & 28 Vic., c. 4, s. 9, for not affixing stamps to a promissory note given for money lost by playing at cards, for such note, under the Statute of 9 Anne, c. 14, is utterly void. (*d*)

A note actually made after the passing of the statute, will be void if not stamped, although it is dated before the passing of the act. (*e*)

On a bill drawn out of Canada, and accepted by the drawee in Canada, the stamps should be affixed by the drawee, at the time of accepting the bill. (*f*)

In pleading, it is not strictly proper to allege that double stamps were affixed; but the amount of stamps affixed for double duty should be stated, and the act done to effect cancellation, should also be stated. (*g*)

(*a*) Baxter v. Baynes, 15 C. P. U. C. 237.
(*b*) McKay v. Grinley, 30 Q. B. U. C. 54.
(*c*) Palmer v. McLennan, 22 C. P. U. C. 258, affirmed in appeal Ib. 565.
(*d*) Taylor v. Golding, 28 Q. B. U. C. 198.
(*e*) Ritchie v. Prout, 16 C. P. U. C. 426.
(*f*) Woolley v. Hunton, 33 Q. B. U. C. 152.
(*g*) Ib.; see also Joseph Hall Mfg. Co., v. Harnden, 34 Q. B. U. C. 8.

The better way of raising the objection that the note is not stamped, is by a special plea to that effect, and where such plea is not pleaded, and there is no plea denying the making of the note, the objection for want of a stamp, cannot be raised. (*a*)

But where no objection was taken, for want of a special plea, the absence of a stamp was allowed to be objected to, under a plea denying the acceptance of the bill. (*b*)

An action for a penalty for not affixing stamps to an instrument, under the statutes, must by the 31 Eliz., c. 5, be brought within a year. No right of action vests in the plaintiff, until the action is so brought, and the defendant therefore may take advantage of this latter statute under a plea of not guilty, and he is not precluded from such defence, by having marked in the margin of his plea, the statute 21 Jac. 1, c. 4, only. (*c*)

(*a*) Baxter v. Baynes, 15 C. P. U. C 237.
(*b*) Stephens v. Berry, 15 C. P. U. C. 548.
(*c*) Mason, Q. T. v. Mossop, 29 Q. B. U. C. 500.

CHAPTER XIII.

OF SET OFF.

The general Statutes of set off are the 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, s. 4. These Statutes only give a set off in the case of mutual debts; that is, both the plaintiff's claim and the defendent's set off must be liquidated money demands. (*a*)

In the Province of Quebec, when two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation, which takes place between them. (*b*)

This compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money, or a certain quantity of indeterminate things of the same kind and quality. So soon as the debts exist simultaneously, they are mutually extinguished, in so far as their respective amounts correspond. (*c*)

Therefore, in the Province of Quebec, if the maker of a note, or the acceptor of a bill is the holder of a note or bill, on which the payee in the first note is primarily liable, the latter cannot recover against the maker or acceptor, except for the excess over and above the amount due from the payee. And if a party is surety to the maker or acceptor, for the amount of a bill or note, and the payee

(*a*) See Lee v. Lester, 7 C. B 1008.
(*b*) Art. 1187 of the Civil Code.
(*c*) Ib. 1188

of the bill or note becomes indebted to the maker or acceptor in respect of another bill or note or other consideration, the surety will be discharged by the compensation which will take place for the amount of the debt, from the payee to the maker or acceptor. But the principal debtor cannot set up in compensation what his creditor owes to the surety. So a joint and several debtor, cannot set up in compensation what the creditor owes to his co-debtor, except for the share of the latter in the joint and several debt. (*a*)

In the other Provinces of the Dominion, a defendant sued for a liquidated money demand, is permitted, but not obliged by law, to set off against the sum which plaintiff claims, any liquidated money demand due from the plaintiff to the defendant.

The defendant's set off may be of a less or a greater amount than the plaintiff's claim.

Instead of pleading a set off, the defendant may, if he likes, bring a cross action, or he may do both, but if he is successful on the plea in the original action, the judgment in the cross action, if in his favour, will be proportionally reduced. (*b*)

In Quebec, as we have already seen the law is different. The debt due on the note is extinguished if the payee owe the maker an equal or greater sum. If the debt due from the payee to the maker, is less than the amount of the note, it will nevertheless extinguish the amount due on the note *pro tanto*; and if the amount due from the payee, exceeds the amount of the note, the maker would be entitled to sue the payee for the excess. But in Quebec, it is apprehended that a cross action could not be brought, except for the excess, as the law extinguishes each debt in so far as the respective amounts correspond.

(*a*) Art. 1191 of the Civil Code, Quebec.
Baskerville, v. Brown, 2 Burr, 1229.

One judgment may be set off against another.

The debt to be set off must be a subsisting legal debt, and not one, the remedy for which is barred by the Statute of Limitations, or one which is satisfied by the discharge of the debtor out of custody. (*a*)

The debt must have been due at the commencement of the action, and must remain due at the time of trial.

A bill, or note for example, to be set off, must have been due and unpaid in the defendant's hands when the action was commenced, and must remain in his hands at the trial. (*b*)

The debts must be mutual—that is, they must be due to the defendant or defendants alone, from the plaintiff or plaintiffs alone.

But it is not meant that the defendant must be unable to sue any one else than the plaintiff; for on a bill for instance, there might be several others who could be sued. Defendant may set off a sum due on plaintiff's *joint and several* note against plaintiff's demand.

For example, if A and B sue D, D can set off a debt due to him from A and B, but not one due to him from A alone, or one due from A, B and C.

So also if the debt were due from A and B, not to D alone, but to D and E, then the debt could not be set off by D.

But the debts and credits of a firm are vested at law in the surviving partner, who is then in the same position as regards set off as if the other parties had never existed.

For example, in the above case, suppose D and E were partners, and E were dead, D, though the sole defendant, and sued for his private debt, might set off a sum due by A and B, the plaintiff's, to the firm of D and E.

(*a*) Byles on Bills, 9th Ed., 352; Jacques v. Withy, 1 T. R. 557.
(*b*) Richards v. James, 2 Exch. 471; Evans v. Prosser, 3 T. R. 186; Eyton v. Littledale, 4 Exch. 159.

And the reason of this is to save the trouble of cross actions; for though the debt did not originally accrue to D alone, yet D is now the only person who could sue for it.

If A sue B alone, B may plead that the money is owed by him, together with C, and that a set off is due from A to B and C. (*a*)

If a note be given to a married woman, the husband may either sue alone, or join his wife. If he sue in his own name, he is not liable to a set off, due from his wife before marriage, but he is to a set off due from himself. If he join her, it should seem he is liable to a set off due from his wife, but he is not to one due from himself. (*b*)

The 124th section of the Insolvent Act of 1869 provides that the statutes of set off shall apply to all claims in insolvency, and also to all suits instituted by the assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent as if the insolvent were plaintiff or defendent as the case may be, except in so far as any claim for set off shall be affected by the provisions of the act respecting frauds and fraudulent preferences.

The Con. Stats. of Ontario, chap. 42, enables the holder of a bill to bring a joint action against the drawers, makers, endorsers and acceptors of any bill or note, and section 32 provides that in such action any person sued may set off against the plaintiff any payment, claim or demand, whether joint or several, which in its nature and circumstances arises out of, or is connected with the bill or promissory note that forms the subject of such joint action, or the consideration thereof in the same manner, and to the same extent as if such defendant had been separately sued.

(*a*) See Slipper v. Stidstone, 1 Esp., 47; Stockwood v. Dunn, 3 Q. B. 822.
(*b*) Burrough v. Moss, 10 B. & C. 558

Although this statute allows the makers and indorsers of a promissory note to be sued in a joint action, it does not confound their several liabilities, or enable the one to avail himself of that which is exclusively the defence of the other. In this respect the parties are to be looked upon as if they were sued in separate actions. (*a*)

Payment, release, or any other matter which discharges all right of action on the bill or note, is a defence to each party. Set off may arise between an indorser and a holder, to which another indorser or the acceptor or drawer of a bill, or the maker of a note, may be an entire stranger. Thus, though the indorsers and payees might have a right of set off against their immediate indorsee, yet a holder taking the bill mediately through the indorsee, would not be subject to a set off which the payees have against their immediate indorsee in respect of a matter collateral to the bill itself. (*b*)

When the several parties to a bill or note are sued in one action under the statute, the right of set off enjoyed by each defendant is confined to a payment, claim, or demand, which in its nature and circumstances arises out of, or is connected with, the bill sued on. (*c*)

And under this statute in an action against the maker and indorser of a promissory note, neither defendant can plead separately a set off not arising out of, or connected with, the note. (*d*)

The indorsee of a note not overdue at the time he takes it, is not liable to a set-off which the maker or payee may have against the party from whom he took it. The set off is a collateral matter, and would not affect the indorsee even if he took the note when overdue. (*e*)

When the executors of the maker are sued on a note

(*a*) Wood v. Ross, 8 C. P. U. C. 303.
(*b*) Ib. 299.
(*c*) Hamilton v Holcomb, 12 C. P. U. C. 38, affirmed in appeal, 2 E. & A. Reps. 230,
(*d*) Hughes v. Snure, 22 Q. B. U. C. 597.
(*e*) Metropolitan Bank v. Snure, 10 C. P. U. C. 24; Wood v. Ross, 8 C. P. U. C. 299

payable to A, or bearer, and by him transferred to the plaintiff, the executors could not set off an account due to them by A, though the note was transferred by A after the testator's death. (*a*)

Where, in an action by the indorsee, the holder of a promissory note against the maker and indorsers, under the statute, the defences clash, or the facts set up as a defence are not equally adapted as a defence to all the parties, they should plead separately. Therefore a plea by all the defendants that there was no consideration for the making of the note, nor for the respective indorsements, nor either of them, and that the plaintiff holds the note without any consideration or value, is bad. (*b*)

(*a*) Smith v. Nicholson, 19 Q. B. U. C. 27.
(*b*) Hawke v. Salt, 3 C. P. U. C. 97.

CHAPTER XIV.

OF CHEQUES.

A cheque is a written order upon a bank or banker for the payment of money. It may be made payable to a particular person, or to order, or to bearer, and is negotiable in the same manner as bills of exchange and promissory notes. (*a*)

A cheque is in legal effect an inland bill of exchange payable to bearer on demand (*b*)

Though a cheque is, in the Province of New Brunswick, treated as an inland bill of exchange, the mere initialing it by the cashier of the bank on which it is drawn will not amount to an acceptance within the statute in force in that Province, which is similar to the Statute, chap. 42 of the Con. Stats. of Ontario, section 7. (*c*)

This statute provides that no acceptance of any bill of exchange shall be sufficient to bind or charge any person unless such acceptance is in writing on the bill.

As a cheque is an inland bill of exchange it is subject to the provisions of the statute, and the acceptance of it must be by writing thereon. It has not yet been decided that the marking in the usual way, by the ledger-keeper of a bank on which the cheque is drawn is such a writing as will satisfy the provisions of the statute, and render the bank liable to pay the cheque by virtue of an actual

(*a*) Art. 2349 Civil Code Quebec.
(*b*) Keene v. Beard, 8 C. B. N. S. 372.
(*c*) Commercial Bk. v. Fleming, Stevens Dig. N. B. Reports, 93; 2 Revue Critique 242-3.

acceptance thereof. The banker having sufficient funds of the drawer of a cheque is liable to the drawer for non-payment of it, if presented within banking hours. But the question is more important as between the holder of a cheque, not being the drawer, and the banker, whether a banker, having marked the cheque of his customer in the usual way, could afterwards decline to pay the holder, if payment were revoked by the drawer. It is submitted that if the cheque is marked *bona fide* without any mistake or misapprehension, the banker will be liable to the holder whether the marking is an acceptance within the statute or not. Thus in the Province of Quebec it has been held that when a cheque is marked or certified the undertaking of the bank is not revocable, and the bank cannot be discharged without release or payment unless the marking were made under a mistake. The ordinary effect of a bank manager placing his initials on a cheque is to convey instruction to the ledger-keeper to debit the drawer with the amount, and to the paying-teller to pay it. Whether the initialing of a cheque by a bank manager amounts to an acceptance within the statute or not, it appears that if a cheque is fraudulently initialed as accepted by the manager of a bank, and the drawer has given in exchange to the manager certain securities which the bank retains, the cheque cannot be repudiated by the bank when it is in the hands of a *bona fide* holder for value. (*a*)

From the relations between banker and customer it is clear that the banker is under no obligation to pay the payee of a cheque until he has in some way bound himself to do so. (*b*) Until then the debt remains between him and his customer, and on non-payment of the cheque the latter is the proper party to sue for damages. But the marking of cheques in the usual way answers all pur-

(*a*) City Bank v. Bank of Montreal, 17 L. C. J. 197.
(*b*) Malcolm v. Scott, 5 Exch. 610.

poses in the majority of cases, for the banker will not mark the cheque unless there are sufficient funds to the drawer's credit. Immediately on the cheque being marked the drawer is charged with the amount, and as between him and the banker, the cheque is treated as paid.

There is this difference between the drawee of a bill and a banker on whom a cheque is drawn, that the former is not in general liable until acceptance, but a banker having in his hands effects of his customer, is an exception to this rule. He is bound within a reasonable time after he has received the money to pay his customers' cheques, and is liable to an action at the suit of his customer if he neglect to do so. (*a*) And he is liable to this action though the cheque has not been accepted as required by the statute, provided, of course, he has sufficient funds.

And if a bank refuse to pay a cheque when they have sufficient funds of the drawer for the purpose, the holder can compel payment in equity. For the purpose of determining the liability of the bank in this respect the actual state of the account must be looked to, and if by mistake there is sufficient funds entered at the drawer's credit in the bank-ledger at the time of the cheque being presented, this will not make the bank liable if, in fact, they have not sufficient funds. The mistake in the entries, though made by the clerks in the bank, will not prejudice them. (*b*)

When a note or bill of a customer, discounted by the bank, falls due, and is unpaid, and the bankers are the legal holders thereof, they are entitled to apply any balance which the customer has to his credit, to the payment of the discounted bill or note; and if such appropriation exhausts the funds which the customer has to his credit, the bankers will not be liable to an

(*a*) Marzetti v. Williams, 1 B. & Ad. 415; Rollin v. Steward, 14 C. B. 595.
(*b*) Gore Bank v. Royal Can. Bk., 13 Grant, 425.

action, at the suit of their customer, for afterwards dishonoring his cheque. (*a*)

Nor will they be liable to such action, if the drawer's assets have been exhausted by the payment of bills accepted by him, payable at the bankers, and it is not necessary for the bankers to show any special authority, or any further order than that contained in such acceptance, to enable them to pay the amounts due upon the bills. (*b*)

A cheque in this country may be post dated, though in England, it is prohibited by the stamp act. Where a cheque is payable on demand, no days of grace are allowed. The want of due presentment, or of notice of dishonor, to the drawer, is of no consequence, unless when the banker on whom it is drawn has become insolvent. (*c*)

And as between the payee and drawer of a cheque, the former may present it at any time within six years, but if the cheque is not presented in due time, and the banker fail, the payee of the cheque must bear the loss.(*d*)

As a matter of expediency, therefore, a cheque should be presented within a reasonable time, which is generally considered to mean within banking hours, of the day after it is received. (*e*)

The holder of a cheque, is not bound to present it for acceptance apart from payment, nevertheless, if it be accepted, he has a direct action against the bank or banker, without prejudice to his claim against the drawer, either upon the cheque or for the debt on account of which it was received. (*f*)

In the Province of Quebec, if the cheque be not presented for payment within a reasonable time, and the

(*a*) Jones v. Bank of Montreal, 29 Q. B. U. C. 248.
(*b*) Kymer v. Laurie, 18 L. J. Q. B. 218.
(*c*) Wood v. Stephenson, 16 Q. B. U. C. 419.
(*d*) Alexander v. Burchfield, 7 M. & G. 1067; Serle v. Norton, 2 M. & Rob. 401.
(*e*) Boddington v. Schlencker, 4 B. & Ad. 752; Moule v. Brown, 4 Bing N. C. 268
(*f*) Art. 2351 Civil Code Quebec.

bank fail, between the delivery of the cheque, and such presentment, the drawer or indorser will be discharged to the extent of the loss he suffers thereby. (*a*)

Subject to the provisions contained in the last preceding article, the holder of a cheque, who has received it from the drawer, may upon refusal of payment by the bank or banker, return it to the drawer with reasonable diligence, and recover the debt for which it was given, or he may retain the cheque, and recover upon it without protest. If the cheque be received from any other party than the drawer, the holder may, in like manner, return it to such party, or he may recover from the parties whose names are upon it, as in the case of an inland bill of exchange. (*b*)

A party receiving a cheque, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity, though the party on whom the cheque is drawn live in the same place. It is sufficient to present it at any time during banking hours, on the day after it is received. Thus where the plaintiff had a banking account with the defendants at St. Catherines, Ont., and deposited with them on Saturday morning, about half-past eleven o'clock, a cheque of one C, on another Bank in the same place, for $350, payable to the plaintiff or bearer, and not indorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment, and dishonored, but it would have been paid if presented on Saturday, before the bank closed at one o'clock. The court held that under these circumstances, the cheque was presented in due time. (*c*)

(*a*) Art. 2252, of the Civil Code.
(*b*) Ib. 2253.
(*c*) Owens v. Quebec Bank, 30 Q. B. U. C. 382.

The court further held that these facts did not prove a purchase of the cheque by the bank, and that on its dishonor they might charge the plaintiff with the amount.

When the person who holds the cheque is not the payee, but has received the cheque from the payee, or from some intermediate holder, the rule is strict that he must present it within banking hours on the day following that on which he received it, at the farthest, provided there are the ordinary means of doing so. (*a*)

And the holder of a cheque, whether payee or other holder, does not obtain any more time by sending the cheque to his own bankers and presenting it through them. (*b*)

But the drawer of a cheque will not be discharged if the payee can show that although he has exceeded a reasonable time in presenting the cheque, still at no time between the delivery to him of the cheque, and the stopping of the bank, had the drawer assets in the bankers' hands to cover the amount of the cheque, or if he could show that from the distance from the bankers' at which he received the cheque, or the lateness of the hour, or other circumstances, he could not have presented the cheque so as to anticipate the stopping of the bank, even though he had actually exceeded the prescribed period of the banking hours of the next day. The payee does not lose his right to recover, by the stoppage of the bank within the prescribed period, provided his presentment, though subsequent to the stoppage, is within the period; also, if it could be shown that the bank had stopped, to the drawer's knowledge, at the time of his delivery to the payee of the cheque, probably, no actual presentment need be proved, in order to render the drawer liable. So the drawer

(*a*) Moule v. Brown, 4 Bing, N. C. 268.
(*b*) Alexander v. Burchfield, 7 M. & G. 1061; Hare v. Henty, 10 C. B. N. S. 65.

would be held liable if it could be proved that he had reduced his account with the banker below the amount of the cheque, before the closing of the bank on the day after his delivery of the cheque, or perhaps at any time before presentment. (*a*)

When a cheque is presented and is not paid, notice of dishonor is not necessary, if there were no sufficient effects of the drawer in the hands of the banker to meet the cheque at the time, or a reasonable probability or expectation of payment, for the drawer cannot be damnified for want of notice in such case. (*b*)

Sending a cheque in a letter by post to the drawer would seem to be a good presentment, but there ought to be a notice of dishonor, if the money is not received, by return of post. (*c*)

Bankers are not justified in paying a cheque which is presented to them before the day on which it purports to have been drawn, or bears date, for by so doing they may be liable to pay over again the amount of the cheque, *e. g.* if it has been lost by the payee, the banker must repay him, it being out of the usual course of banking business, to cash cheques before the day of the date. (*d*)

So the insolvency of the drawer of a cheque is good ground of refusal by the bankers to honor the cheque, for after the assignment, the assignee is entitled to any money to the insolvent's credit at his bankers; and the latter paying the insolvent would be liable to pay the money over again to the assignees. (*e*)

During any delay in presenting the authority of the banker to pay it, may be revoked by the death of the drawer of the cheque. (*f*)

(*a*) Boehm v. Stirling, 7 T. R., 429; Grant on Banking, 56-7.
(*b*) Carew v. Duckworth, L. R. 4 Exch. 313.
(*c*) Bailey v. Bodenham, 16 C. B. N. S. 288.
(*d*) DaSilva v. Fuller, Chitty on Bills, 10th Ed. 180; Morley v. Culverwell, 7 M. & W. 78.
(*e*) Vernon. v. Hankey, 2 T. R. 119.
(*f*) Tate v. Hilbert, 2 Ves. Jun. 118.

But if the banker pay the cheque before notice of the death, the payment would be good, (*a*) and in case of non-payment on account of the death of the drawer, between the date of delivering the cheque and its presentment, the holder might have relief in equity against the banker. (*b*)

Though the drawer of the cheque is still living, his account may have been overdrawn, or he may have ceased to have an account with the banker in the interval, and in such cases the payee might be obliged to resort to an action to recover the value. So if the drawer becomes bankrupt or insolvent before presentment of the cheque, the holder would have to prove on the estate for the amount of it.

If the sum for which the customer drew the cheque be fraudulently altered and increased, and the banker pay the larger sum, he cannot charge his customer with the excess, but must bear the loss. (*c*) But should any act of the drawer have facilitated or given occasion to the forgery he must bear the loss himself. (*d*)

Where a bank discounts for A a draft by him on B and accepts a cheque for the proceeds and delivers it to A for transmission to B, to enable B therewith to retire a draft for a similar amount drawn by A and accepted by B for A's accommodation, and about to fall due at the branch of the bank where B resides, on the faith of A's representation, assurance and undertaking (without authority, however from B) that B will accept the new draft and B receives the cheque, and before using it has knowledge of the transaction as between A and the bank, B cannot legally use the cheque to retire his own acceptance on the old draft without accepting the new one. (*e*)

(*a*) Tate v. Hilbert, 2 Ves. Jun. 118.
(*b*) Rodick v. Gaudell, 12 Beav. 3.5.
(*c*) Hall v. Fuller, 5 B & C. 750; Smith v. Mercer, 6 Taunt. 76.
(*d*) Young v Grote, 4 Bing. 253.
(*e*) Torrance v. Bank B. N. America, 15 L. C. J. 169; affirmed on appeal to Privy Council, 17 L. C. J. 185.

A cheque must not be drawn payable in any foreign money, but it may be drawn for any sum, however small, which the drawer has in the hands of his bankers. If the sum in the body of the cheque differs from that in the margin, the sum in the body is the sum the banker ought to pay. (*a*)

If a number of executors have a fund standing in their joint names at a banker's, payment of a cheque signed by one of the executors will discharge the bank as to all of them. (*b*) It is not absolutely necessary that the signature of the drawer of a cheque should appear at the foot of it, if the name appears in any part of the cheque, so as to shew who it is that orders the payment, that will be sufficient to authorize the bankers to pay, provided the hand-writing is that of their customer of the name stated. (*c*)

A married woman cannot deposit money with a banker and draw cheques thereon, except as the agent, or with the implied assent of her husband. (*d*)

In the Province of Ontario, a married woman may make deposits of money in her own name in any savings or other bank, and withdraw the same by her own cheque; and any receipt or acquittance of such depositor shall be a sufficient legal discharge to any such bank. (*e*)

But nothing in the Act contained in reference to moneys deposited or investments by any married woman shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors; and any moneys so deposited or invested may be followed as if the Act had not been passed. (*f*)

Where a corporation has a deposit at bankers, the

(*a*) Sanderson v. Piper, 5 Bing. N. C. 430.
(*b*) Exparte Rigby, 19 Ves. 462.
(*c*) Taylor v. Dobbins, 1 Strange 399; Sanderson v. Jackson, 2 B. & P. 238.
(*d*) Lloyd v. Pughe, L. R. 8, ch. 88, 27 L. T. N. S. 250.
(*e*) 35 Vic., c. 16, s. 6, of Ontario.
(*f*) Ib. section 7.

latter would not, at common law, be discharged by payment of a cheque that was not under the common seal or signed by some officer of the corporation, whose signature the bankers were authorized to honor by authority expressly given in an instrument under the common seal. But in most cases of statutory corporations, power is given to the president or vice-president, or three directors, or the secretary, or other officer or persons designated in the Act, to draw and sign cheques; and when a cheque is signed in the manner pointed out in the statute, the banker paying it will be protected.

Where a cheque is cashed over the counter the money ceases to be the money of the banker, and he cannot revoke or recall the payment, although he should immediately discover that the drawer's account is considerably overdrawn. (*a*)

It is the duty of a banker not to disclose the state of his customer's account, except on a reasonable and proper occasion; but it has been doubted whether an action will lie against the banker, unless his customer has been injured by the disclosure. (*b*)

When securities are deposited by a customer with his bankers for safe keeping or to collect the interest thereon, they will not be liable in case of their being stolen, unless the loss was occasioned by gross or contributory negligence on their part. (*c*)

Money paid into a bank ceases altogether to be the specific money of the person paying it in; it is the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. (*d*)

(*a*) Chambers v. Miller, 13 C. B. N. S. 125.
(*b*) Hardy v. Vesey, L. R. 3, Exch. 107.
(*c*) Giblin v. McMullen, L. R. 2 P. C. 317.
(*d*) Foley v. Hill, 2 H. L. Cas. 36.

The legal relation of banker and customer in their ordinary dealings in money is purely and simply that of debtor and creditor, respectively, the money paid in to banker's being merely a common law debt. (*a*)

And the Statute of Limitations runs against this debt as against any other simple contract debt, and in six years from the last deposit or last settlement with the customer his right to recover the balance will be barred. (*b*)

(*a*) Foley v. Hill, 2 H. L. Cas. 36; see Smith v. Leveaux, 2 De G. J. & S. 5.
(*b*) Pott v. Clegg, 16 M. & W. 321.

CHAPTER XV.

OF ACTIONS ON BILLS AND NOTES.

The holder of the bill at the time of action brought, *i. e.*, the person who is then entitled at law to receive its contents, is the only person who can then sue on it. (*a*)

It is a good defence that at the time of action commenced, the bill was outstanding in the hands of an indorsee. But if such indorsee held the bill as agent or trustee for the plaintiff, the latter may sue, though not in actual possession of the bill, (*b*) even though the agent's authority depend on a ratification after action brought. (*c*)

If a note is indorsed to two persons by name, as "pay A and B," they may, as holders, bring an action on the note in their joint names though they are not partners in trade. (*d*)

So the holder of a note for the purposes of collection may recover thereon. (*e*)

An action may be brought against one partner on a bill accepted, or note made by the firm, and in pleading it may be alleged that the defendant accepted or made the note, for this allegation will be supported by proof of a joint contract. (*f*)

Where the defendant by writing promised to pay A "or her heirs" a certain sum of money, it was held that on

(*a*) Emmett v. Tottenham, 8 Exch. 884; and see Jungbluth v. Way, 1 H. & N. 71.
(*b*) Stones v. Butt, 2 C. & M. 416.
(*c*) Ancona v. Marks, 7 H. & N. 686; see ante. p. 12, Byles on bills, 9th ed. 391-2.
(*d*) Stevenson v. Blissett, 8 L. C. R. 191.
(*e*) Jones v. Whitty, 9 L. C. R. 191.
(*f*) Stackweather v. Andrews, 6 U. S. 135.

the death of A the right to recover the money vested in her personal representatives and not in her heirs. (*a*)

An action can be maintained against the widow of the maker of a bill or note under cross, made payable to A & Co., or order, and by them indorsed in blank to the plaintiffs, the maker, indorser and plaintiff being described as traders. (*b*)

The indorser of a note payable to order, who has not paid it himself, and is not otherwise the holder thereof, cannot sue the maker to compel him to pay the note in consequence of its being due and protested. (*c*)

An indorser who pays an indorsee has no right to sue a prior party in the name of the indorsee without his consent, and the Court has allowed the defendant as well as the indorsee, whose name has been usurped, to raise the objection. (*d*)

In the Province of Ontario the holder of any bill of exchange or promissory note may, instead of bringing separate suits against the drawers, makers, indorsers, and acceptors of such bill or note, include *all* or *any* of the parties thereto in one action, and proceed to judgment and execution in the same manner as though all the defendants were joint-contractors. (*e*)

But a substantial and not a mere technical satisfaction of the debt by any one will discharge all subsequent parties, and after a creditor has once levied the amount of the debt on the goods of one party, the court will grant a rule to restrain him from levying it over again on the goods of another. (*f*)

If a party be liable on a bill in two or more capacities, he may be the object of several actions on the same bill, at the suit of the same plaintiff. Thus where a party

(*a*) Doak v. Robinson, 1 Hannay 279.
(*b*) Anderson v. Park, 6 L. C. R. 479.
(*c*) Maynard v. Renaud, 12 L. C. J. 293.
(*d*) Coleman v. Bredman, 7 C. B. 871.
(*e*) Con. Stat. Ont., c. 42 s. 23.
(*f*) Windham v. Wither, 1 Stra. 515; ex parte Wildman, 2 ves. n. 115.

was sued jointly with others as a drawer, and separately as the acceptor of a bill, the Court considering him liable in the two characters, and the plaintiff entitled to both remedies, which could not be comprised in the same declaration, refused to stay the proceedings in either as vexatious. (*a*)

Though after the principal sum due on a bill has been once paid or levied upon the goods of the party ultimately liable, the holder cannot recover it again from any other of the parties, yet if other actions were pending at the time of payment, he may proceed in them for costs without recovering any part of the principal sum. (*b*)

Indorsers who have to pay costs of actions against them, cannot sustain an action for those costs against the acceptor; (*c*) nor, it is conceived, against any other party. In common language, a bill accepted or indorsed without any consideration moving to the party making himself liable on the bill, is called an accommodation bill; but in strictness an accommodation bill is not merely a bill accepted or indorsed without value received, by the acceptor or indorser, but a bill accepted or indorsed without value by the acceptor or indorser to *accommodate* the drawer, or some other party, *i. e.* that the party accommodated may raise money upon it, or otherwise make use of it. This distinction is of importance; for a party accepting a bill merely, without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and afterwards sued on that bill, cannot charge the drawer with the costs of defending the action, (*d*) whereas the acceptor of an accommodation bill, properly so-called,

(*a*) Wise v. Prowse, 9 Price 393.
(*b*) Toms v. Powell, 7 East 536; Goodwin v. Cremer, 18 Q. B. 757; Byles on Bills, 9th Ed. 392-3.
(*c*) Dawson v. Morgan, 9 B. & C. 618.
(*d*) Bagnall v. Andrews, 7 Bing. 217; Tindall v. Bell, 11 M. & W. 228; Ronneberg v. Falkland I. Co., 10 L. T. N. S. 530.

who is compelled by an action to pay it, may have a claim upon the drawer for all the expenses of the action. (*a*) But an accommodation acceptor has no right to charge the party accommodated with the costs of an action to which the accommodation acceptor had evidently no defence. (*b*)

Although under the statute, the several parties to the note may be sued in a joint action, yet each must succeed or fail upon any issue of law or fact applying to his own case, in the same manner as if he were separately sued.

Where *in assumpsit* against the maker and indorsers of a promissory note, under the statute, the plaintiff averred that the payee duly indorsed the note to the plaintiff, but the indorsement was not stated to have been made at a certain time, nor was the word "afterwards" used as given in the form in the statute, the declaration was held insufficient. (*c*)

When the several parties to any bill or note are sued in one action under the statute, their rights and responsibilities as between each other, remain the same as though the Act had not been passed, saving only the rights of the plaintiff, so far as they may have been determined by the judgment. (*d*)

In such case a joint judgment against them has not the effect of an ordinary judgment against joint contractors, but the rights of the plaintiff in respect of the several parties stand on the same ground as if he had recovered a several judgment against each. If, for instance, the drawer and accommodation acceptor of a bill are sued in one action, and a joint judgment obtained against them, a release by the plaintiff of the

(*a*) Ex parte Marshall, 1 Atk. 262; Garrad v. Cottrell, 10 Q. B. 679.
(*b*) Roach v. Thompson, M. & M. 487; Beech v. Jones 5 C. B. 696; Byles on Bills, 9th Ed. 393.
(*c*) Grant v. Eyre, 2 Q. B. U. C. 426.
(*d*) Con. Stat. Ont. chap. 42, s. 26.

acceptor will not discharge the drawer, though it would do so if they stood in the position of ordinary debtors, against whom a joint judgment has been obtained. (*a*)

When the several parties to a bill or note are sued in one action under the Con. Stats. Ont. chap. 42, s. 25, judgment may be rendered against some one or more of the defendants, and also in favour of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties may appear, either upon confession, default, by pleading, or on trial; and when judgment is rendered in favor of any defendant, he shall recover costs against the plaintiff in the same manner as though judgment had been rendered for all the defendants.

This statute does not apply to joint makers of a note, who may be sued together independently of the provisions of the Act; and when such joint makers are sued together in one action, if the plaintiff fails in proving a case against one he will fail as to all. A case must be established as against *all* the parties sued on a joint contract. (*b*)

When several defendants are included in one process, under the Act, and any of them cannot be served therewith by reason of absence from or concealment within Ontario, then the action may proceed as against the other defendant or defendants, without prejudice, and the plaintiff may afterwards sue the defendant separately who has not been served with process, and may recover costs as if the Act had not been passed. (*c*)

In case an action be brought against more than one defendant under the Act, who must otherwise have been sued separately, and it happens that any defendant dies pending the suit, an action may nevertheless be

(*a*) Hamilton v. Holcomb, 12 C. P. U. C. 38; affirmed in appeal, 2 E. & A. Repts. 28
(*b*) Sifton v. McCabe, 6 Q. B. U.C. 394.
(*c*) Con. Stat. Ont., c. 42, s. 29.

brought against the executors or administrators of such deceased defendant. (*a*)

The statute further provides that in case several suits be brought on one bond, recognizance or other instrument, against the different parties to the same, or on one promissory note or bill of exchange, or against the maker, drawer, acceptor, or indorser of such note or bill, respectively, there shall be collected or received from the defendant the costs taxed in one suit only, at the election of the plaintiff; and in the other suits the actual disbursements only shall be collected or received from the defendant; but this provision shall not extend to any interlocutory costs in any such suits. (*b*)

This section does not apply where one of the parties to the note, who is not sued with the others, is at the commencement of the suit out of the jurisdiction of the court. (*c*)

A note made in this country, payable in the United States in American currency, may be sued on here when all the parties reside in this country. (*d*)

In an action on a note made payable in the United States, for so many dollars, it is not necessary to prove the value of the dollars and cents in the States, as we have a corresponding currency, and no par value for the American currency is fixed by law. (*e*)

The payee of two promissory notes for £25 each having absconded, is not thereby disabled from suing the maker upon them on his return to the Province, because in his absence an attachment had been taken out against him by A B a creditor for £21. (*f*)

(*a*) Con. Stat. Ont., c. 42. s. 23.
(*b*) Ib. s. 35.
(*c*) Bank B. N. A. v Elliott, 6 U. C. L. J. 16.
(*d*) Greenwood v. Foley, 22 C. P. U. C. 352.
(*e*) Griffin v. Judson, 12 C. P. U. C. 430.
(*f*) Slattery v. Turney, 7 Q. B. U. C. 578.

Though the holder of a note has proved for the amount thereof, under a sequestration issued against his debtor, the maker, in Glasgow, under the "Scottish Bankrupt Act of 1856," he may, nevertheless, maintain an action in this country against the maker of the note, if he carries on business here and in Scotland, and the proof will be no bar to an action commenced during the pendency of the bankruptcy proceedings and before final discharge. (*a*)

When fraud is pleaded to a note, it is necessary that the note should be produced in Court before the defence can be gone into, and when the making of the note is not denied the plaintiff is not bound to produce it, unless notice to produce has been given him. (*b*)

In the Province of Ontario, a defendant cannot be arrested on a bill or note, unless it amounts to, or exceeds one hundred dollars. But if the holder of a note by the affidavit of himself or of some other individual, shews to the satisfaction of a judge of either of the Superior Courts of Common Law, or the judge or acting judge of any County Court, that such holder has a cause of action against the party liable on the note, to the amount of one hundred dollars or upwards, and also by affidavit shows such facts and circumstances as satisfy the judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Canada with the intent to defraud his creditors generally, or the said party in particular, the judge may order a writ of *capias* to issue, to arrest the party liable on the note or bill. (*c*) The style and title of the court need not be inserted in the affidavit at the time it is made, but may be added at the time of suing out the process, and such style and title when so added, shall be for all purposes and

(*a*) Robinson v. McKeand, 23 Q. B. U. C. 359.
(*b*) Bank of Montreal v. Snyder, 18 Q. B. U. C. 492.
(*c*) Con Stat. Ont. c. 24, s. 4 & 5.

in all proceedings, whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*. (*a*) It is necessary that the style of the Court should be inserted in the affidavit at the time of suing out of the process. (*b*)

In case the parties to the bill or note are designated therein by the initial letter or letters, or some contraction of the Christian or first name or names, they may be designated in the same manner in the affidavit. (*c*)

The affidavit on which the order for the *capias* is moved for must shew the amount for which the note is made, and that the note is payable, (*d*) and it must also state the default of the maker or acceptor. (*e*)

The plaintiff need not state expressly that he is the holder of the bill at the time of making the affidavit to hold to bail. (*f*) But the affidavit must shew that the note is overdue, either by directly stating the fact or by giving the date of the note and the time it has to run. (*g*)

If the holder bring concurrent actions against the acceptor, the drawer, and the indorsers, the Court will stay the proceedings in any one of those actions on payment of the amount of the bill, and of the costs in that particular action, (*h*) and in Ontario, by rule No. 25 of the superior court, it is provided that in any action against an acceptor of a bill of exchange or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

It is stated by Mr. Justice Byles that when a bill is

(*a*) Con. Stat Ont., c. 24, s 6.
(*b*) Allman v. Kensel, 3 P. R. U. C. 110.
(*c*) Con. Stat. Ont., c. 42 s. 30.
(*d*) Smith v. Sullivan, Taylor 493.
(*e*) Ross v. Balfour, 5 O. S. 683.
(*f*) Brett v. Smith, 1 P. R. U. C. 309.
(*g*) Racey v. Carman, 3 L. J. U. C. 204; Ross v. Hurd, 1 P. R. U. C. 153; Digest of Robinson & Joseph, 193-4.
(*h*) Byles on Bills, 9th Ed. 399-400.

dishonored the owner has his option to sue on the bill or on the consideration. That is to say if a merchant who has supplied a quantity of goods to a customer take a bill for the amount, he may, on the dishonor of the bill, sue for the amount of it or he may bring his action for the price of the goods, which form the consideration for the bill. It is advisable, however, to sue on the bill—first, because it reduces the debt to a certainty; secondly, because less evidence is necessary; thirdly, in an action on a bill proof of payment of the bill lies on the defendant, but in an action on the consideration only, if a defendant shew that a bill was given, plaintiff must prove that the bill was not paid. (*a*)

It is best, when possible, to join a count on the bill with a count on the consideration, and the plaintiff may take a verdict on both counts. (*b*)

The following explanation of Re-exchange is taken from Byles on Bills:

"Re-Exchange is the difference in the value of a bill occasioned by its being dishonored in a foreign country in which it was payable. The existence and amount of it depend on the rate of exchange between the two countries. The theory of the transaction is this: A merchant in London indorses a bill for a certain number of Austrian florins, payable at a future day in Vienna. The holder is entitled to receive in Vienna, on the day the maturity of the bill, a certain number of Austrian florins. Suppose the bill to be dishonored. The holder is now, by the custom of merchants, entitled to immediate and specific redress, by his own act, in this way: He is entitled, being in Vienna, then and there to raise the exact number of Austrian florins, by drawing and negotiating a cross bill, payable at sight, on his indorser in London, for as much English money as

(*a*) Byles on Bills, 9th Ed. 402-3; Bishop v. Rowe, 3 M. & Sel. 362.
(*b*) Ib., Ryder v. Ellis, 8 C. & P. 357.

will purchase in Vienna the exact number of Austrian florins, at the rate of exchange on the day of di honor, and to include in the amount of that bill the interest and necessary expenses of the transaction. This cross-bill is called in French the *retraite*. The amount for which it is drawn is called in low Latin *ricambium*, in Italian *ricambio*, and in French and English re-exchange. If the indorser pay the cross or re-exchange bill he has fulfilled his engagement of indemnity. If not, the holder of the original bill may sue him on it, and will be entitled to recover in that action the amount of the *retraite* or cross bill, with the interest and expenses thereon.

The amount of the verdict will then be an exact indemnity for the non-payment of the Austrian florins, in Vienna on the day of the maturity of the original bill.

According to English practice the *retraite* or re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law-merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damage in an action on the original bill, can be scientifically understood and computed.

It is plain that whether the indorser gain or lose by the re-exchange depends (except in so far as relates to the expenses) on the rate of exchange between the two countries. If the value of the Austrian florin, measured in pounds sterling, has risen, the holder will be entitled to recover more than the original amount of the bill in English money. (*a*)

But if the value of the Austrian florin has declined, then the indorser may not be liable to repay as much English money as the bill was originally drawn for,

(*a*) De Tastet v. Baring, 11 East 265.

unless the interest and expenses cover or exceed the difference (*a*)

The drawer of a bill is liable to the re-exchange though the bill be returned through never so many hands. (*b*) But the acceptor is not liable to the re-exchange. (*c*)

(a) Suse v. Pompe. 8 C. B. N. S. 538.
(b) Mellish v. Simeon, 2 H. Bl. 378.
(c) Napier v. Schneider, 12 East 420.

CHAPTER XVI.

OF PLEADING AND EVIDENCE

In the Province of Ontario, in an action brought to recover the amount of any bill, draft, order, or promissory note, and the damages and interest, the expenses of noting and protesting, and all other charges and postages incurred thereon, it is not necessary to declare specially for such damages, interest, expenses and charges, but the same are allowed to the plaintiff, at any trial, assessment, or reference, as if the same had been specially declared for. (*a*)

And when the several parties to a note are sued together under the statute, any joint drawer, maker, endorser or acceptor may plead in abatement the non-joinder of any other joint drawer, maker, endorser or acceptor, in the same manner as though the act had not been passed; but no judgment to be rendered in pursuance of the act shall be of any effect against a party not served with process. (*b*)

The plaintiff declared upon a note as made by R to M, and indorsed by M to defendant, who indorsed to plaintiff. The defendant pleaded that he did not indorse to the plaintiff, as alleged. The name of defendant appeared as indorser on the note, before that of M. The court held, however, that on the pleadings this was immaterial, for M's indorsement to defendant was not denied, and his name appearing before defendant's, could not affect the right of recovery. (*c*)

(*a*) Con Stat. Ont. Chap. 42, s. 14.
(*b*) Ib. s. 24.
(*c*) Brightly v. Rankin, 25 Q. B. U. C. 257.

Where an action is brought by a party, whose title is apparent on the face of the instrument, as by payee against the drawer of a bill of exchange, a plea by the defendant, that the plaintiff is not the holder, must show that the plaintiff's title has been divested by his having indorsed the bill to some one else. (*a*)

In an action against the maker and indorser of a promissory note, it is unnecessary to make a formal averment of a joint liability, when the declaration sets forth facts, which in law make the defendants jointly liable. (*b*)

In an action of assumpsit, brought by an indorsee against an indorser of a note, the declaration after averring the indorser's liability to pay, need not aver that he promised to pay. If, however, the parties sued be the executors of the indorser, instead of the indorser himself, and the note has become due after the death of their testator, a promise to pay by the executors, must be stated in the declaration. (*c*)

In case the parties to a bill of exchange or promissory note, are designated therein by the initial letter or letters, or some contraction of the Christian, or first name or names, they may be designated in the same manner in an affidavit, to support an application for a judge's order, to hold to bail, and in any process or declaration made, sued out or filed against them, upon, or in respect of such bill or note. (*d*)

In the case of *Dougall* v. *Reafisch*, (*e*) the Court declared that where one Christian name is given in full, with a capital letter before or after it, besides the surname, it will not be assumed that the party so described has anything more of a second name, than is given to him, and this without any distinction between vowels and conson-

(*a*) Boys v. Joseph, 8 Q. B. U. C. 273.
(*b*) Chapman v. Dubrey, 21 Q. B. U. C. 244.
(*c*) Bank B. N. A. v. Jones, 7 Q. B. U. C. 166.
(*d*) Con. Stat. Ont. c. 42, s. 30; Con. Stat. L. C., c. 64, s. 29; 2 Rev. Stat. N. B., s. 38, page 361.
(*e*) 6 Q. B. U. C. 391.

ants, and they accordingly held it sufficient, to set forth the name of the payee, as John J. Shaver.

Where a payee was described, in declaring upon a note, by the capital letter of his second Christian name, "James A. Walker," as he described himself in the note, instead of giving the second name in full; the court held the declaration good, adhering to the principle enunciated in the preceding case. (*a*)

And, whenever in pleading, one Christian name shall be given to the party in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described, has anything more of a second name than is given to him, and that without distinction between vowels and consonants. (*b*)

In averring the making or indorsing of a note, it is sufficient to describe the party by the initials of his Christian name, without alleging that the making or indorsement was by such initials. (*c*)

So it is sufficient to allege that the note was made without expressly alleging that it was signed. (*d*)

A declaration on a note need not allege that the note was given for value received, as the fact of such value being received is a matter of proof. (*e*)

In an action against the maker and indorser of a promissory note the plaintiff declared according to the form given by the Con. Stats. Ont., chap. 42, s. 31, but did not aver presentment to the maker and notice to the indorser. The Court held on demurrer by both defendants, on that ground that by reason of s. 25 of the statute (which provides that judgment may be rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants against the

(*a*) Mair v. Jones, 7 Q. B. U. C. 139.
(*b*) Bank U. C. v. Gwynne, 7 Q. B. U. C. 140.
(*c*) Andrews v. Talbot, 13 Q. B. U. C. 188.
(*d*) Bullit v. Shaw, 7 L. C. J. 47.
(*e*) Whitney v. Burke, 4 L. C. J. 308.

plaintiff, according as the rights and liabilities of the respective parties may appear), the plaintiff was entitled to judgment against the maker, and that the indorser was entitled to judgment against him. (*a*)

A bill was specially indorsed to a firm composed of three partners. After the note became due, and before action, one of the partners died and the action was brought by the survivors, but the declaration stated that the indorsement was made to the two surviving partners. This defect was allowed to be amended under the Act, 7 Wm. 4, c. 14, s. 7, of the Province of New Brunswick. (*b*)

In declaring upon a note made payable to and indorsed by a firm, it is necessary to aver that the maker of the note promised to pay "to certain persons using the name and style of," and then to aver that the said persons so using the name and style did, by such name and style, &c., endorse the note. (*c*)

In an action by the payees against the maker of a promissory note payable to A B C & D, the declaration alleged that the defendant promised to pay the plaintiffs by the name, style and firm of A B C & D. The words, "name, style and firm," were not in the note. The Court held that it was not necessary to prove that the plaintiffs were partners, and that the words "name, style and firm" might be struck out of the declaration. (*d*)

A verbal agreement entered into at the time of making a note cannot be relied upon, or given in evidence to vary its terms. (*e*)

This is in accordance with a well-established rule of evidence, that verbal testimony cannot be relied on to control written documents. The rule is the same in regard to bills and notes as in other cases. Thus, where

(*a*) Small v. Rogers, 6 O. S. 476.
(*b*) Tarratt v. Wilmot, 1 Allen 352.
(*c*) Moffat v. Vance, 7 Q. B. U. C. 142.
(*d*) Allen v. McNaughton, 4 Allen 234.
(*e*) Moore v. Sullivan, 21 Q. B. U. C. 445.

a party indorses a note in the usual manner he cannot afterwards adduce parol evidence to show that he was not to be liable on his indorsement, inasmuch as such evidence cannot be given to contradict or vary a contemporaneous written document. (*a*)

Parol evidence cannot, in the absence of fraud, be received to shew that a bill of exchange, accepted payable three days after sight, is not to be paid until a further time has elapsed. (*b*)

Where a man draws a bill of exchange to pay a debt, he cannot set up as a defence to an action brought by the indorsee, that the bill was given upon a prior verbal understanding between himself and the indorsee, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer. (*c*)

The maker of a note cannot be allowed to prove that before the note was made, or at the time it was made, a parol agreement was made by the holder to renew the note on being paid half the amount due on the note. (*d*)

Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified. (*e*)

In an action by the payee against the maker, a promissory note is admissible in evidence under the common money counts, although it is in the body of it made payable at a particular place; the right of recovery, however, is suspended until presentment be made at the place, on or after the time of payment. (*f*)

When the maker of the note has induced the plaintiff to purchase it, and promised that if purchased by the plaintiff he will pay it, and has, before trial, admitted his

(*a*) Chamberlin v. Ball, 11 L. C. R. 50.
(*b*) Bradbury v. Oliver, 5 O. S. 703.
(*c*) Adams v. Thomas, 7 Q. B. U. C. 249.
(*d*) Hayes v. Davis, 6 Q. B. U. C. 396.
(*e*) Davis v. McSherry, 7 Q. B. U. C. 490.
(*f*) Merritt v. Woods, Berton, 261.

signature, it is not necessary to call a subscribing witness to the note to prove the signature. (*a*)

In case the several parties to a note are sued in one action under the statute, any defendant shall be entitled to the testimony of any co-defendant as a witness, in case the defendant or defendants calling the witness would have been entitled to his testimony had such co-defendant not been a party to the suit or individually named in the Record. (*b*)

In the Province of Ontario, no person offered as a witness is excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter in question, or on any enquiry arising in any civil suit, action, or proceeding in any Court, or before any judge, jury, coroner, magistrate, officer, or person having by law or by consent of parties, authority to hear, receive, and examine evidence. (*c*)

Section 4 of this statute further provides that on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any civil suit, action or proceeding, the parties thereto and the persons in whose behalf any such suit, action or proceeding may be brought or defended, shall be competent and compellable to give evidence either *viva voce* or by deposition according to the practice of the court on behalf of themselves, or of any or either of the parties, to such suit, action or other proceeding.

It has been held that the indorser of a note is not a competent witness for the maker. (*d*)

But under the statute already referred to in Ontario it

(*a*) Perry v. Lawless, 5 Q. B. U. C. 514.
(*b*) Con. Stat. Ont. c. 42, s. 27.
(*c*) Ont. 33 Vic., c. 13, s. 2.
(*d*) Bank U. C. v. Upton, 10 C. P. U. C. 455; Moffatt v. Robertson, 19 Q. B. U. C. 401.

is apprehended there is nothing to disqualify the indorser from giving evidence for the maker of the note.

In a joint action against the maker and indorser of a note, the maker having suffered judgment by default, is admissible as a witness under the Con. Stat. Ont. ch. 42, against the indorsers in the same manner as if the parties had been sued in separate actions. (*a*)

(a) McLaren v. Muirhead, 2 Q. B. U. C. 59.

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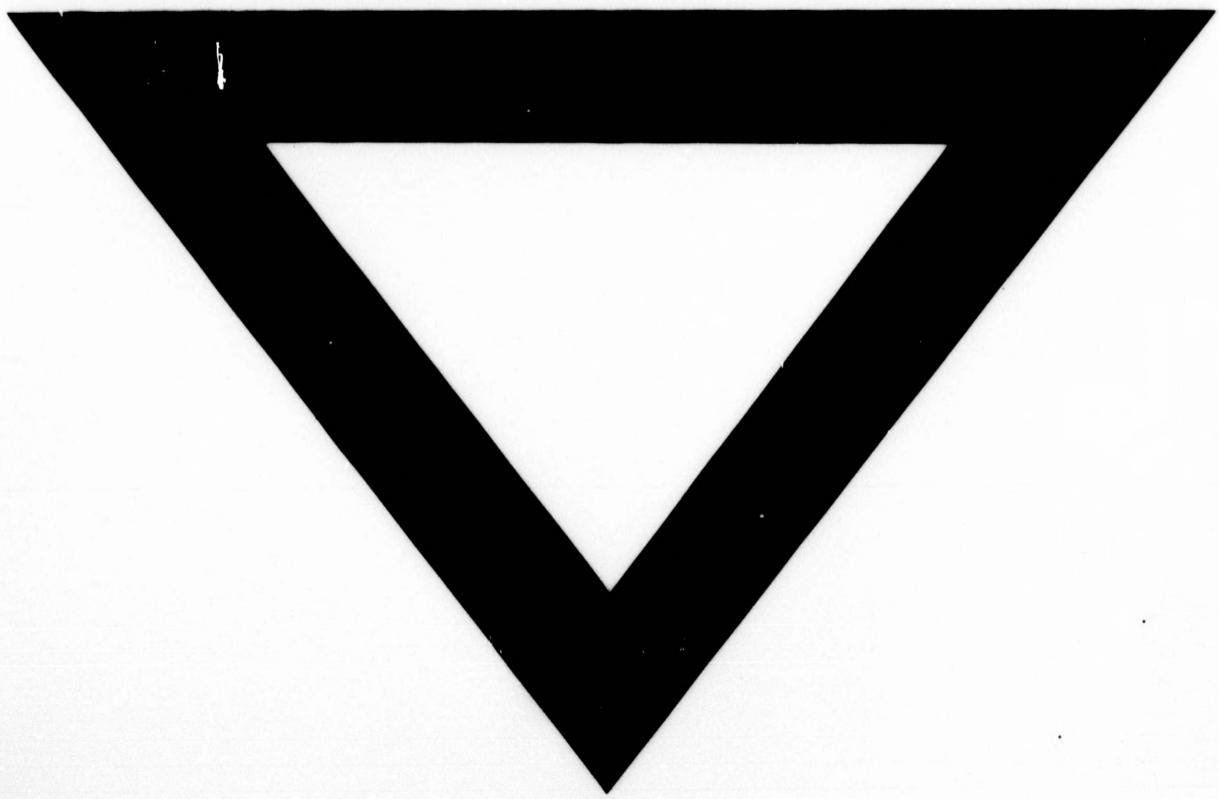
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